THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2020-0058

Appeal of Robert R. Scott, Commissioner, New Hampshire Department of Environmental Services

INTERLOCUTORY APPEAL PURSUANT TO RULE 8 FROM AN ORDER OF THE MERRIMACK COUNTY SUPERIOR COURT

OPENING BRIEF OF THE APPELLANT, ROBERT R. SCOTT, COMMISSIONER, N.H. DEPARTMENT OF ENVIRONMENTAL SERVICES

April 29, 2020

THE STATE OF NEW HAMPSHIRE
DEPT. OF ENVIRONMENTAL SERVICES

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The State requests fifteen minutes of oral argument before the full court, to be presented by Senior Assistant Attorney General K. Allen Brooks

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1. Whether it was error for the trial court to issue a preliminary injunction with respect to the AGQS on the basis that NHDES failed to adequately consider costs and benefits where such requirements do not appear in RSA ch. 485-C (the Groundwater Protection Act). App. Vol. IV, 239-40 (Defendant's Mot. for Expedited Reconsideration at 2-3).

2. Whether the trial court committed error when it issued a preliminary injunction with respect to both the MCL and the AGQS based on a conclusion that NHDES did not undertake adequate consideration of the costs and benefits to affected parties. App. Vol. III, 31-32 (Defendants' Objection to Motion for Preliminary Injunction at 29-30).

3. Whether the record fails to support a showing of harm sufficient to support a preliminary injunction with respect to either the MCL or the AGQS. App. Vol. III, 6-16 (Defendants' Objection to Motion for Preliminary Injunction at 4-14).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

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 31:3-a - Suits Involving State-Mandated Programs.

If legal proceedings have been commenced by a town against the state over whether a state program or responsibility violates the provisions of Part I, Article 28-a of the New Hampshire constitution relative to mandated programs, all penalties or liens which the state may impose on the town for failure to comply with the state program or mandate shall be stayed until the court proceedings are completed. For the purposes of this section, the term "town" shall mean every political subdivision of the state, which shall include any village district, school district, city, county, unincorporated town, or unorganized place.

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.

N.H. RSA 485:16-e - Perfluorochemicals.

By January 1, 2019, the commissioner shall, in consultation with the commissioner of the department of health and human services and other interested parties, initiate rulemaking in accordance with RSA 541-A to adopt a maximum contaminant limit for perfluorooctanoic acid (PFOA), perfluoroctanesulfonic acid (PFOS), perfluorononanoic acid (PFNA), and perfluorohexanesulfonic acid (PFHxS).

485-C:6 - Ambient Groundwater Quality Standards.

I. The commissioner shall establish and adopt ambient groundwater quality standards for regulated contaminants which adversely affect human health or the environment. Ambient groundwater standards shall apply to all regulated contaminants which result from human operations or activities, but do not apply to naturally occurring contaminants. Where state

maximum contaminant levels have been adopted under RSA 485:3, I(b), ambient groundwater quality standards shall be equivalent to such standards. Where federal maximum contaminant level or health advisories have been promulgated under the Federal Safe Drinking Water Act or rules relevant to such act, ambient groundwater quality standards shall be no less stringent than such standards. The commissioner may adopt standards more stringent than federal maximum contaminant levels or health advisories if, accounting for an adequate margin of safety to protect human health at all life stages, including but not limited to pre-natal development, the commissioner determines federal standards are insufficient for protection of human health. Where such standards are established based upon health advisories that address cancer risks, the ambient groundwater quality standards shall be equivalent to that exposure which causes a lifetime exposure risk of one cancer in 1,000,000 exposed population. Where no federal or state maximum contaminant level or health advisory has been issued, the commissioner may adopt ambient groundwater quality standards on a basis which provides for an adequate margin of safety to protect human health and safety.

II. Health advisories that are adopted as ambient groundwater quality standards shall be reviewed by the department at least every 5 years to determine if new research warrants revising the current ambient groundwater quality standard. If the department finds a revision is necessary it shall conduct rulemaking to adopt the revised standard.

III. Ambient groundwater quality standards shall be the water quality basis for issuance of groundwater discharge permits under RSA 485-A:13.

IV. Except for discharges of domestic wastewater regulated under RSA 485-A:13 and RSA 485-A:29, no person shall violate ambient groundwater quality standards.

V. By January 1, 2019, the commissioner shall, in consultation with the commissioner of the department of health and human services and interested parties, initiate rulemaking to adopt ambient groundwater quality standards for perfluorononanoic acid (PFNA) and perfluorohexanesulfonic

acid (PFHxS).

VI. By January 1, 2019, the commissioner shall, in consultation with the commissioner of the department of health and human services and interested parties, conduct a review to determine whether current research warrants revising the existing ambient groundwater quality standards for perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS).

The following administrative rule sections are too voluminous to reproduce here and are instead included in the Appendix:

N.H. Admin. R. Env-Or 600, *et seq.*

N.H. Admin. R. Env-Or 602.16

N.H. Admin. R. Env-Or 605.04(b)(2)

N.H. Admin. R. Env-Or 606.10(d)(3)

N.H. Admin. R. Env-Dw 700, *et seq.*

N.H. Admin. R. Env-Dw 712.23

N.H. Admin. R. Env-Wq 804.03

N.H. Admin. R. Env-Wq 808.03

STATEMENT OF FACTS AND OF THE CASE

A. Statutory Background

RSA ch. 485, the Safe Drinking Water Act, requires the N.H. Dept. of Environmental Services ("NHDES") to, among other things, make rules establishing "Maximum Contaminant Levels" or "MCLs." RSA 485:3. MCLs are found in the drinking water rules at N.H. Admin. R. Env-Dw 100 *et seq*. Once NHDES establishes an MCL, operators of public water systems must test (generally quarterly) to determine if the water they provide meets the MCL. N.H. Admin. R. Env-Dw 712.23. Any one quarterly test may exceed the MCL; however, if the average concentration of a contaminant over four consecutive quarters exceeds the MCL, NHDES may require the water system to take corrective action. App. Vol. IV, 212-213 [Oct. 18 Tr. 71-72].[1] Quicker action may be needed if initial results show concentrations more than four times the MCL, as it will automatically exceed the yearly average; however, any remedial action will take many months to be designed, approved, and implemented. *Id*.

A separate statute, RSA ch. 485-C, the Groundwater Protection Act, requires NHDES to protect groundwater quality. Among other things, the statute allows NHDES to establish "Ambient Groundwater Quality Standards" or "AGQS." RSA 485-C:6. AGQS are found within the

[1] The State's Appendix will be referenced as "App. Vol. __,__" The trial court's order and order on reconsideration appear in the addendum and will be referenced as "Order, __ [Add. __]" and "Recon.Order, __ [Add. __]," respectively.
Transcripts of the October 1, 2019 temporary hearing, October 18, 2019 preliminary hearing, and the December 6, 2019 discovery status conference in the State's Appendix will be referenced as "App. Vol. __,__ [_ Tr _]."

NHDES Site Remediation Rules at N.H. Admin. R. Env-Or 600, *et seq*. The statute precludes anyone from degrading groundwater to levels in excess of an AGQS whether or not the groundwater is used as a drinking water source. RSA 485-C:6, III. A spill that causes an exceedance of an AGQS must be addressed by the responsible party. Measures used to remediate AGQS exceedances include groundwater treatment and recovery, soil excavation, and monitored natural attenuation. N.H. Admin. R. Env-Or 605.04(b)(2),(3),(4), and Env-Or 602.16. Cleanup efforts usually involve protection and treatment of impacted drinking water sources. N.H. Admin. R. Env-Or 606.10(d)(3)(e)-(f). For example, Saint-Gobain is currently undertaking a multi-million dollar remediation project in southern New Hampshire as a result of PFAS[2] concentrations in groundwater exceeding the applicable AGQS. App. Vol. IV, 186-87 [Oct. 18 Tr. 45-46].

In 2016, pursuant to RSA 485-C:6, NHDES promulgated an AGQS equal to a U.S. EPA health advisory of 70 parts per trillion ("ppt") for PFOA[3] and PFOS[4] combined. App. Vol. I, 10. In 2018, the Legislature passed SB 309 (Laws 2018, ch. 368) in an attempt to further address PFAS contamination. App. Vol. I, 107. SB 309 amended both statutes discussed above—RSA ch. 485, the Safe Drinking Water Act, and RSA ch. 485-C, the Groundwater Protection Act—and for the first time specifically included water quality provisions in the statute on Air Pollution Control,

[2] PFAS refers to a large class of per- and polyfluoroalkyl compounds also called perfluorochemicals or "PFCs". This appeal involves four of these compounds.
[3] PFOA means Perfluorooctanoic Acid.
[4] PFOS means Perfluorooctanesulfonic Acid.

RSA ch. 125-C. App. Vol. I, 107.

SB 309 amended the Safe Drinking Water Act, RSA ch. 485, to better protect public health by requiring NHDES to promulgate MCLs for four PFAS compounds: PFOA, PFOS, PFNA[5] and PFHxS.[6] RSA 485:16-e. SB 309 also inserted a provision in RSA 485:3 stating that NHDES shall enact MCLs "[a]fter consideration" of several factors. RSA 485:3, I(b). These are:

- The extent to which contamination 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.

App. Vol. I, 110. The statute does not prescribe or otherwise qualify the level or type of "consideration" required. The statute does, however, expressly mandate establishment of a purely health-based standard, not a cost-based standard. *See* RSA 485:3, I (requiring "standards which are necessary to protect the public health"). Specifically, the statute requires NHDES to either create a standard "that is acceptable in water for human consumption," or, if the level needed to protect health is so small that it lies below detection limits, a requirement for "one or more treatment techniques … sufficient to protect the public health." RSA 485:3, I(b)(1),(2).

[5] PFNA means Perfluorononanoic Acid.
[6] PFHxS means Perfluorohexanesulfonic Acid.

SB 309 also amended the Groundwater Protection Act, RSA ch. 485-C, to require NHDES to address PFOA, PFOS, PFNA and PFHxS. RSA 485-C:6, V, VI. For PFNA and PFHxS, the amended statute requires NHDES to create an AGQS. RSA 485-C:6, V. For PFOA and PFOS, the statute requires NHDES to work with the N.H. Dept. of Health and Human Services to review "current research" and then determine whether it should revise the existing AGQS. RSA 485-C:6, VI.

Prior to SB 309, RSA 485-C:6 required an AGQS to be equivalent to any established federal MCL or health advisory level. App. Vol. I, 111. RSA 485-C:6 also provided NHDES authority to enact an AGQS separately from, and in the absence of, a federal advisory or MCL. *Id.* As amended by SB 309, the statute now requires that an AGQS must be equivalent to any adopted State MCL. RSA 485-C:6, I. In keeping with the history of RSA 485-C, SB 309 specifically provided NHDES authority to enact an AGQS in the absence of a State MCL. RSA 485-C:6, I. SB 309 did not amend RSA 485-C to include language requiring consideration of the factors now in RSA 485:3 including consideration of costs or benefits, and no such provisions appear in the statute. *See* RSA ch. 485-C.

