STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

CASE NO. 217-2019-CV-00650

The Plymouth Village Water & Sewer District, et al

Plaintiffs,

v.

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

Defendant.

OBJECTION TO MOTION FOR PRELIMINARY INJUNCTION

NOW COMES Robert R. Scott, as Commissioner of the State of New Hampshire, Dept. of Environmental Services ("NHDES") and objects to the plaintiffs' motion for a preliminary injunction. In support of this objection, NHDES avers as follows:

I. PRELIMINARY INJUNCTION STANDARD

The plaintiffs face a heavy burden in their attempt to obtain 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). Therefore, a preliminary injunction should be issued sparingly, only when (1) the movant shows that it will likely succeed on the merits and when there is an (2) immediate danger of (3) irreparable harm.

The N.H. Supreme Court has not adopted the presumption of irreparable harm for violations of constitutional rights espoused by the plaintiffs. This proposition is found in one

Merrimack County Superior Court decision from 2013 – *Deere and Co. v. New Hampshire*, 2013 WL 9889004 (2013). In any event, the Merrimack County Superior Court in *Deere*, and the cases cited by the superior court, clearly establish merely a presumption, not an automatic finding. The superior court quoted *Donohue v. Mangano*, 886 F. Supp. 2d 126 (E.D.N.Y. 2012) in which the district court stated that "the assertion of a constitutional injury is insufficient to *automatically* trigger a finding of irreparable harm" and allowed the injunction to issue in that case because "the constitutional deprivation [was] convincingly shown" further finding that the "violation carrie[d] noncompensable damages." *Mangano 886 F. Supp. 2d at 150* (emphasis added). The court in *Mangano* agreed that a preliminary injunction cannot issue if "Plaintiffs cannot assert a constitutional injury *at this time*," citing to other cases for the proposition that "[b]are allegations, without more, are insufficient for the issuance of a preliminary injunction." *Id*. at 150-151 (internal citations omitted) (emphasis added). In *Univ. of Hawaii Prof'l Assembly v. Cayetano*, 16 F. Supp. 2d 1242, 1247 (D. Haw. 1998), although the court recognized that the Ninth Circuit found that "[a]n alleged constitutional infringement will often alone constitute irreparable harm," it went on to determine whether the premise applied, stating that:

> the Court finds that irreparable harm is possible because, as discussed above, many of the 3157 members of UHPA may experience harm from a pay lag including incurring late fees for bills and credit cards and delays in mortgage payments. In some cases, a delay of even five days could effect a person's credit report. It is highly unlikely that any damages remedy would adequately compensate the injury of each and every member of UHPA

Univ. of Hawaii Prof'l Assembly v. Cayetano, 16 F. Supp. 2d 1242, 1247 (D. Haw. 1998), *aff'd sub nom. Univ. of Hawai'i Prof'l Assembly v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999), and *order dissolved*, 125 F. Supp. 2d 1237 (D. Haw. 2000).

Other cases cited by the superior court made similar findings. *Goings v. Court Servs. & Offender Supervision Agency for D.C.*, 786 F. Supp. 2d 48, 78 (D.D.C. 2011) ("Given that the

conditions imposed on the plaintiff limit his ability to see and interact with his family, his freedom of movement, and association, the Court finds that the plaintiff has demonstrated irreparable harm"); *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844, 878 (N.D. Ill. 2000) ("plaintiffs are being compelled to do business with distributors whom they wish to terminate and, because of provisions of the Act barring any state judicial interference with the proceedings before the Liquor Control Commission, cannot, in the foreseeable future, seek a remedy from the Illinois courts"). For its part, the U.S. Supreme Court limited its application to issues involving First Amendment freedoms. *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976). In general, all of the movants in these cases had to show an actual injury, not simply a claim of general or hypothetical constitutional infirmity. It is worth noting that *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012), cited by the superior court, applied the presumption to the "irreparable" prong of the test, but not to whether the plaintiff "face[d] a concrete and imminent injury." *Id*. at 1131.