B. NHDES PFAS Rulemaking

In late 2018, NHDES undertook three separate rulemakings with respect to PFAS standards pursuant to SB 309: one related to Water Quality and Quantity (Env-Wq 402); one related to MCLs (Env-Dw 700 and 800 various sections & paragraphs); and one related to AGQS (Env-Or 603.03 (b) intro & (2) and (c) intro and Table 600-1). App. Vol. II, 394-5; App. Vol. IV, 348-9. The initial proposed rules established MCLs and

identical AGQS for each of the four PFAS compounds:

Initial Proposed MCL		**Initial Proposed AGQS**	
PFOA	38 ppt	PFOA	38 ppt
PFOS	70 ppt	PFOS	70 ppt
PFHxS	85 ppt	PFHxS	85 ppt
PFNA	23 ppt	PFNA	23 ppt

App. Vol. IV, 364. After consideration of public comment and additional scientific data, NHDES issued a final proposed rule in late June, 2019, proposing more stringent MCLs and AGQS in order to protect public health:

Final MCL		**Final AGQS**	
PFOA	12 ppt	PFOA	12 ppt
PFOS	15 ppt	PFOS	15 ppt
PFHxS	18 ppt	PFHxS	18 ppt
PFNA	11 ppt	PFNA	11 ppt

Id. at Vol. IV, 348, 363. NHDES indicated that the final MCLs and AGQS would become effective on September 30, 2019.

Two months after issuance of the final rule, and on the same day that the rules were to become effective, the plaintiffs challenged the rulemakings related to the MCLs and the AGQS claiming violations of

N.H. Constitution Part I, Art. 28-a (unfunded mandate), RSA ch. 541-A (statutory unfunded mandate and notice and comment provisions), due process related to the timing of rulemaking, and RSA ch. 485, the Safe Drinking Water Act, with respect to the consideration of costs and benefits. App. Vol. II, 3-30; *see also* App. Vol. II, 426 [Oct. 1 Tr. 9]. The plaintiffs did not challenge the science underlying the rulemaking and did not allege that a more relaxed standard would still be protective of human health. *Id*.

C. The Plaintiffs

The complaint includes allegations from four very differently situated plaintiffs, each described below:

1. The Plymouth Village Water and Sewer District ("Plymouth Water District")

The Plymouth Water District operates a public water system and stands alone among the plaintiffs as the only entity purporting to be a subdivision of a municipality. Plymouth Water District brought, among other things, a claim that the new standards imposed an unfunded mandate under Part I, Art. 28-a of the N.H. Constitution. App. Vol. II, 28. Pursuant to RSA 31:3-a, a village district (such as Plymouth Water District) cannot be penalized for the failure to comply with a challenged State mandate "until the court proceedings are completed."

Plymouth Water District previously tested its water and results came back below both reporting and detection limits. App. Vol. III, 36. The detection limit associated with the results are below the challenged standards. *Id*. The State also volunteered to pay for Plymouth Water District's water testing. App. Vol. III, 63 [Oct. 18 Tr. 61]. NHDES

estimated the cost of testing to be about $350 per test, or $700 per quarter for Plymouth Water District. App. Vol. III, 36.[7]

2. The 3M Company ("3M")

3M owns property located at 11 Paper Trail in Tilton that includes a public water system; specifically a non-transient non-community water system (i.e., a water system for employees). *Id*. at 36-37. 3M's property is subject to testing requirements in monitoring wells due to a pre-existing Groundwater Discharge Permit (GDP). 3M has already tested for all four compounds at issue here. The results came back non-detect for all compounds except PFOA which showed concentrations of 2 parts per trillion ("ppt")—well below the limits currently at issue. App. Vol. III, 36-37. To this day, 3M has never submitted an affidavit or verified pleading substantiating harm. All of its allegations remain unsupported. In fact, 3M continues to maintain, on behalf of all of the plaintiffs, that none of the plaintiffs need to demonstrate harm at all. App. Vol. IV, 376-77, 381.

3. Resource Management Inc. ("RMI")

RMI is a residuals processing facility. It does not have a public water system and, therefore, is not subject to MCLs. App. Vol. III, 37. Instead, because the RMI facility processes wastewater "residuals" (meaning treated sludge and septage) for land application for beneficial agricultural use, it operates under a Sludge Facility Permit (Permit# SL96002).

[7] Initially, the plaintiffs told the trial court that four quarterly tests would cost up to $30,000 (App. Vol. II, 424 [Oct. 1 Tr. 7]) but later agreed with the State that testing would actually cost about "$300 a pop." App. Vol. IV, 217 [Oct. 18 Tr. 76].

RMI's Sludge Facility Permit requires groundwater monitoring for the facility. App. Vol. III, 40-41. Monitoring results for RMI's groundwater showed levels above the pre-existing 70 ppt AGQS for PFOA and PFOS. *Id*. Therefore, in accordance with Env-Wq 808.03, RMI has already created and submitted a corrective action plan ("CAP") to address PFOA and PFOS in the groundwater at the sludge facility. *Id*. Under pre-existing rules (Env-Wq 808.03(a)), whenever a contaminant is detected above "background value," the permit holder must "[c]ommence monthly monitoring for each constituent for which background has been exceeded at each well where background has been exceeded." N.H. Admin. R. Env-Wq 808.03(a)(2). "Background" is defined as "the analytical detection limit for that constituent"—a stricter standard than the challenged AGQS. *Id*. at (b)(1).

To the extent treatment of impacted groundwater must eventually occur at RMI's site, such treatment will likely be identical irrespective of any new AGQS, and, in any event, would not occur until well into the future. App. Vol. III, 43-44. RMI has not articulated what immediate impact the current standards might have on its facility.

With respect to RMI's business operation generally, anyone taking sludge from a facility for land application must first obtain a Sludge Quality Certification (SQC) from NHDES. N.H. Admin. R. Env-Wq 804.03. Pursuant to its SQC, RMI already tests for nine PFAS compounds, including all four at issue in this case. App. Vol. III, 40-41. The

challenged rules do not affect sludge testing or sludge facility operations.[8]

4. Charles G. Hanson

Mr. Hanson owns Hilltop Farm located at 121 Dane Road, Center Harbor, New Hampshire. Mr. Hanson is also a Director and Secretary of RMI. Mr. Hanson stated in the complaint that "Plaintiff Hanson will be subject to new rules" and speculated that he "may be required to test for, and if necessary, remediate, PFOA, PFOS, PFNA, and PFHxS, if the rules are not enjoined." App. Vol. II, 5, ¶5. However, NHDES does not require groundwater monitoring for sludge site permits. In any case, RMI holds a "Sludge Site Permit Renewal" (Permit #SLS-01-004) for the land application of treated sludge on "The Hanson Hilltop Farm" fields. *Id*. at 41. As the permit holder, RMI, not Mr. Hanson, would be subject to the terms of the sludge site permit. As stated above, RMI's operations would not be impacted by the standards at issue here.

In summary, of the four plaintiffs, only two operate water systems, i.e., only two would be subject to MCLs. Both already tested and the results came back below both reporting limits and detection limits. Detection limits for the testing performed by plaintiffs were 1-8 ppt—below even the lowest MCL at issue in this case. The State estimated future quarterly testing expenses for the Plymouth Water District to equal approximately $700, which the State volunteered to pay in Q4 2019. In any event, Plymouth Water District, as a municipal subdivision bringing an

[8] NHDES indicated that any biosolid standard was a "year or two" away. App. Vol. IV, 232 [Oct. 18 Tr. 91].

unfunded mandate claim, cannot be penalized for not performing testing during the pendency of its case pursuant to RSA 31:3-a. The other water system owner—3M—has never submitted an affidavit substantiating injury. No enforcement action against any water system in the State under the challenged rules is imminent.[9]

Of the remaining two plaintiffs, RMI is unaffected by the MCL and already subject to testing to levels below the AGQS and would, therefore, not be impacted by the new standards. Mr. Hanson is currently not impacted by either standard.

D. NHDES Consideration of Costs and Benefits

Prior to finalizing rulemaking, NHDES extensively considered the costs and benefits of the regulated compounds. In an affidavit provided to the trial court, NHDES described its process, stating:

> In order to provide available information on cost and benefits the department analyzed internal data, researched information on costs and benefits prepared by others, and spoke with experts.

App. Vol. III, 44-45. After providing more information specific to costs, the affidavit then specifically addressed benefits, stating:

> For the description of what is known about benefit, the department similarly looked at what New Jersey did and USEPA's guidance for quantifying benefits of a proposed MCL. Unfortunately, because of the emerging nature of these chemicals and the lack of specific causation information

[9] To the extent treatment is required, RSA 485:4 already empowers NHDES to require installation of such treatment to protect public health, even in the absence of a specific standard. RSA 485:4, I.

> related to the many health impacts [that] have been associated with the four PFAS compounds, neither were helpful. At the three information sessions held in the Fall of 2018, NHDES asked stakeholders to provide any information or resources that could help us monetize benefit. After consultation with a consulting health risk expert and the health economist team that the department had recently engaged to calculate benefit of a lower arsenic standard, the department concluded that the existing methodologies to quantify benefit were not appropriate to use in this case. Instead we 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.

App. Vol. III, 44-45. Documents show that NHDES undertook the approach described in the affidavit. In its January 4, 2019 *Summary Report*, NHDES devoted a section to "Costs to Affected Parties" and another section to "Benefits of Affected Parties." App. Vol. I, 14-19, *see also* 80-87. The section on benefits follows:[10]

> **5. Benefits to Affected Parties**
>
> In general, it is difficult to quantify the monetized benefits for environmental and public health standards, and often the case is made that EPA's guidance on deriving benefits for MCLs underestimates benefit, particularly in the area of indirect costs such as reduced quality of life for both the sick individual and their family caregivers. *Contingent valuation*, which is a survey-based economic method for valuing non-market

[10] Information focusing on benefits is reproduced here because the trial court seemed to question NHDES consideration of benefit but accept the NHDES cost consideration. However, extensive information considered by NHDES on costs is also in the Appendix. *See, e.g.*, App. Vol. I, 14-19.

resources (e.g., asking people what they would pay to lower the risk of an adverse health outcome) is a widely accepted economic method to evaluate benefits in such cases as establishing a MCL when reduction in risk can be reasonably quantified. Contingent valuation is based on the economic principle that value equates to willingness to pay. 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 given the findings of the few previous direct exposure studies and the emerging findings from current epidemiological studies. 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.

NHDES researched the subject of benefit quantification and spoke with experts, including a group of professors and researchers at the University of New Hampshire (UNH), with whom NHDES recently contracted to quantify the benefits of reducing the arsenic MCL. NHDES intends to further evaluate the possibility of quantifying benefit of these standards with the group at UNH to see whether studies exist or emerge that would allow the department to do so. In addition, through previous stakeholder engagements, a number of stakeholder groups have been engaging with other research institutions throughout the United States to find recent methods or studies

that can help quantify the benefits.

App. Vol. I, 19. The appendix to this *Summary Report* included more information on costs.

On June 28, 2019, NHDES published a document entitled *New Hampshire Department of Environmental Services Update on Cost and Benefit Consideration* ("*Update*"). App. Vol. I, 90. Among other things, it stated:

> Chapter Law RSA 345 requires the New Hampshire Department of Environmental Services to consider what is known about cost and benefit to affected parties when proposing maximum contaminant levels (MCLs) and ambient groundwater quality standards (AGQSs). This consideration was documented in the [*Summary Report*], for the initial proposed rules and is updated here for the final proposal. 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. Examples of these limitations include not having extensive sampling data for all potential contamination sources and public water systems statewide and having an incomplete understanding of all the health impacts associated with exposure to these four PFAS. Since the initial proposal, NHDES has continued to gather information and further research what is known about costs and benefits to consider in determining the standards to be included in the final proposal. 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. I, 91. The *Update* then provided additional information on costs and benefits:

> BENEFITS:
> In the case of benefits, a number of new studies continue to suggest significant health impacts related to these four compounds, confirming that PFAS may:
>
> - Increase cholesterol levels
> - Increase liver enzyme levels
> - Affect growth, learning, and behavior
> - Interfere with the body's natural hormones, including thyroid hormone levels and sex hormone levels that could affect reproductive development and a woman's fertility
> - Affect the immune system (e.g., decrease how well the body responds to vaccines)
> - Increase the risk of certain types of cancers
>
> ***
>
> Additionally, the recent publication "A transgenerational toxicokinetic model and its use in derivation of Minnesota PFOA water guidance" provides a peer reviewed method to estimate blood serum levels that result from exposure to PFOA (later papers and one currently under peer review documented similar capabilities for PFOS, PFNA and PFHxS) in infants and children. As the statute specifically required that proposed standards provide "an adequate margin of safety to protect human health at all life stages, including but not limited to pre-natal development", this insight into how developmental-stage blood serum levels respond to different amounts of each of the four PFAS in drinking water strongly suggests that the

proposed lower MCLs/AGQSs are necessary to keep infant and children blood serum levels below the levels that indicate enhanced risk of the various health endpoints identified by the ATSDR above.

As was described in the [*Summary Report*], NHDES was not able to monetize the avoided health impact costs. However, some of these impacts are clearly associated with the developmental stage of life and therefore can have significant through-life costs such as direct health care treatment costs, the associated losses of economic production and income of those impacted, and the associated impacts to families and caregivers. NHDES came to this conclusion after reviewing the most recent published research and speaking with experts, including a group of professors and researchers at the University of New Hampshire (UNH) with whom NHDES recently contracted to quantify the benefits of reducing the arsenic MCL. After filing the initial proposal, NHDES continued to reach out to experts and search for valid methods for quantifying benefit. Two recent studies were identified that have attempted to quantify benefits. The utility of these studies is discussed below. The lack of science identifying direct causality between health impacts and these compounds continues to limit quantification of benefit, as was discussed in the [*Summary Report*] related to utilizing contingent valuation studies. It should be noted that this is not unique to PFAS regulation in other states, other compounds have been regulated once the linkage to negative health impacts was documented, but before direct causality and dose/rate relationships were clearly known. This precautionary process is followed in drinking water regulation to limit the harm identified while the exact benefit is quantified through longer term studies. NHDES, based on the most recent studies, is confident that there is a clear and significant benefit to reducing

exposure to these compounds through drinking water while additional studies will help to more accurately quantify the specific health care costs avoided from the known, and to be discovered, specific health impacts caused by these four PFAS compounds.

A new study produced by the Nordic Council of Ministers "The Cost of Inaction, A socioeconomic analysis of environmental and health impacts linked to exposure to PFAS" has attempted to quantify costs associated with low, medium and high risks of exposure to PFAS. This report assumes that PFAS as a group directly causes certain associated health impacts and then assumes a percentage of reported health events, for instance for kidney cancer, is caused by exposure to PFAS above certain levels. While not directly of utility to quantifying the health benefit associated with the proposed standards for these four compounds in New Hampshire, it does provide further estimation of the avoided costs that could be associated with reduced exposure to PFAS. A summary of the report is attached. Similarly, a recent study used a previous study, that showed a clear link between low to moderate exposure to PFOA and reduced birth weights, to estimate health impact costs. This study, "Perfluorooctanoic acid and low birth weight: Estimates of US attributable burden and economic costs from 2003 through 2014", showed that while blood serum levels in the general US population are going down, there are still impacts to birth weights and attempted to quantify the through-life cost impacts of those reduced birth weights. This is based on the National Health and Nutrition Examination Survey (NHANES) database where the general population is measured on a number of factors, including PFAS blood serum levels. It is important to note that a number of New Hampshire communities have measured blood serum levels significantly above those found in the NHANES data,

> which implies there is significant benefit in reducing exposures to better align with the national averages, as this study indicates there are still health impacts (reduced birth weight) that could be reduced by limiting exposure prior to and during pregnancy. While this study cannot be directly related to NH's population to quantify a benefit due to health cost mitigation, it did calculate (for the entire United States population) that the health impacts due to reduced birth weight were 347 million in 2013-2014. It is a consideration that the national averages for PFOA blood serum levels during this time period were half what has been measured recently in some impacted NH communities. The cost implications estimated in the study when the US population had similar blood serum levels to NH's impacted communities was approximately $2.7B. While this does not quantify the benefits of reduced PFAS exposure, it does imply that the benefits are significant,
>
> Finally, the treatment that will be used at most public water systems that exceed an MCL(s) is granular activated carbon. This treatment may provide an ancillary benefit of removing many other substances such as any new emerging chemicals and other unregulated, not well studied PFAS.

App. Vol. I, 91-93.

In summary, NHDES culled information from around the world and sought expert advice from various entities. After consulting with "a health risk expert and health economist team … the department 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…." App. Vol. III, 44-45 (emphasis added). Substantial information on health impacts was provided throughout the NHDES material. *Id*. at 14-

19, 91, 93-97. As stated in its initial study, NHDES simply had no "quantified value of benefit" that could be "monetized" because, as it explained at length in background material, "the type of information needed to use contingent valuation is not yet available." *Id*. at 19.

The NHDES update confirmed this appraisal and explained at length that the "lack of science identifying direct causality between health impacts and these compounds continues to limit quantification of benefit…." *Id*. at 92. Nevertheless, NHDES used "published research" and "experts, including a group of professors and researchers at the University of New Hampshire (UNH)" to describe the benefits of the standards. *Id*. In addition to the narrative on benefits, the background material thoroughly explains adverse health impacts, the avoidance of which is a benefit. Generally, this undertaking was a highly technical, scientific task.

E. The Preliminary Injunction Process

On September 30, 2019, the plaintiffs filed a 27-page complaint with 253 pages of attachments. App. Vol. II, 3-283. The State had 9 days to file an objection to all of the plaintiffs' claims. *Id*. at 417. In this objection, the State had to provide information about its consideration of costs and benefits in preparation for the hearing on the request for a preliminary injunction. The agency provided the background information described above. App. Vol. III, 35-303. The preliminary injunction hearing on October 18, 2019, proceeded by legal argument and offer-of-proof without live witness testimony. Among other things, the State argued that:

- The plaintiffs did not show immediate harm;

- The plaintiffs did not show irreparable harm;
- The plaintiffs did not show a likelihood of success on the merits because consideration of costs and benefits satisfied the statutory requirements; and
- No consideration of costs and benefits is required to adopt an AGQS under RSA 485-C:6 making an injunction of the AGQS improper.

See App. Vol. III; App. Vol. IV, 142-237 [Oct. 18 Tr.].

On November 26, 2019, the Merrimack Superior Court issued a preliminary injunction in favor of all four plaintiffs with respect to both the MCLs and the AGQS based solely on a claimed failure by NHDES to properly apply the statutory provision requiring "consideration of costs and benefits." Order, 1-2, 23 [Add. 48-9, 70]. The order enjoins the rules in their entirety. *Id.*

On November 27, 2019, the State asked for reconsideration because the trial court enjoined the AGQS even though the statute mandating promulgation of an AGQS contained no language regarding consideration of costs or benefits. *Id*. Vol. IV, 326-74. On December 16, 2019, the trial court denied reconsideration finding the requirement to "consider costs and benefits" found only in RSA 485 also applied to an AGQS because AGQS must be equal to any adopted MCL. Recon.Order, 2-3 [Add. 72-3].

This interlocutory appeal followed.

SUMMARY OF THE ARGUMENT

As stated above, on November 26, 2019, the Merrimack Superior Court preliminarily enjoined both the State's drinking water standard (MCL) and its groundwater protection standard (AGQS) for four PFAS compounds. The trial court erred because the plaintiffs failed to demonstrate immediate harm—a prerequisite to a preliminary injunction. Specifically, of the four plaintiffs, only two—the Plymouth Water District and 3M—operate water systems subject to an MCL. 3M failed to submit any affidavit related to harm and the Plymouth Water District cannot be penalized for the failure to abide by the challenged standards during the pendency of the lawsuit pursuant to RSA 31:3-a. 3M and Plymouth Water District also already tested their water and results came back below both reporting and detection limits. The State even offered to pay for Plymouth Water District Q4 water testing which the State estimated would cost $700. The remaining two plaintiffs do not operate water systems. One—RMI—is already subject to testing to "background" levels, i.e., levels below the AGQS. The other is a farm owner who is not currently impacted by either standard.

The trial court also enjoined *both* the rules adopting an MCL and the rules adopting an AGQS for the alleged failure to adequately consider costs and benefits even though the statute allowing NHDES to promulgate an AGQS includes no such requirement. Only the statute requiring NHDES to establish MCLs for the four PFAS compounds includes "consideration" of several factors, one of which is costs and benefits, but mandates promulgation of a purely health-based standard, not a cost-based standard.

NHDES extensively considered costs and benefits. Nevertheless, while bypassing an articulation of requisite harm, the trial court ignored the consideration NHDES gave the issue and imposed a cost-benefit analysis requirement that does not appear in the applicable statutes, all in the context of an abbreviated preliminary injunction proceeding as opposed to a full hearing on the merits.

ARGUMENT

I. Standard of Review

This Court "will uphold the decision of the trial court with regard to the issuance of an injunction absent an error of law, [unsustainable exercise] of discretion, or clearly erroneous findings of fact." *DuPont v. Nashua Police Dep't*, 167 N.H. 429, 434 (2015) (quotations omitted). However, this Court "review[s] the trial court's application of the law to the facts *de novo*." *Id*. "Statutory interpretation is a question of law, which [the Court] review[s] *de novo." Everett Ashton, Inc. v. City of Concord*, 169 N.H. 40, 44 (2016).

II. The Record Does Not Support a Finding of Harm Necessary to Justify Issuance of a Preliminary Injunction

A trial court must ensure that plaintiffs meet a heavy burden before entering a preliminary injunction.

> The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy…. An injunction should not issue unless there is an *immediate danger of irreparable harm* to the party seeking injunctive relief, and there is no adequate remedy at law. *Also*, a party seeking an injunction must show that it would likely succeed on the merits.

N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007) (internal citations omitted) (emphasis added). Therefore, a preliminary injunction should be issued sparingly, and only when there is an (1) immediate danger of (2) irreparable harm *and* when (3) the movant shows that it will likely succeed on the merits. Even where a defendant suffers no harm from an

injunction, plaintiffs "cannot invoke equitable relief unless they show that they would suffer substantial harm . . . ." *Fletcher v. Frisbee*, 119 N.H. 555, 559 (1979).

A. Plaintiffs Failed to Establish Immediate Harm

The plaintiffs' complaint and motion for temporary and preliminary injunction, although lengthy, contained no recitation of any specific harm against any plaintiff. Instead, the pleadings speculated as to possible future harm to entities throughout the State. App. Vol. II, 3-29, 283-308. Neither the complaint nor the motion was verified and no affidavits related to harm were attached. *Id.* 3M has never submitted an affidavit substantiating harm and is, therefore, not entitled to a preliminary injunction as a matter of rule. *See* Super. Ct. R. 11(b). ("The court will not hear any motion grounded upon facts, unless such facts are verified by affidavit….").

After the State objected to the plaintiffs' unsupported and generic assertions, the three other plaintiffs submitted affidavits on the eve of the preliminary injunction hearing. App. Vol. IV, 29-56. These affidavits were written in the subjunctive, were entirely speculative, and provided no information as to the timing of any alleged harm. *Id.* It is beyond dispute that a "plaintiff seeking an injunction must demonstrate that there is an immediate threat of harm." *Meredith Hardware, Inc. v. Belknap Realty Tr.*, 117 N.H. 22, 26 (1977). Indeed, it "has long been settled that injunctive relief is one of 'the peculiar and extraordinary powers of equity' (*Bassett v. Salisbury Mfg. Company*, 47 N.H. 426, 437 [1867]) exercised only when warranted by 'imminent danger of great and irreparable damage.' *Wason v. Sanborn*, 45 N.H. 169, 171 [1862]." *Johnson v. Shaw*, 101 N.H. 182, 188–

89 (1957).