In contrast, longstanding New Hampshire law indicates that invalidating an action of the legislature or executive on a preliminary basis cannot be taken lightly.

> It has always been the practice in this jurisdiction to follow the universally accepted doctrine that the constitutionality of an act passed by the coordinate branch of the government is to be presumed. It will not be declared to be invalid except upon unescapable grounds; and the operation under it of another department of the state government will not be interfered with until the matter has received full and deliberate consideration.
>
> …
>
> Unless irreparable loss will be caused, no restraining order should issue until the subject has been passed upon by the court of last resort.

Musgrove v. Parker, 84 N.H. 550 (1931).

The Court should note that the rules at issue in this case only require quarterly testing of each water source for a period of one year (four samples for each water source from October 1,

2019-September 30, 2020). Env-Dw 712.23. The initial quarterly test need not be completed until December 31, 2019. To the extent that a plaintiff tests above standards, as determined by calculating the average of the four quarterly samples collected over the first year, further actions may be required such as the installation of treatment. *Id*. DES estimates that testing costs up to $350 per test. Exhibit A. By way of example, the Plymouth Water District must conduct four tests on each of its two wells over the next year, which NHDES estimates may total up to $2800. Only two tests are required by December 31, 2019, totaling approximately $700. The frequency of testing after the first year is based on the results from the first year as specified in the rules, but could decrease to as little as testing each source once every three years. Also, by rule, if a system has non-detect in their initial two samples, the system may immediately change its sampling regime to sample only once every three years which, in this case, would limit costs to up to $1400 over those three years.

II. THE PLAINTIFFS HAVE NOT DEMONSTRATED A HIGH LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Complaint and Motion for Preliminary Injunction Allege No Facts Upon Which the Court Could Establish Harm

The complaint includes allegations from four very differently situated plaintiffs consisting of:

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

The Plymouth Water District runs a public water system and stands alone among the plaintiffs as the only entity purporting to be a subdivision of a municipality.

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

The 3M property located at 11 Paper Trail in Tilton includes a public water system; specifically a non-transient non-community water system (i.e., a water system for employees).

Exhibit A. As a public water system, it is subject to quarterly testing requirements; however, the site at 11 Paper Trail is also subject to numerous other requirements due to its Groundwater Discharge Permit ("GDP"). Exhibit A. As a result, 3M has already tested for all of the compounds in this case. Exhibit A. The results came back non-detect for all compounds except PFOA which showed concentrations of 2 parts per trillion ("ppt") – well below the current limits promulgated by NHDES. Exhibit A.

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 the testing requirements of a public water system. Exhibit A. 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 (#SL96002). RMI also holds a Sludge Site Permit (#SL96010S) for the on-site land application of residuals. Exhibit B. The required groundwater monitoring for the Sludge Facility is included in the Sludge Facility Permit Conditions. Exhibit B. Results obtained as part of this monitoring have shown that RMI already exceeded the old NHDES Ambient Groundwater Quality Standards (AGQS) for PFOA/PFOS and nitrate in its groundwater. Exhibit B. In accordance with Env-Wq 808.03, RMI created and submitted a corrective action plan (CAP) to address the AGQS exceedances of PFOA/PFOS and nitrate in groundwater at the sludge facility. The last revised version of the CAP was received by NHDES RMS on February 2, 2019. RMI has also submitted a waiver request received by NHDES RMS on February 1, 2019, in accordance with Env-Wq 811, requesting relief from Env-Wq 808.03(f)(1) which requires the permit holder to "cease operation immediately" if the concentration of any monitored constituent detected in any down-gradient monitoring well exceeds the AGQS. Exhibit B. Review of these documents by NHDES is pending. Also 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." Env 808.03(a)(2). "Background" is defined as "the analytical detection limit for that constituent" – a stricter standard than the MCL at issue in this case. Env 808.03(b)(1). The RMI sludge facility has experienced groundwater concentrations for several metals, TKN, and nitrate, that exceed "background" levels, and continues to perform monthly monitoring and reporting for these constituents. Exhibit B.

To the extent treatment of impacted groundwater must occur at this facility/site, the two viable options for treatment most likely consist of either a groundwater treatment system or monitored natural attenuation ("MNA"). Exhibit C. Treatment systems are designed to treat to non-detect, therefore, the capital cost of such a system is the same whether one uses the old or new standard. Exhibit C. MNA would consist of monitoring contaminant concentrations in on-site groundwater samples without active treatment and is essentially the same under the current or old PFAS AGQS. Exhibit C. In short, RMI already has an obligation to monitor greater than what would be required under the new rules. It has not articulated what immediate and irreparable impact the new standards might have on its facility.

With respect to RMI's business operation generally, sludge taken from a facility for land application for beneficial agricultural use, must first be tested and obtain/maintain a Sludge Quality Certification (SQC) from NHDES (Env-Wq 804.04 and Env-Wq 809). This testing must be done for the initial certification and on an annual basis (Env-Wq 809). RMI already tests for 9 PFAS compounds, including all four at issue in this case. Exhibit B. Currently, NHDES does not have MCL for PFAS in sludge, therefore, a positive PFAS result in sludge will not affect sludge facility operations at this time unless it exceeds a contact limit with is and will likely

remain an order of magnitude higher than the current AGQS/MCL. NHDES does not require further testing of biosolids that RMI takes directly from a source (such as Plymouth) to an application site.

4. Charles G. Hanson

Mr. Hanson owns and operates 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 may be required to test for, and if necessary, remediate, PFOA, PFOS, PFNA, and PFHxS, if the rules are not enjoined." Complaint, pg. 3, para. 5. However, NHDES does not require groundwater monitoring for sludge site permits. RMI obtained a "Sludge Site Permit Renewal" (#SLS-01-004) for the land application of treated sludge at agronomic rates on "The Hanson Hilltop Farm" fields. Exhibit B. As the permit holder, RMI, would be subject to the terms of the sludge site permit. As stated above, RMI would only have to test biosolids at its sludge facility that it planned to land apply at permitted sites, in accordance with the facility's SQC requirements.

Despite fundamentally different characteristics, the complaint never attributes factual allegations to any particular plaintiff. Allegations either relate to the public generally or to the plaintiffs as a group. For instance, Count I discusses Part I, Art. 28-A, "unfunded mandates," and a concomitant section in the State Administrative Procedures Act, RSA 541-A ("APA"). If the arguments in this count have any validity, it is only with respect to the Plymouth Water District. Nevertheless, Count I either talks about municipalities generally or the "Plaintiffs" collectively. Complaint, pg. 19, para. 79 ("Few if any municipalities have approved the

increased expenditures….")[1]; *id*. at pg. 19, para. 80 ("…requiring municipalities to incur enormous local expenditures…"); *id*. at pg. 20, para. 83 ("…responsibility to cities and towns by requiring them to expend funds…"); *id*. at pg. 20, para. 87 (after discussing only requirements related to municipalities, the complaint states: "*Plaintiffs* request that judgment be entered declaring the Final Rules invalid ….") (emphasis added); *id*. at pg. 20, para. ("pg. 21, para. 88 ("*Plaintiffs* further request the Court temporarily, preliminarily and permanently enjoin the NHDES from enforcing the Final Rules") (emphasis added). Nothing indicates whether the Plymouth Water District, or the Town of Plymouth (which has chosen not to be a party) has budgeted for this expenditure or whether the Plymouth Water District or the Town of Plymouth is actually likely to experience "enormous local expenditures." Information available to NHDES indicates that it may not as it already performed testing on two of the four regulated compounds and the results came back at non-detect with a reporting limit (at the time) of 20-40 ppt and a detection limit of 1-8 ppt. Exhibit A.