These three plaintiffs assert that they, along with all public water system owners in the state, *could* be required to install treatment systems in the future *if* testing shows that their water exceeds the new standards. App. Vol. II, 18-20; App. Vol. IV, 33-4, 36, 45, 54-55. Yet, the plaintiffs seem to agree that remediation costs are purely speculative. App. Vol. IV, 261 [Dec. 6 Tr. 20] (wherein plaintiffs state: "And it doesn't go to whether Plymouth or anybody else right now is going to have to impose a treatment system or anything else. We don't know that yet").[11]

The State provided the trial court with detailed information, recited above, demonstrating that none of the plaintiffs demonstrated that they will suffer immediate harm. *See* Statement of Facts, Section C, *supra*. As stated above, 3M and RMI already tested for PFAS, and Mr. Hanson has no testing obligation under the challenged rules. The Plymouth Water District—the only municipal plaintiff in this case—cannot show immediate harm as a matter of law, because it is protected from any penalty for noncompliance during the pendency of the case pursuant to RSA 31:3-a. None of the pertinent factual information provided by the State was contradicted by plaintiffs' affidavits.

Accordingly, the plaintiffs cannot demonstrate, and never alleged, they would suffer any immediate harm. Not surprisingly, the trial court

[11] Even if remediation costs were not speculative, the record establishes that test results for two plaintiffs—3M and Plymouth Water District—show that PFAS concentrations are currently below the threshold for any required remediation. *See* Statement of Facts, Section C, *supra*. RMI, while not a public water system subject to the rules, is already obligated to treat PFAS in its groundwater to a level below that set by the challenged rules. *Id.*

never found *immediate* harm; in fact, it never described any harm at all. Order, 23 [Add. 70]. Rather, it merely stated that the "Plaintiffs will never be able to recoup the expenses they incur if they succeed at trial…." *Id*. In other words, any expense incurred by the plaintiffs would constitute *irreparable* harm because sovereign immunity barred monetary recovery against the State.[12] However, the trial court never described what these "expenses" could be or which plaintiff would incur them. It certainly never found any cost to be *immediate*. In the absence of a finding of immediate harm, a preliminary injunction may not issue. *Meredith Hardware*, 117 N.H. at 26.

B. Claims of Generalized Harm Are Insufficient to Justify Injunctive Relief

Plaintiffs have avoided arguing in favor of any actual, immediate harm, asserting instead that they need not demonstrate harm at all. Throughout this case, the plaintiffs have refused to abide by the automatic disclosure requirement in Super. Ct. R. 22 or respond to any discovery requests claiming that they need not demonstrate *any* harm either to establish standing or to obtain an injunction. App. Vol. IV, 376-7 ("The State does not have a right to any discovery against the Plaintiffs in this case"). Instead, they assert that "[a] showing that NHDES violated any one

[12] The State does not address the trial court's ruling regarding the "irreparability" of harm given that no harm, and certainly no immediate harm, was found. However, the State notes that the trial court verbally asserted that the cost of testing would not even qualify as "irreparable" harm. App. Vol. II, 440 [Oct. 1 Tr. 23] (wherein the trial court stated that "payment of a couple thousand dollars is not going to be irreparable harm").

of RSA 541-A, RSA 485:3, and Art. 28-a is independently and wholly sufficient for Plaintiffs to meet its [sic] burden for injunctive relief." App. Vol. IV, 381. Therefore, according to the plaintiffs, any party can bring suit to enjoin any governmental function without showing harm.

However, to merit the extraordinary relief of a preliminary injunction, there must be "an immediate danger of irreparable harm *to the party seeking injunctive relief*." *Murphy v. McQuade Realty, Inc.*, 122 N.H. 314, 316 (1982) (emphasis added); *see also Mottolo*, 155 N.H. at 63. The plaintiffs, however, admit that they envision a generalized claim. App. Vol. IV, 234 [Oct. 18 Tr. 93] (telling the trial court: "you don't just consider the impact to these Plaintiffs here, because this is really an integrity of the process. So it's just not the impact of those before you"); *id.* at 237 ("The measure of the harm inflicted by the Final Rules is not specific to the Plaintiffs that filed this lawsuit."). Such generalized claims of process violations do not even establish standing, never-mind the individualized harm required to justify an award of injunctive relief.

Case law confirms the need for individualized harm even in the rulemaking context. Plaintiffs must show that they "suffered harm" as a result of any alleged rulemaking infirmity. In *Nevins v. New Hampshire Dep't of Res. & Econ. Dev.*, 147 N.H. 484 (2002), the plaintiff alleged that "DRED" failed to undergo rulemaking required by RSA 541-A with respect to a lease agreement. The plaintiff's claim failed partly because it did not "assert that if DRED had followed proper rulemaking procedures, thereby allowing for public input into the rulemaking process, DRED would not have entered into the lease with U.S. Cellular," the harm alleged by the plaintiff. *Nevins*, 147 N.H. at 488.

Contrary to this Court's analysis in *Nevins*, in this case the trial court granted the injunction based solely on the alleged failure of NHDES to consider costs and benefits specific to the final standards. The plaintiffs have never explained, and the trial court did not find, how the NHDES decision on a final standard would or could have been different if it had done more to consider costs and benefits, much less in a way that would have caused plaintiffs harm. In fact, they cannot do so as the statute requires a health-based, not a cost-based, standard. Thus, the trial court could not meet the standards necessary for injunctive relief.

III. The Trial Court Wrongfully Applied the Requirement to Consider Costs and Benefits of an MCL in RSA 485:3 to the Establishment of an AGQS under RSA 485-C:6

As previously stated, NHDES conducted rulemaking related to two separate standards—MCLs and AGQS. These are distinct. RSA ch. 485, the Safe Drinking Water Act, allows NHDES to create MCLs that apply to public water systems. Systems must test to determine if an MCL is exceeded. If an MCL is exceeded over four quarterly samples, further steps may be required. In contrast, RSA ch. 485-C, the Groundwater Protection Act, allows NHDES to establish an AGQS, a cleanup standard applied to remediation sites to ensure the protection of groundwater. Each of these two separate standards appear in their own chapter within the RSAs. The final promulgated rules are in different rule chapters as well—MCLs are in the Env-Dw 700 rules for *Water Quality: Standards, Monitoring, Treatment, Compliance, and Reporting,* whereas the AGQS resides in the Env-Or 600 *Contaminated Site Management* rules. N.H. Admin. R. Env-

Dw 700; N.H. Admin. R. Env-Or 600.

Nothing in RSA ch. 485-C, the Groundwater Protection Act, requires NHDES to consider costs and benefits. If the legislature wanted NHDES to consider costs when promulgating an AGQS, it could have said so. It clearly knew how. *Petition of Carrier*, 165 N.H. 719, 721 (2013) ("We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include"); *see also Appeal of Roland*, 170 N.H. 467, 470 (2017) (noting that "[i]f the legislature wanted to establish a mandatory timeframe, it knew how to do so"). The promulgation of an AGQS cannot be enjoined for an alleged infirmity in a process located in a different statute and unique to the establishment of a different standard.

Contrary to the trial court's legal finding, the fact that an AGQS must be set at the same level as an existing MCL does not mean that all the requirements for establishing an MCL can be read into the separate statute concerning the creation of an AGQS. Similar language requiring that an AGQS be set at the level of federal MCLs or federal health advisories existed for many years. As can be seen in the struck-through portion of SB 309, RSA 485-C:6 previously stated: "Where federal maximum contaminant levels or health advisories have been promulgated under the Safe Drinking Water Act or rules relevant to such act, ambient groundwater quality standards shall be equivalent to such standards." App. Vol. I, 111. Grammatically, this language is identical to that relied upon by the trial court here. However, no one ever interpreted this to mean that all of the requirements placed upon the federal government in establishing a health advisory suddenly applied to the State whenever it made an AGQS. Such a

result bears no resemblance to the statutory language.

In summary, the trial court erred by enjoining the AGQS for the alleged failure to meet requirements pertaining solely to creation of an MCL, which reside in an entirely different chapter. Such an interpretation has no basis in the statutory language.

IV. The Trial Court Misinterpreted RSA 485:3's Requirement to Consider Costs and Benefits

The trial court also erred in its analysis of the likelihood of success on the merits. Neither the APA nor RSA 485:3 require NHDES to commence the arduous and expensive analysis required of the U.S. EPA under federal rules. RSA 485:3. The trial court appears to recognize as much. Order, 22 [Add. 69]. The law merely says that rulemaking shall commence "after consideration" of "costs and benefits." In *Appeal of Nationwide Ins. Co.*, 120 N.H. 90 (1980), this Court analyzed what it meant for the Commissioner of the N.H. Dept. of Insurance to give "'due consideration' to the factors enumerated in RSA 412:15 and RSA 414:3…." *Id*. at 93. The Court determined that the Commissioner had discretion to determine how to give various factors "due consideration." It stated:

> RSA 413:3(b) (Supp.1977) does not prescribe the weight to be accorded to the various factors considered by the commissioner in ratemaking, and it is within his discretion to determine both the method to be used in deriving rates and the weight to be given to each factor. Nationwide has not overcome the presumption that the commissioner's decision is prima facie lawful and reasonable.

Nationwide, 120 N.H. at 94 (internal citations omitted). In this case, RSA 485:3 required NHDES to give "consideration" to costs and benefits before adopting an MCL. It did so. The affidavit from Sarah Pillsbury, Administrator of the NHDES Drinking Water and Groundwater Bureau, and the two publicly-available cost/benefit reports attached thereto, provide ample information about this process. App. Vol. III, 43-230. It is beyond dispute that NHDES considered costs and benefits.

Nevertheless, the trial court, while appearing to accept NHDES' *cost* consideration, described NHDES' consideration of *benefits* as inadequate. Order, 22 [Add. 69]. The trial court began by relying on the plain meaning of "consideration," stating: "Merriam-Webster's online dictionary defines 'consideration' as 'to think carefully about something, typically before making a decision.'" Order, 21-22 [Add. 68-9]. The trial court appeared to agree with NHDES' assertion that benefits could not be quantified or monetized, but then stated: "Where, as here, there is no quantification of the level of harm caused by PFAS at different levels of exposure, at the very least some explanation for benefits expected from imposing different levels of concentration and correlative different levels of cost must be made." Order, 22 [Add. 69]. However, the trial court provided almost no substantive explanation of how NHDES' actual consideration of benefits was inadequate under the statute.

The trial court overlooked substantial evidence in the record proving that NHDES carefully considered the benefits of establishing health-based standards for PFAS. *See* Statement of Facts, Section D, *supra*. To the extent the trial court did consider this evidence, its explanation demonstrates it reasoned incorrectly. The trial court fundamentally

misunderstood the scope of the statutory requirement—to consider costs and benefits—and the technical nature of cost consideration in developing a health-based standard.

For example, the trial court improperly sought to impose on NHDES a requirement to conduct a full cost-benefit analysis. In fact, the trial court titled the relevant section of its order: "The Cost Benefit Analysis Required by RSA 485:3, I(b)." Order, 18 [Add. 65]. The statute, however, requires NHDES to *consider* several factors, one of which is costs and benefits. It does not require NHDES to conduct a *cost-benefit analysis*. These two concepts are different:

> Regulatory decisions incorporate cost considerations in several ways. The decision-maker can disregard cost completely, merely take cost into consideration, use cost-effectiveness analysis to determine the least expensive method of achieving the objective, or formally balance costs against benefits. This last method, better known as cost-benefit analysis, is unique in that it considers cost when establishing the goal as well as the method of achieving the goal.

March Sadowitz, *Tailoring Cost-Benefit Analysis to Environmental Policy Goals: Technology-and Health Based Environmental Standards in the Age of Cost-Benefit Analysis*, 2 B.U. J. Sci. & Tech. L. 11 (1996) at ¶22; *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217 (2009) (stating that a "cost-benefit analysis … compares the costs and benefits of various ends, and chooses the end with the best net benefits"). The statute does not require a "cost-benefit analysis," it requires "consideration of … costs and benefits." RSA 485:3.I(b). This language most closely resembles the

terms at issue in *Nationwide* (cited above).[13] In any event, the statute requires NHDES to create a health-based standard, not a cost-based standard.

Though federal law is not controlling, the decision of the U.S. Supreme Court in *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) further illustrates the trial court's error. In *Donovan*, the U.S. Supreme Court held that "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *Donovan*, 452 U.S. at 510. For example, a clear requirement to engage in a "cost-benefit analysis" would require that "benefits to whomsoever they may accrue are in excess of the estimated costs." *Id*. (quoting 33 U.S.C. § 701a). By contrast, when an agency must "consider cost," the U.S. Supreme Court has "made it quite clear that it did not read the statute to require a formal cost-benefit analysis." *Nicopure Labs, LLC v. Food & Drug Admin.*, 266 F. Supp. 3d 360, 402 (D.D.C. 2017), aff'd, 944 F.3d 267 (D.C. Cir. 2019) (*citing Michigan v. EPA*, — U.S. —, 135 S.Ct. 2699 (2015)). RSA 485:3 contains no language requiring a cost-benefit analysis.

Even when statutes require a formal cost-benefit analysis, courts afford the agency significant deference in its conduct of the analysis. In

[13] The trial court failed to give deference to NHDES' considered opinion of what the statute it implements actually requires. *Appeal of Town of Seabrook*, 163 N.H. 635, 644 (2012) ("[I]t is well established in our case law that an interpretation of a statute by the agency charged with its administration is entitled to deference.").

Nicopure Labs, reviewing the U.S. Food and Drug Administration's rules on vaping, the court held that even if the cost-benefit analysis required by *Michigan v. EPA* did apply:

> [T]he administrative record reflects that the agency expressly considered both the burdens the decision would impose on the vaping industry and the benefits to the public. Thus, even if the agency was bound by the decision in *Michigan v. EPA* to pay "some attention to cost," that was done in this case, and the decision cannot be overturned on that basis.

Nicopure Labs, 266 F. Supp. 3d at 403 (internal citations omitted). The FDA in *Nicopure Labs* faced similar problems to those experienced by NHDES and engaged in a similar approach, which the court approved:

> While the agency conceded that it could not "quantify the benefits of the final rule due to lack of information and substantial uncertainties associated with estimating its effects," it concluded that the rule was justified in light of [] "welfare gains."

Id. at 404. The court rejected the very challenge asserted by the plaintiffs in this case:

> [P]laintiffs argue that in failing to quantify the benefits of the rule, the agency "shirk[ed] a statutory responsibility simply because it [was] difficult." They posit that "[a]n agency cannot realistically determine that a rule's benefits justify its costs if it does not have at least a general grasp of the rule's benefits." While it is true that the agency concluded that the "direct benefits [of the Deeming Rule] ... are difficult to quantify" monetarily, it is disingenuous to argue that the agency did not articulate "at least a general grasp of the rule's benefits,"

> because the RIA provided substantial detail on the benefits of the rule, and the reasons why quantification was not possible. And, as noted above, there was no statutory duty to quantify the benefits at all, and even if such a duty can be implied from a statutory provision that lacks any requirement that the agency must find regulation to be "appropriate and necessary," *Michigan v. EPA* does not require that the benefits be quantified in any particular way when compared to the costs.

Nicopure Labs, 266 F. Supp. 3d at 406 (internal citations omitted).

In addition to imposing an incorrect standard as described above, the trial court's analysis is incorrect for two additional reasons. First, the final rule does not reflect a different policy choice than the initial proposal. In other words, NHDES did not decide to do one thing in its initial proposal and then change course in the final rule. In compliance with the statutes, both standards were health-based, meaning "necessary to protect the public health." RSA 485:3, I. NHDES simply obtained more information on health impacts between the initial and final rule and, consequently, determined that the levels initially proposed would not protect health as originally believed, and that lower standards were needed. App. Vol. III, 47-48. In other words, the final standard is simply a more accurate numerical articulation of the same health-based standard. Therefore, the benefits will be essentially the same.

Second, rather than focus on the actual actions undertaken by NHDES, the trial court took issue with the manner in which both NHDES and its attorneys described the agency's role. Specifically, the trial court appeared disturbed at NHDES' assertion that it looked at all "known" information and the State's assertion in its objection that NHDES

performed its task to the "best of its ability." Order, 19, 21 [Add. 66, 68]. The trial court relied on these statements to infer what it deemed an "implicit suggestion" from NHDES that it needed to give costs and benefits only "cursory consideration." Order, 22 [Add. 69]. It appears that the trial court felt that these *descriptions* of what NHDES did, rather than the evidence of what NHDES *actually did*, "compell[ed] the Court's conclusion." *Id*.

However, NHDES never asserted that it did or should give consideration of costs and benefits only a "cursory consideration" and the information submitted demonstrates that it did just the opposite. The description that NHDES reviewed "known" information or did so "to the best of its ability" should pose no issue. First, what NHDES actually did is clear, regardless of any description thereof. Second, no one can reasonably suggest that the statute compelled NHDES to review *unknown* information or to perform its tasks *beyond the best of its ability*. Therefore, the trial court's characterizations are both inaccurate and immaterial.

CONCLUSION

Wherefore, the State requests that this Honorable Court find the preliminary injunction to be issued in error and remand the case for further proceedings consistent with its order.

The State requests a 15-minute oral argument. Attorney Brooks will argue for the State. Copies of the written decisions appealed from are included in an addendum to this brief.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney,

GORDON J. MACDONALD
ATTORNEY GENERAL

Dated: April 29, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation set out in Supreme Court Rule 16(11), and contains 9150 words.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the State's brief shall be served on all counsel of record through the New Hampshire Supreme Court's electronic filing system.

/s/ K. Allen Brooks
K. Allen Brooks, Esq.

ADDENDUM

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The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

The Plymouth Village Water & Sewer District, Resource Management, Inc. Charles G. Hansen and 3M Company

v.

Robert R. Scott, as Commissioner of the New Hampshire Department of Environmental Services

No. 217-2019-CV-00650

ORDER

Plaintiffs, the Plymouth Village Water & Sewer District ("Plymouth Village"), Resource Management, Inc. ("Resource Management"), Charles G. Hansen ("Hansen"), and 3M Company ("3M") (collectively, "Plaintiffs") have sought preliminary injunctive relief against the New Hampshire Department of Environmental Services ("DES"). Plaintiffs now seek to enjoin DES from enforcing recently adopted rules (the "Final Rules") related to the Maximum Containment Levels ("MCLs") and Ambient Groundwater Quality Standards ("AGQS") of certain substances, identified in Plaintiffs' papers as perfluorooctanoic acid ("PFOA"), perfluorooctane sulfonate ("PFOS"), perfluorononanoic acid ("PFNA"), and perfluorohexanesulfonate ("PFHxS").[1] For the reasons stated in this Order, the Motion for preliminary injunctive relief is GRANTED. DES is enjoined from

[1]These chemicals are generically considered per- and polyflouralkyl substances ("PFAS"). (Compl. ¶ 9.) PFAS refers to a large group of chemicals with widely varying form. (Id.) Among other uses, PFAS have been used for their water and steam repellent properties, resistance to temperatures, and to reduce surface tension. (Id.)

implementing the Final Rules until it complies with the provisions of RSA 485:3, I(b). However, the legal issues raised by Plaintiffs' challenge are complex, the importance of public health is paramount and the expense imposed by the proposed rule is significant. Accordingly, the Court's Order will be STAYED until Dec. 31, 2019, so that either party may seek immediate review of this decision in the New Hampshire Supreme Court.

I. Background

Plaintiffs filed their Complaint on September 30, 2019, seeking to enjoin the operation of the challenged rules, which were scheduled to go into effect on that same date. A brief hearing was held on that date, and the Court ordered that a hearing on a preliminary injunction would be held on October 18, 2019, after DES had the opportunity to respond to the Complaint and the request for equitable relief.

Plaintiffs' claim arises from certain regulations promulgated by DES in 2019. The rules have their genesis in 2018 legislation. On July 10, 2018 the Governor signed SB309, which became N.H. Laws, ch. 368 (2018). The law directed DES to commence rulemaking by January 1, 2019 to establish drinking standards called MCLs and AGQS that would apply to all public water supplies for levels of PFOA, PFOS, PFNA, and PFHxS. RSA 485:16-e. On January 4, 2019, DES proposed numeric MCLs and AGQS and set a schedule for public hearing and comment. (Compl. ¶ 12.) On June 28, 2019, DES promulgated final rules that, according to Plaintiffs' Complaint, set standards far lower than those proposed in January, 2019. (Compl. ¶ 13.) The standards are measured in parts per trillion ("ppt"), representing the ratio of parts of PFAS per trillion parts of liquid sampled:

	PFOA	PFOS	PFO/PFOA (combined)	PFNA	PFHxS
Proposed Jan., 2019	38 ppt	70 ppt	70ppt	23 ppt	85 ppt

Final Rules June, 2019	12 ppt	15 ppt	N/A	11 ppt	18 ppt

(Parties' Undisputed Chronology ¶ 13.) (hereinafter, "Chron.")

Plaintiffs assert that the final rules issued in June, 2019 used a significantly different toxicity study for PFOS and used significantly different critical endpoints and exposure modeling approaches from those proposed in January, 2019. (Compl. ¶ 14). Plaintiffs assert that DES never offered the public an opportunity to comment on the changes it made in the rules. (Id.) Plaintiffs also allege that DES failed to comply with numerous provisions of RSA 541-A, the Administrative Procedure Act ("APA"), and RSA 485:3, I(b).

Count I seeks a declaratory judgment, temporary, preliminary, and permanent injunctive relief, alleging that DES's actions violated Part I, Article 28-a of the New Hampshire Constitution. (Id. ¶¶ 71-72.) Part I, Article 28-a prohibits the State from mandating "any new, expanded or modified programs or responsibilities [. . .] in such a way as to necessitate local expenditures" unless they "are fully funded by the state or unless [they] are approved" by the legislative body of the local political subdivision. N.H. CONST. Part I, Art. 28-a. Plaintiffs also assert that DES has violated RSA 541-A:25, which prohibits the adoption of agency rules that "mandate or assign any new, expanded, or modified programs or responsibilities to any political subdivision in such a way as to necessitate further expenditures by [municipalities] unless approved [. . .] by a vote of the local legislative body." RSA 541-A:25; (Compl. ¶ 75.)

Counts II and IV of Plaintiffs' Complaint allege that DES has violated the APA and the requirements of due process of law by promulgating rules in violation of the APA and in violation of Plaintiffs' rights to fair notice of the rules. Count III alleges that DES has

violated the New Hampshire Safe Drinking Water Act, RSA 485:3, by not undertaking a cost and benefit analysis of the adoption of the final rules and its impact on affected parties. (Compl. ¶ 108.) DES objects to the request for preliminary relief.