The closest that any allegation comes to linking the Plymouth Water District to an actual fact is on page 6 of the *Memorandum of Law* which states:

> The burden thrust upon political subdivisions of the State such as Plaintiff Plymouth Village Water & Sewer District to ensure filter water resources [sic] to near-zero levels of PFOA, PFOS, PFNA, and PFHxS is a new and/or expanded undertaking, and necessitates a material change to the duties, responsibilities, and costs incurred by political subdivisions.

Nothing indicates that the current standards will require the Plymouth Water District to "filter…to near-zero levels" or that it would "necessitate[] a material change to the duties, responsibilities, and costs" incurred by the Plymouth Water District[2] – an entity whose job it is to

[1] During discovery, the State intends to inquire about the status of funding for testing by the Plymouth Water District.

[2] The official government record, consisting of a video, of a meeting of the Plymouth Water District in which this case was discussed shows no concern about immediate or irreparable harm

manage water resources. As discussed further below, RSA 485:4 already allows NHDES to require municipalities to remediate for anything it considers to be a health hazard. More information on the Plymouth Water District is provided below. In any event, three of the four plaintiffs have no standing to make this claim.

In sections dedicated to claims other than the one related to allegedly unfunded mandates, the plaintiffs memorandum lumps the plaintiffs together with all parties located in the State without any distinct claim of harm related to any specific plaintiff. *See* Memo.,[3] pg. 16 ("Plaintiffs and other interested and affected public [sic]."); *id*. at 17 ("The Final Rules threaten to … deprive Plaintiffs and all political subdivisions of the State…"); *id*. at 18 ("Plaintiffs, political subdivisions and businesses across the State will be deprived…"); *id*. ("Many political subdivisions lack the technology, personnel, infrastructure, training, and other resources to filter

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to the Plymouth Water District, merely a desire by 3M's attorneys to include a town. At the meeting of September 24, 2019, at approximately 14 minutes and 41 seconds into the video, the Plymouth Water District states: "There is a coalition coming together to file an appeal of the PFAS regulations. I have talked to the lawyers, McLane Graf is the representative for the State of New Hampshire, they are targeting, they want to have it filed in time for an injunction, PFAS regs become effective October 1, so they [McLane] are scurrying, they [McLane] have the lawyer on standby for six oclock if there are questions, … but essentially we would be looking for a modest contribution overall … they [McLane] need us a lot at this point, they [McLane] need a municipal entity, there may be others that they're trying to bring on board but the reason they need it is because the constitution provides for – prohibits unfunded mandates, and municipalities are the only entities that are covered by that unfunded mandate provision, so that adds horses to the nature of the appeal, so my recommendation is that you authorize me to officially join the appeal and commit $1,000 dollars at the front end and with the stipulation that we will entertain but not guarantee further commitment…. " This video is available at the Plymouth Water District site at http://pvwsd.org/ by clicking on the "TV" icon to the right or directly at https://www.youtube.com/watch?v=4uka1UtjNqs&list=PLbPTWBdOlg4DQD80ONdBPCNmTQOM6xV3H&index=2&t=0s.

[3] "Memo." refers to the plaintiffs "Memorandum in Support of Temporary and Preliminary Injunction."

water to near-zero levels of these compounds.")[4]; *id*. ("Political subdivisions and other interested private parties that are involved in the supply and treatment of water resources across the State will incur all of these costs…."); *id.* at 24 (The rule will "impose an unlawful, costly burden on the political subdivisions and taxpayers of the State").

Similarly, the complaint makes no allegations specific to any plaintiff with respect to the public comment/rulemaking process. Instead, again, the complaint advocates for the public at-large. Complaint, pg. 5, para. 15 ("NHDES never offered the public an opportunity to comment…."); *id*. at pg. 5, para. 17 ("NHDES did not give the public an opportunity to comment…."); *id*. at pg. 17, para. 18 ("NHDES never gave the public an opportunity to comment….) *id.* at pg. 14, para. 56 ("Although many members of the public were present at the JLCAR hearing and some requested to speak in opposition to the rules, JLCAR refused to accept public comment."); *id*. ("JLCAR ignored specific requests by the public…."); *id*. at pg. 17, para. 69 ("For the first time, political subdivisions and municipalities will be required to test for PFOA, PFOS, PFNA, and PFHxS as part of any mandated groundwater sampling (e.g., water discharge, leachate discharge and groundwater management permit)"); *id*. at pg. 18, para. 69 ("All taxpayers that operate a public water system…"); *id*. at pg. 18, para. 70 ("Numerous other entities…face potentially huge costs….").

At other times, the complaint passively and ambiguously lumps all of the plaintiffs together in ways that make commonality among the plaintiffs more than dubious. For instance, pg. 14 of the complaint states that: "Had public comments…been allowed, numerous detailed

[4] The State believes it may well establish that the Plymouth Water District has the requisite capability and, in any event, is already subject to remediation for any contamination impacting public health pursuant to RSA 485:4. In addition, treatment systems used for PFAS provide clean water, i.e., they treat to "near-zero levels" anyway. Exhibit A. That is true whether the MCL is 70 ppt or 14 ppt. Therefore, this allegation, and those like it, appear to be mere puffing.

comments on the risks considered would have been provided." Complaint, pg. 14, para. 58. It then goes on to list four very technical, sophisticated, and specific comments; namely:

a. The risk analysis used to develop the MCLs and the AGQS is based on non-cancer endpoints.

b. The EPA does not classify PFOA, PFOS, PFNA, PFHxS as known human carcinogens.

c. "The available human studies have identified some potential targets of toxicity; however, cause and effect relationships have not been established for any of the effects, and the effects have not been consistently found in all studies." Toxicological Profile for Perfluoroalkyls, Draft for Public Comment, ASTDR 2018; p.p. 635-36.

d. There is no scientifically established risk of humans developing cancer at the low parts-per-trillion levels in the Proposed Rules, let alone the dramatically lower parts per trillion limits of the Final Rules.

A similar allegation is repeated in the next paragraph which states:

> Had public comment … been allowed, numerous detailed comments on the costs considered would have been provided. For example:
>
> a. NHDES failed to fully evaluate the costs and benefits to all affected parties that result from MCL and AGQS standards in the June 2019 Final Rules as required by RSA 485:3, 1(b).
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> b. NHDES' June 28, 2019 Updated on Cost and Benefit Considerations report runs a mere four pages, plus attachments.
>
> c. EPA is developing MCLs for some of the same PFAS substances. Part of that process includes a detailed and rigorous consideration of costs and benefits. EPA's Guidelines for Preparing Economic Analyses, National Center for Environmental Economics Office of Policy U.S. Environmental Protection Agency, December 17, 2010 (updated May 2014), stretches to well over 300 pages and references methodologies for discounting future benefits and costs, analyzing benefits, analyzing costs, conduct of an economic impact analysis, and other factors, including an appendix devoted to Economic Theory.

Complaint, pg. 15, para. 59. The complaint does not allege which if any of the plaintiffs actually would have made such comments. Discovery is needed, but it appears likely that some of the

plaintiffs intended to do nothing of the sort and it is almost a certainty that not all four of the plaintiffs would have made these exact comments.