II. Plaintiffs' Claims for Relief

An injunction is an extraordinary remedy. Injunctive relief will not be granted unless the party seeking an injunction shows that "there is an immediate danger of irreparable harm," that "there is no adequate remedy at law," and that "it would likely succeed on the merits." N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). Moreover, a court must consider whether the grant of an injunction would be in the public interest. See UniFirst Corp. v. Nashua, 130 N.H. 11, 13-14 (1987). "It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity." Mottolo, 155 N.H. at 63. In cases involving the state, a court must be mindful of the fact that a plaintiff who sues the State has no opportunity for redress or costs incurred by improper requirements because, by its express terms, the Administrative Procedure Act does not waive the Government's sovereign immunity with regard to claims seeking money damages. Bel Air Assocs. v. N.H. Dep't of Health & Human Servs., 158 N.H. 104 (2008); N.H. Hosp. Ass'n v. Burwell, 2016 WL 1048023 at *18 (D.N.H. Mar. 11, 2016). Applying these principles, the Court turns to the claims made by Plaintiffs.[2]

A. The Part I, Article 28-a Claim

Plaintiffs claim that the regulations in question violate Part I, Article 28-a of the

[2]As in all preliminary injunction orders, the Court relies upon what appear to be undisputed facts, based upon the statements of the parties. However, the Court makes no findings of fact. The conclusions reached in this Order are for purposes of Plaintiffs' request for injunctive relief and do not have res judicata or collateral estoppel effect.

New Hampshire Constitution, enacted in 1984, which prohibits unfunded mandates imposed on cities and towns by the State of New Hampshire. It provides that:

> 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. CONST., Part I, Art. 28-a.

The New Hampshire Supreme Court has described Article 28-a as "a safety net to save cities and towns from the burden of coping with new financial responsibilities, not of their own creation, and to permit them a stronger grasp of their fiscal affairs." N.H. Ass'n of Counties v. State, 158 N.H. 284, 288 (2009).

RSA 541-A:25 is similar in language and purpose to Article 28-a and is intended to apply specifically to agency actions. It provides, in relevant part:

> I. A state agency to which rulemaking authority has been granted, including those agencies, the rulemaking authority of which was granted prior to May 6, 1992, shall not mandate or assign any new, expanded, or modified programs or responsibilities to any political subdivision in such a way as to necessitate further expenditures by the political subdivision unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision. Such programs include those functions of a nature customarily undertaken by municipalities whether or not performance of such functions is required by statute.
>
> II. Such programs also include, but are not limited to, functions such as police, fire and rescue, roads and bridges, solid waste, sewer and water, and construction and maintenance of buildings and other municipal facilities or other facilities or functions undertaken by a political subdivision.
>
> III. Included in the scope and nature of such programs are those municipal functions which might be undertaken by a municipality or by a private entity and those functions which a municipality may legally choose not to undertake.

RSA 541-A:25.

At the outset, the Court notes that both Article 28-a and RSA 541-A:25 are only

applicable to political subdivisions, such as cities and towns. By their terms, Article 28-a and RSA 541-A:25 have no applicability to Hanson, 3M, or Resource Management. Moreover, it is questionable whether Part I, Article 28-a is violated by the regulations at issue with respect to the Town of Plymouth because the constitutional amendment, by its terms, provides that it only relates to "any new, expanded or modified programs or responsibilities." As DES notes, the Town of Plymouth has no obligation to run a Water District and many municipalities do not do so.

The New Hampshire Supreme Court has stated that "reconciling our cases elucidating the meaning of Article 28-a is not an easy exercise," but it did so in City of Concord v. State, 164 N.H. 130, 140 (2012). In that case, the Court stated that there were 4 requisites to finding that Article 28-a has been violated: "(1) the State must mandate or assign to a local subdivision (2) a program or responsibility (3) that is new, expanded or modified from what existed before the state action, and which (4) necessitates additional expenditures by the local subdivision." Id. An increase in expenditures is not necessarily dispositive of whether or not a program or responsibility has been expanded or modified. Town of Nelson v. N.H. DOT, 146 N.H. 75, 78 (2001). Critically, "where a local subdivision has historically had responsibility for the subject matter of the mandate, some change in the scope of that responsibility does not result in a violation of Article 28-a." City of Concord v. State, 164 N.H. at 140. The Court noted that the language of Article 28-a distinguished between the meaning of "responsibility" and the word "expenditure," and held that the language of the amendment "demonstrates an intention to distinguish between programs and responsibilities on one hand and expenditures on the other." Id. at 141. The Court held that "to constitute a new, expanded or modified 'responsibility,' the state action must impose some substantive change to an underlying function, duty or

activity performed or to be performed by local government." Id. at 142. Thus, the Court held that legislation shifting part of the financial obligation for funding the New Hampshire retirement system from the State to the local subdivisions, without altering any underlying activities, did not violate Part 1, Article 28-a even though, as a practical matter, the legislation before the court resulted in a substantial increase in expenditures required from cities and towns. Id. at 142.

The Plymouth Water District is bound by the comprehensive drinking water protection program established by RSA 485:1, the so-called "Safe Drinking Water Act." It was subject to RSA 148-B, the prior iteration of the Safe Drinking Water Act, before enactment of Article 28-a. It appears to concede that, prior to enactment of the new rule by DES, it already monitored and treated for PFAS. As in City of Concord, while the testing required by the new rule may be more expensive, testing was already required. No new responsibility has been imposed upon the Plymouth Water District.

Moreover, Plymouth Village is not required to operate any water system. In Opinion of the Justices (Solid Waste Disposal), the Court specifically held that a proposed bill that set priorities for the disposal of certain components of a solid waste stream did not violate Article 28-a. 135 N.H. 543, 545 (1992). Even though the legislation would have prohibited the disposal of certain goods by the solid waste generator and prohibited acceptance of those goods by a landfill, composting facility, or incinerator for disposal, it did not require action by local subdivisions such as recycling.

It is not clear that the provisions of the APA itself, RSA 541-A:25, require a different analysis. Article 28 was enacted in 1984. By the early 1990s, municipalities were concerned that, despite the language of the constitutional amendment, mandates were being imposed by the State on municipalities. (Pls.' Mem. at 8.) HB 1501 was enacted as RSA 541-A:25.

(Id.) The legislative history suggests that the intent was to require that environmental programs created by the State be funded by the State to effectuate the then-current interpretation of Article 28-a. (See generally id. at 10-11.) Plaintiffs argue that the language of RSA 541-A:25 is somewhat broader than that of Part I, Article 28-a because Article 28-a only generally describes "responsibilities." RSA 541-A:25, II describes both responsibilities and "programs," which include specific municipal functions such as water. This distinction appears to be reflected in DES's own rules. See N.H. Admin. R., Env-Dw 504.02 ("Special Provisions for Political Subdivisions," which purports to exempt certain regulations from applicability to towns and cities based on Article 28-a).

On the other hand, the regulation in question, Env-Dw 102.01, refers to Article 28-a as the guiding principle to allow some regulations to be imposed on cities and towns while forbidding imposition of costs or other regulations. See N.H. Admin. R., Env-Dw 102.01. Plainly, Article 28-a does not give any administrative agency the right to pick and choose what cost can be imposed apart from the settled interpretation of a provision of the Constitution. The legislative branch cannot add to or detract from the meaning of the Constitution and therefore there is no reason to conduct a separate analysis of the requirements of RSA 541:25.

B. The RSA 541-A Claims

The claim that DES has not given proper notice of its rules, however, is properly raised by all Plaintiffs. The APA specifically provides that notice to the public must be given if an agency decides to draft new rules. See generally RSA 541-A:6-12.[3] While the New Hampshire Supreme Court has not dealt with what notice is required by the APA at

[3]Plaintiffs also make a broader argument, that the rulemaking process violated the requirements of due process. Obviously, if DES complied with the provisions of the APA, it could not have violated any party's rights to due process of law.

any length, the parties assume, and the Court agrees, that the relatively robust body of law surrounding notice of administrative rules under the federal APA, 5 U.S.C.§ 552(b-c), is applicable to the adequacy of the notice provided by DES. Rulemaking is simply a function of modern government. As one commentator has noted:

> The rulemakers are charged to give detail to often vague and sensitive legislation. Legislators find it politic to leave uncomfortable details to the agencies. The administrative rulemakers must confront such details and, when they do so, they face the controversy that the legislators avoid.

1 Charles H. Koch, Jr. & Richard Murphy, Administrative Law & Practice § 443 (3d ed. 2019).

Courts have noted that the federal APA notice requirement does not simply erect arbitrary hoops through which federal agencies must jump without reason. It "improves the quality of agency rulemaking" by exposing regulations to diverse comments. This ensures fairness and provides a well-developed record that "enhances the quality of judicial review." Small Ref. Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983). The federal APA requires that an agency conducting notice and comment rulemaking publish in its notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 USCS § 553(b)(3) (2019). Similar requirements are imposed by the State APA, in particular RSA 541-A:6. Federal courts have uniformly interpreted the notice and comment requirement of the Federal APA to mean that the final rule that the agency adopts must be "a logical outgrowth" of the rule proposed.

Plaintiffs argue that the notice and comment requirements of the State APA are substantially those of the Federal APA. See RSA 541-A:3; (Pls.' Reply Mem. at 11.) In their papers, they rely on federal cases which provide, in substance, that "an agency abuses its

discretion and violates the APA where it promulgates a final rule that is not a 'logical outgrowth' of the proposed rule." Envtl. Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005); (see generally Pls.' Reply Mem. at 11-13.) At oral argument, DES argued that the "logical outgrowth" test is applicable to the State APA and argued that the rule is appropriate under that standard.

The object of notice and rulemaking is fairness; "[n]otice of a proposed rule is sufficient if it affords interested parties a reasonable opportunity to participate in the rulemaking process, and if the parties have not been deprived of the opportunity to present relevant information by lack of notice that the issue was there." James T. O'Reilley, Administrative Rulemaking § 5.8 (2019 ed.). "Among the information that must be revealed for public evaluation are the 'technical studies and data' upon which the agency relies in its rulemaking." Id.; see Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227 (D.C. Cir. 2008). "By requiring the 'most critical factual material' used by the agency be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review." Am. Radio Relay, 524 F.3d at 236.

There is no doubt that the final DES rules are very different from the proposed rules, but that is hardly dispositive. In order to decide this case, the Court must engage in a two-step analysis. First, the Court must determine what information was disclosed to the public; second, the Court must determine whether or not adequate notice was given as a matter of law because the final rule was a "logical outgrowth" of the proposed rule.

1. The Factual Record

DES began informing stakeholders about PFAS long before setting the standards

that gave rise to this litigation. In March, 2016, DES created a webpage dedicated to informing the public about the presence of PFAS in the State's water. (Def.'s Obj. to Mot. Prelim. Inj. ("Def.'s Obj."). at 15.) On May 31, 2016, DES adopted the federal Environmental Protection Agency ("EPA")'s 2016 advisory limit of 70ppt each for PFOA and PFOS or a total of 70ppt for a combination of both chemicals. (Parties' Undisputed Chronology ("Chron.") ¶ 13.) On September 1, 2017, DES created a second webpage, a "blog" DES used to update the public on activity regarding PFAS and the rulemaking process. (See Def.'s Obj. at 16.)

On October 16, 17 and 18, 2018, DES held public meetings at 3 technical sessions with stakeholders in Litchfield, Portsmouth, and Concord, respectively.[4] (Compl., Ex. 2 at 2; Chron. ¶ 3.) At the meetings, DES informed the public of its process for deriving MCLs for PFAS and received feedback in the form of technical information, recommendations, and comments from interested stakeholders. (Chron. ¶ 3.)

On January 2, 2019, DES published its notice of proposed rulemaking and set a schedule for public hearing and comment. (Id. ¶ 4.) The notice maintained both the PFOS standard and the combined PFOA and PFOS standard at 70ppt, but it lowered the level of PFOA to 38ppt. (See Compl., Ex 4.) It also added standards for PFHxS and PFNA for the first time, setting them at 85 and 23 ppt, respectively. (Id.) At the time, New Jersey appears to have been the only other state in the country to have set an MCL for any PFAS, let alone PFHxS and PFNA. (Compl., Ex. 2. at 10.) On January 4, 2019, DES published a "Summary Report" about the proposed rules, discussing the estimated costs and benefits

[4] Despite these meetings, DES did not formally begin the rulemaking process until December 31, 2018. (Compl., Ex. 2 at 2.) In July, 2018, the State legislature had directed DES to "initiate rulemaking" by January 1, 2019, with an aim to eventually adopt new PFNA and PFHxS standards and to assess whether to revise existing PFOA and PFOS standards. See RSA 485-C:6, V-VI. The meetings were apparently held for purposes of aiding the agency in developing proposed standards. (See Compl., Ex. 5 at 8.)

of the proposed standards, the feasibility of water treatment for PFAS, and the risk assessment methodology used. (Chron. ¶ 5). Though it did not provide a cost and benefits estimate as thorough as those the EPA provides, DES repeatedly cited to the relative lack of scientific evidence available in compiling the report. (See e.g., Compl., Ex. 5 at 6 (stating available data on the effects of PFAS "is often incomplete and contradictory," which "influence[s] the toxic effect that is chosen.").) In addition, DES provided qualitative analysis where quantitative cost analysis was not available. (Id. at 11.) On January 24, 2019, DES formally published notices of the proposed rules in the New Hampshire Rulemaking Register. (Chron. ¶ 6.)

On February 21, 2019, in a second press release, DES informed the public that new information surfaced that "may change" DES's proposed PFAS standards. (Id. ¶ 7.) In particular, DES referenced a "new assessment tool developed by the Minnesota Department of Health." (Id.) DES provided a direct link to a study describing use of the assessment tool in creating water guidance in Minnesota. (Compl., Ex. 6 at 3.) DES also stated that the levels for PFOA and PFOS "would be potentially lowered significantly below the initial proposal" but did not make a similar statement with respect to PFHxS or PFNA. (Id. at 1.) Instead, DES stated it was "continuing to review the suitability of this assessment tool for PFHxS and PFNA." (Id.) In fact, DES had considered lowering the standards in part on the basis of a "wave of 2019 studies," including the one from Minnesota, that showed a "potential for breastmilk transfer" of PFAS. (Pls.' Unmarked Ex. 5.)

On March 4, 5, and 12, 2019, DES held public hearings in Merrimack, Concord, and Portsmouth, respectively. (Chron. ¶¶ 8-10.) "Participants were asked to comment on the use of a toxicokinetic model developed by the Minnesota Department of Health ('MN model') to assess blood serum levels of people exposed to PFOA, including breastfed and

bottle-fed infants." (Compl., Ex. 2 at 3). DES further allowed the submission of written comments through April 12, 2019. (Chron. ¶11.) Consideration of the comments received, of "further research and new studies," and "discussions with other state toxicologists" informed the final rule. (Id.)

When the final proposed standards issued on June 28, 2019, they were far lower than the standards originally proposed to the public in January. (Compl., Ex. 2 at 3.) The standards represented a decrease of approximately 50%-80% in permissible levels of PFAS from the original proposal. (Pls.' Unmarked Ex. 1). They also eliminated standards for a combined PFOS/PFOA concentration. (Id.) In all, the estimated costs of implementation rose between approximately 170%-2300% depending on the PFAS source type. (Pls.' Unmarked Ex. 2.) Nevertheless, DES stated that, "[a]fter considering what currently is known about costs and benefits, [DES] believes that the benefit of adopting these rules is not outweighed by the costs of implementing the proposed health based standards." (Compl., Ex. 2 at 3.) Among the comments DES addressed in its final notice was that the costs and benefits were not "adequately quantified." (Id. at 4-5.) In response, DES said it "could not directly estimate" the benefits given the available data, although a "future quantification may be possible." (Id. at 5.)

2. Applicable Law Regarding Change in Proposed and Final Rules

The "logical outgrowth" doctrine recognizes that "a certain degree of change" between a proposed and a final rule is "inherent to the APA's scheme of rulemaking through notice and comment." Mid Continent Nail Corp. v. United States, 846 F.3d 1364, 1374 (D.C. Cir. 2017). The judiciary seeks to "balance the values served by adequate notice [. . .] with the public interest in expedition and finality." Id. For a final rule to constitute the logical outgrowth of a proposed rule, the degree of change from the

proposed to the final rule must be such that "interested parties should have anticipated that the change was possible, and thus should have filed their comments on the subject during the notice and comment period." Idaho Conservation League v. Wheeler, 930 F.3d 494, 508 (D.C. Cir. 2019). The Court must be satisfied, after "careful consideration on a case-by-case basis," that "given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms." United States v. Whitlow, 714 F.3d 41, 47 (1st Cir. 2013). By contrast, a final rule is not the logical outgrowth of a proposed rule if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." Council Tree Communs., Inc. v. FCC, 619 F.3d 235, 250 (3rd Cir. 2010).

Plaintiffs' chief complaint about the rulemaking process undertaken by DES is that DES both relied on different data than that provided to the public and reached PFAS standards that were substantially lower than those articulated in the proposed rule. (Compl. ¶ 13-14.) Petitioners claim the reliance on undisclosed data should have produced a new wave of notice and public comment. (See Pls.' Resp. Def.'s Obj. Pls.' Mot. Prelim. Inj. at 13.) The "technical studies and data" the agency relies on are among the information the rulemaker must provide for public evaluation. American Radio Relay League, Inc. v. F.C.C., 524 F. 3d. 227, 236 (D.C. Cir. 2008). "Public notice and comment regarding relied-upon technical analysis, then, are the safety valves in the use of . . . sophisticated methodology." Id. (citations omitted).

However, while "[t]he data that an agency has used to set proposed limits obviously should be subject to public comment if possible, . . . [t]his does not mean . . . that any new numbers gathered after publication of proposed regulations must be submitted for comment." BASF Wyandotte Corp. v. Costele, 598 F.2d 637, 644 (1st Cir.

1979). Rather, "[i]t is perfectly predictable that new data will come in during the comment period, either submitted by the public with comments or collected by the agency. . . [and] [t]he agency should be encouraged to use such information in its final calculations without risking the requirement of a new comment period." Id. at 644-645. "If data used and disclosed for the [notice of proposed rulemaking] presented the issues for comment, then there is no need to seek new comment even though significant quantitative differences result." Id. at 645.

Courts have consistently upheld final rules as logical outgrowths where "the [notice of proposed rulemaking] expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a particular change." CSX Transp. Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1081 (D.C. Cir. 2009). "[A]lthough they may not provide the only basis upon which an agency claims to have satisfied the notice requirement, comments may be adduced as evidence of the adequacy of notice." Miami-Dade County v. United States EPA, 529 F. 3d 1049, 1059 (11th Cir. 2008); see also Nat'l Restaurant Ass'n v. Solis, 870 F. Supp 2d 42, 52-53 (D.C. Cir. 2012) ("the volume of comments [an agency] receives. . . [addressing the question at issue] is a strong indication that interested parties plainly understood what was at stake."). In this vein, "[d]efects in an original notice may be cured by an adequate later notice. . . but that curative effect depends on the agency's mind remaining open enough at the later stage." Advocates for Highway & Auto Safety v. Federal Highway Admin., 28 F.3d 1288, 1291-1292 (D.C. Cir. 1994). The agency is presumed to have a "closed mind." Id. It must make a "compelling showing" that the "language of [its] published replies" suggests the agency considered subsequent comments with an open mind. Id.

Here, the final rule promulgated by DES was a logical outgrowth of its notice and

comment rulemaking. First, the January 2 notice of proposed rulemaking adequately framed the subjects for discussion to the public by stating that DES was establishing new standards for PFAS levels and setting several of these levels below the preexisting interim rule standards. In fact, DES expressed its concern about the presence of PFAS in State water through repeated publications on its website and then proposed new standards for three of the five PFAS at issue, all three of which fell below the EPA advisory limits. See City of Portland v. Environmental Protection Agency, 507 F.3d 706, 715 (D.C. Cir. 2007) (holding that a final rule requiring decontamination of certain reservoirs was a logical outgrowth of a proposed rule that stated the agency "continued to be concerned" about reservoir contamination). Above and beyond the general language of "concern" used by the agency in City of Portland, DES here specifically alerted the public that it considered lowering PFAS standards. Id.

Second, any deficiencies between the notice of proposed rulemaking and the final rule were cured by the second, subsequent notice DES provided the public. The second press release informed the public that new evidence, which DES "should be encouraged to use," had surfaced. BASF Wyandotte Corp, 598 F.2d at 644. It clearly indicated that the MCLs might be significantly lowered as a consequence of this new evidence. DES makes a "compelling showing" that its mind remained open during the comment period by referencing several in-depth responses to comments on whether and how to set the adequate standards in its final rule. Advocates for Highway & Auto Safety v. Federal Highway Admin., 28 F.3d at 1292. For example, DES responded to 9 comments regarding the general health-based risk assessment of the various PFAS and it directly responded to comments on the assessment tool referenced in the linked Minnesota study. (Compl., Ex. 2).

Third, the extensive public comment received by DES further supports that the notice to the public was adequate. See Nat'l Restaurant Ass'n v. Solis, 870 F. Supp 2d at 52-53. DES received over 857 pages of comments on the proposed rule during this comment period, much of which focused on the Minnesota assessment tool. (Compl., Ex. 2.) A renewed notice and comment period would not have provided Plaintiffs their "first occasion to offer new and different criticisms;" Plaintiffs were provided with scientific data the agency relied on in setting its final standards as well as notice that the agency meant to lower PFAS standards. See United States v. Whitlow, 714 F.3d at 47; see also Council Tree Communs., Inc. v. FCC, 619 F.3d at 250. Accordingly, to the extent Plaintiffs wished to provide comment on the potentially lowered standards or the underlying scientific data, they had the opportunity to do so during the written and public comment period.

DES provided the public a series of technical studies and data, including a link to a Minnesota study that at least referenced the new assessment tool DES initially relied on in revising its standards. (Id. ("here are the revised PFAS numbers. . . thanks Minnesota and wave of 2019 studies!"); Compl., Ex. 2.) During the three rounds of public comment held on March 4, 5, and 12, participants were specifically asked to comment on the use of this new toxicokinetic model developed by the Minnesota Department of Health. (See Compl., Ex. 2 at 3; Chron. ¶11.) DES received substantial comments on the technical studies and data upon which the new levels are derived, and it addressed those comments in its final rule. (Compl., Ex. 2); See American Radio Relay League, Inc. v. F.C.C., 524 F. 3d. at 236.

Finally, Plaintiffs' reliance on the "surprise switcheroo" line of cases is misplaced. The doctrine is grounded in the established principle that "the 'logical outgrowth'

doctrine does not extend to a final rule that finds no roots in the agency's proposal because 'something is not a logical outgrowth of nothing.'" Envtl. Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005) (citations omitted). There is no "switcheroo" in this case because further lowering PFAS standards is hardly a divergence with "no roots" in a proposed notice that itself lowers those standards. Id. While, as Plaintiffs claim, the courts "have refused to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities," a "surprise switcheroo" has only been found in cases where the agency has given notice that it considered taking a specific action only to "flip-flop" and issue a final rule taking a distinguishable action. See e.g., Envtl. Integrity Project, 425 F.3d at 996; see also Fertilizer Inst. V. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991). No "flip-flop" occurred here because, as proposed, DES merely lowered the proposed PFAS standards.