In fact, missing from the complaint is the fact that on April 12, 2019, 3M actually provided 50 pages of comments to NHDES along with multiple pages of attachments. As part of those comments, 3M noted: "On February 21, 2019, NHDES announced that there was 'new information that may change its proposed PFAS drinking water standards' and identified 'a new assessment tool developed by the Minnesota Department of Health'" described in an article by Goeden et al. Exhibit C.4 (pg. 6. of 3M comments). In response, 3M stated that it had "hired Dr. Anne Loccisano (Exponent), a nationally recognized expert on pharmacokinetic modeling, to review Goeden et al." and included both a summary of her findings and an attachment of her "review in its entirety." *Id.*

Many of 3M's comments mirror those found in the complaint that it now claims could not be made.[5] For instance, 3M asserted that it was "scientifically unjustified to use a single endpoint of slightly reduced litter size in a mouse reproductive and developmental study," i.e., a non-cancer endpoint. Exhibit C.4 (pg. 2. of 3M comments). 3M further stated, "there is an absence of data for PFAS that would support: (1) carcinogenicity in humans." Exhibit C.4 (pg. 6. of 3M comments). In language tracking the complaint almost verbatim, 3M told NHDES:

> In its 2018 Draft Toxicological Profile for Perfluoroalkyls, ATSDR recently acknowledged that for PFAS there is no cause and effect established between health effects and exposure to humans, when it stated: "The available human studies have identified some potential targets of toxicity; however, ***cause and effect relationships have not been established for any of the effects, and the effects have not been consistently found in all studies***." ATSDR 2018; pages 635-636.

[5] The similarity of 3M's comments to NHDES to those found in the complaint indicates that they likely originated solely from 3M and not any of the other plaintiffs. Discovery on this issue is needed.

Exhibit C.4 (pg. 5. of 3M comments) (emphasis original).

At the time of its comments, the NHDES methodology for determining costs and benefits was known even if the final numerical standards had not yet been released. 3M chose to say nothing about this methodology. It is also worth noting that the president of RMI attended and provided comments at the second of three NHDES public hearings. Exhibit C.

In contrast to the plaintiffs aspirational pleadings, the law requires each plaintiff to recite the injury to *it*. Indeed, a plaintiff must allege more than an infirmity with a rulemaking process, it must show that it "suffered harm." *Nevins v. New Hampshire Dep't of Res. & Econ. Dev.*, 147 N.H. 484, 488 (2002). In this case, with respect to the rulemaking process, the complaint lacks even one concrete factual recital indicating that the process precluded any particular plaintiff from submitting comments and certainly fails to allege that the NHDES decision on its final rule would have been different if it had allowed additional public input. *Id.* (wherein the plaintiffs 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").

With respect to actual injury, other than the Plymouth Water District, no plaintiff articulates how, given their current status and other existing obligations, they could possibly be harmed. Specifically, as stated above, RMI has to test its site for other reasons, 3M already tested and came up under 2 ppt, and Mr. Hanson need not test at all. Certainly, nothing rises to the level of being immediate and irreparable. With respect to the Plymouth Water District, NHDES estimates that it will need to take quarterly samples for each of its two sources of water by September 30, 2020, for a total of eight samples. The frequency of future sampling will be determined by the results of sampling for the first year and could be reduced to sampling each

source of water only once every three years if the compounds are not detected in the water samples. NHDES estimates that a reasonable high estimate for each test is $350. Exhibit A. The Plymouth Water District already tested for PFOA, PFNA and PFHxS and PFOS in September 2016 and came back below both the laboratory detection and reporting limits (reporting limits at that time equaling about 20-40 pp and detection limits of 1-8 ppt). Exhibit A. The detection limits associated with the results of Plymouth Water District's testing results are below the MCLs and all of the results associated with the compounds MCLs have been established for were "ND" meaning "not detected." Plymouth reported to NHDES that the PFAS was not detected in its water. Exhibit A. If PFAS were detected above the current limits, the Plymouth Water District would simply need to conduct four more quarterly tests to see if levels persisted. Only after more than a year of high readings might a corrective action plan be requested. RSA 485:4 already gives NHDES the authority to require such measures. Hardly the basis for the issuance of an "extraordinary remedy."[6]