3. The Cost Benefit Analysis Required by RSA 485:3, I(b)

RSA 485:3, I(b) was enacted in 2018 as part of Senate Bill 309, which became N.H. Session Laws, c. 368. It provides that DES, when promulgating rules related to the regulation or order, shall:

> (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. . .

RSA 485:3, I(b) (emphasis supplied).

Plaintiffs assert that DES failed to fully evaluate the costs and benefits to all affected parties that result from MCL and AGQS standards in the June 2019 Final Rule. (Compl., ¶ 59(a)). Plaintiffs refer to NH DES's June 28, 2019 document entitled "Update on the Cost and Benefit Consideration," which is a mere 4 pages long, and which contains only a few attachments. (Compl., ¶ 59(b)). Plaintiffs note that the federal Environmental Protection Agency is developing MCLs for some of the same substances and part of that process includes a detailed and rigorous examination of costs and benefits. (Compl., ¶ 59(c)). Plaintiffs cite to the EPA's Guidelines for Preparing Economic Analysis, National Center for Environmental Economics Office of Policy, United States Environmental Protection Agency, December 17, 2010 (updated May, 2014), which references methodologies for discounting future benefits and costs, analyzing benefits, analyzing costs, conduct of an economic impact analysis, and other factors. (Id.)

Plaintiffs assert that the incremental costs DES estimated as a result of the lower limits set in its Final Rules "increased by a factor of 30 to 60 times from the limits originally proposed." (Pls.' Mem. at 20.) They argue that the estimate for initial treatment costs for public water systems was $1,850,000 to $5,171,000, but the estimate of the same costs for the Final Rules was $65,000,000 to $142,800,000. (Id.)

The Court has carefully examined the June 2019 Update on the Cost and Benefit Consideration and agrees with Plaintiffs that it is problematic. First, the document begins with a subtle but important gloss on the statute: "Chapter law RSA 345 (sic) requires the New Hampshire Department of Environmental Services to consider what is known about cost and benefit to affected parties when proposing maximum contaminant levels (MCLs) and ambient ground water quality standards (AGQSs)..."

(emphasis supplied)—a standard different from that established by the statute itself. (Pls.' Mem, Ex. 12 at. 1.)

Second, DES recognized its limitations including "not having extensive sampling data for all potential contamination sources and public water systems and having an incomplete understanding of all the health impacts associated with exposure to these 4 PFSAs." (Id.) DES conceded in the June, 2019 "Update on Cost and Benefit Consideration" that it was "not able to monetize the avoided health impact costs" by application of the new standard." (Id. at 2.) However, it came to the conclusion that exposure to PFAS "can have significant through-life costs such as direct healthcare treatment costs, the associated losses of economic production and income of those impacted, and the associated impacts to families and caregivers." (Compl., Ex. 2, Attach. 2.) It recites that it "came to this conclusion after reviewing the most recently published research and speaking with experts, including a group of professors and researchers at the University of New Hampshire and with whom DES recently contracted to quantify the benefits of reducing the arsenic MCLs." (Id. at 2.)

Such information is not included in the June document. Rather, the only attachment is a document called "The Cost of Inaction," from an organization called the "Nordic Council of Ministers." (Id. at 2-3.)[5] This document purports to relate to investigations of the cost of exposure to PFAS and is based upon estimates "from the Nordic countries, when available" and "from other European countries, the USA and Australia, where relevant." (Id.) Plaintiffs argue vigorously that the document lacks peer-reviewed scientific backing and assumes unproven health effects on humans.

[5] There is little information provided about the genesis of this document, what the "Nordic Council of Ministers" is, and no explanation why a document from the "Nordic Council of Ministers" would be in English.

But most importantly, DES implicitly concedes in its papers that that it did not undertake a thorough cost-benefit analysis. It breezily states that:

> "neither the APA nor [RSA 485:3] "require DES to commence the arduous and expensive analysis required of the US EPA under federal rules. The law merely says that rulemaking shall commence "after consideration" of "costs and benefits..."

(Def.'s Mem. Supp. Opp. Prelim. Inj. ("Def.s' Mem.") at 30.) (emphasis supplied). And its definition of "consideration" is unusual indeed: "[e]verything indicates that NH DES considered costs and benefits to the best of its ability. Nothing more is required." (Id.) (emphasis supplied).

The Court disagrees. Any rational interpretation of the statute requires more. The result of the application of DES's definition of "consideration" is reflected in the Affidavit of Sarah Pillsbury, Ex C to Def.s' Mem which it asserts "provides information about this process:"

> For the description of what is known about benefits, the department similarly looked at what New Jersey did and USEPA's guidance for quantifying benefit of a proposed MCL. Unfortunately, because of the emerging nature of these chemicals and the lack of specific causation information related to the many health impacts they (sic), have been associated with the four PFAS compounds, neither were helpful. At the three information sessions held in the Fall of 2018, NHDES asked stakeholders to provide any information or resources that could help us monetize benefit. After consultation with a consulting health risk expert and the health economist team that the department had recently engaged to calculate the benefit of a lower arsenic standard, the department concluded that the existing methodologies to quantify benefit were not appropriate to use in this case. Instead we 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, Ex C to Def.s' Mem., ¶ 15.

When examining the language of a statute, a court must ascribe the plain and ordinary meaning to the words used. Petition of State of New Hampshire, 159 N.H. 456, 457 (2009). Merriam-Webster's online dictionary defines "consideration" as "to think

carefully about something, typically before making a decision." Moreover, statutes must be interpreted so as to avoid an absurd result. Virgin v. Fireworks of Tilton, LLC 215 Atl. 3d 892, 894 (2019). When the Legislature delegates authority to an administrative agency and requires it to give due consideration to the factors it enumerates, it obviously expects the administrative agency to carry out its mandate with diligence. See e.g. Appeal of Nationwide Insurance Company, 120 N.H. 90, 94 (1980). It may be that DES is not required to conduct a cost benefit analysis as extensive as that required by the federal government.[6] But it 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. DES's concession compels the Court's conclusion.

The Court finds the implicit suggestion from DES that it need do no more than give the cost benefit analysis of RSA 485:3, I(b) such cursory consideration as it, in its sole discretion, thinks it deserves, unpersuasive. Where, as here, there is no quantification of the level of harm caused by PFAS at different levels of exposure, at the very least some explanation for benefits expected from imposing different levels of concentration and correlative different levels of cost must be made.

[6] The fact, however, that DES asserts that its ability to carry out a cost-benefit analysis does not match that of the EPA, seems to be inconsistent with its decision to set standards for PFOA and PFOS dramatically lower than those set by the EPA.

III. Conclusion

Plaintiffs have not established that they will likely succeed on the argument that the regulations in question violate Pt. 1, Article 28-a of the New Hampshire Constitution or RSA 541-A. They have shown they will likely succeed on the merits of their claim that DES has not conducted an adequate cost-benefit analysis required by RSA 485:3, I(b). Mottolo, 155 N.H. at 63. Because New Hampshire is protected by sovereign immunity, if injunctive relief is not granted, Plaintiffs will never be able to recoup the expenses they incur if they succeed at trial. For the foregoing reasons, Plaintiffs' petition for preliminary injunctive relief is GRANTED. DES is enjoined from implementing the Final Rules until it complies with the provisions of RSA 485:3, I (b). However, the legal issues raised by Plaintiffs' challenge are complex, the importance of public health is paramount and the expense imposed by the proposed rule is significant. Accordingly, the Court's Order will be STAYED until Dec. 31, 2019, so that either party may seek immediate review of this decision in the New Hampshire Supreme Court.

SO ORDERED

11/26/19
DATE

Richard B. McNamara,
Presiding Justice

RBM/

Clerk's Notice of Decision
Document Sent to Parties
on 11/26/2019

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

The Plymouth Village Water & Sewer District, et al

v.

Robert R. Scott, as Commissioner of the Department of Environmental Services.

No. 217-2019-CV-00650

ORDER

Defendant has moved for reconsideration of this Court's Order of November 26, 2019, asserting that the Court erred in holding that the Administrative Rules provided by the Department of Environmental Services ("DES") establishing maximum contaminant levels ("MCLs") and ambient ground water quality standards ("AGQS") are invalid because DES did not consider costs and benefits as required by RSA 485:3. DES argues that RSA 485:3 only applies to rulemaking for MCLs, and is not applicable to rulemaking for AGQSs. Plaintiffs object. For the reasons stated in this Order, the Motion to Reconsider is DENIED.

The Motion to Reconsider depends in large part on interpretation of the relevant statutes. Plaintiffs assert that consideration of costs and benefits is required by RSA 485:3 with respect to both MCLs and AGOSs under RSA 485-C: 6, I, which provides that "where state maximum containment levels have been adopted under RSA 485:3, I (b) ambient ground water quality standards shall be equivalent to such standards." Plaintiffs argue that "under this mandatory statutory process, DES cannot set an AGOS without first

setting an MCL." Plaintiff's Objection to Defendant's Expedited Motion for Reconsideration, p.4. Citing the legislative history of the statute, Plaintiffs assert that the rules relating to adoption of MCLs are AGOSs are "inextricably linked." Id.

On the other hand, DES argues that it "has completely independent authority to promulgate an AGOS and the AGOSs in this case was the result of separate rulemaking." Reply to Objection to the State's Motion for Expedited Reconsideration, p. 4. DES references the record of rulemaking in this case and notes that the "Notice of Rulemaking clearly delineates separate rulemaking." Id. at 5. DES asserts that "nothing in RSA 45-C requires that DES "consider cause" when promulgating and AGOS. Id.

But as Plaintiffs point out in their papers, the Affidavit of Sarah Pillsbury, attached as Exhibit C to the Objection to the Motion for Preliminary Injunction states in support of DES's claim that it considered the cost and benefits provides in paragraph 15:

> In addition to PWS treatment costs, *because in New Hampshire an MCL by law becomes an ambient groundwater standard (AGOS)* the Department also chose to include costs to current and likely regulated entities affected by establishing the MCL/AGOS. (Emphasis supplied).
> Affidavit of Sarah Pillsbury, attached as Exhibit C to the Objection to the Motion for Preliminary Injunction, ¶ 15.

Ms. Pillsbury's recognition of the fact that an MCL by law becomes an ambient groundwater standard is helpful in construing the statutory scheme. Cf. DHB, Inc. v. Town of Pembroke, 152 N.H. 314, 321 (2005) (An administrative gloss placed upon an ambiguous clause by those responsible for its implementation is relevant in determining its meaning.). As the Objection demonstrates, the legislative history of the statute strongly suggests that the Legislature intended that DES consider the costs and benefits before promulgating either standard. Plaintiff's Objection to Defendant's Expedited Motion for Reconsideration, p. 3-6. And as a practical matter, DES was required to do so.

Considering the legislative history and the overall purpose of the statute, the Court believes that interpreting the requirement that the considering the costs and benefits of a regulation only applies to MCL s would lead to an absurd result, since there appears to be no dispute that an MCL by law becomes an AGOS. Statutes cannot be interpreted in a manner which would lead to an absurd result. Virgin v. Fireworks of Tilton, LLC 215 Atl. 3rd 892, 894 (2019). [1] Accordingly, the Motion for Reconsideration must be DENIED.

SO ORDERED

12/16/19
DATE

Richard B. McNamara,
Presiding Justice

RBM/

Clerk's Notice of Decision
Document Sent to Parties
on 12/16/2019

[1] Plymouth Village Water and Sewer District has also moved to correct the statement in the Court's Order on injunctive relief that it concedes that prior to enactment of the new rule it already monitored and treated for PFAS. Based upon the materials on file, the Motion is GRANTED.