In total, other than a possible legal argument regarding the Plymouth Water District, not only does the complaint as written provide no basis for a preliminary injunction, it provides almost no grounds upon which relief could be granted at all. It strays even farther from providing a factual basis that could support a finding of immediate and irreparable harm. Most striking, neither the complaint nor the motion and associated memorandum include affidavits supporting any factual allegation related to injury, irreparability, or immediacy. SUPER. CT. RULE 11 states: "The court will not hear any motion grounded upon facts, unless such facts are verified by affidavit…." Had such factual allegations been made, and had such affidavits been

[6] Alleging that the Plymouth Water District could be penalized is non-sequitur, RSA 31:3-a frees it from any such threat.

provided, the State would have investigated the allegations and affirmations, contradicted those it found inaccurate or groundless, and provided a thorough response. As it stands, there is nothing to which the State can respond. Therefore, the motion, taken together with the complaint, provides no basis for preliminary relief.

B. NHDES Followed the Process Set Forth in the APA

Even if the plaintiffs had alleged actual injuries, they cannot demonstrate a high likelihood of success on the underlying merits. The facts demonstrate the following chronology. *See* Exhibit C:[7]

- March 2016 – NHDES creates its first webpage dedicated to PFAS
- September 1, 2017- NHDES establishes a PFAS "blog" meaning, essentially, a website with sequential updates
- October 16, 17, 18, 2018 - NHDES holds stakeholder Public Meetings
- December 31, 2018 - NHDES files a Request for Fiscal Impact Statement to the Legislative Budget Assistant ("LBA")
- January 1, 2019 – NHDES receives a fiscal impact statement from LBA
- January 24, 2019 – NHDES publishes a Rulemaking Notice
- February 21, 2019 – NHDES blog updated with post entitled "New Information May Change NHDES Proposed PFAS Drinking Water Standards"
- March 4, 2019 – NHDES conducts its First Public hearing
- March 5, 2019 – NHDES conducts its Second Public hearing
- March 12, 2019 –NHDES conducts a Third Public hearing
- April 12, 2019 – Written comments due
- June 28, 2019 – NHDES publishes its Final Proposed Rule (includes final standards)
- July 18, 2019 – JLCAR holds public meeting and approves the Final Proposed Rule
- July 24, 2019 – Adoption letter sent to Office of Legislative Services ("OLS")
- July 25, 2019 – Rules adopted
- September 30, 2019 – Rules effective

[7] The parties are working to submit a stipulated chronology to the Court. Nevertheless, NHDES has confirmed the accuracy of this outline. Exhibit C.

This chronology demonstrates that NHDES published a rulemaking notice on January 24, 2019. On February 21, 2019, NHDES updated its PFAS blog with a post entitled: "New Information May Change NHDES Proposed PFAS Drinking Water Standards." Exhibit C.1. In that post, NHDES references "a new assessment tool developed by the Minnesota Department of Health." It goes on to state:

> NHDES's assessment of the exposure model for the interaction of drinking water levels of PFAS and breastfeeding (Goeden et al, 2019) indicates that health-based drinking water or groundwater standards for PFOA and PFOS *would potentially be lowered significantly below the initial proposal figures of 38 parts per trillion (ppt) and 70 ppt, respectively*.

Exhibit C.1 (emphasis added). The February 21, 2019 blog post (which the plaintiffs call "Second Press Release") includes a link to the referenced, peer-reviewed work of Goeden, et al.: https://www.nature.com/articles/s41370-018-0110-5. Among other things, Goeden et al., analyzed and referenced the Minnesota assessment tool. All of this information was published 11 days before the first public hearing, 12 days before the second public hearing, 19 days before the third public hearing, and 49 days before comments were due. The APA does not require the publication of any of it.

After receiving and considering comments from 3M and others by the April 4, 2019 deadline, NHDES published a Final Proposed Rule on June 28, 2018 – 20 days before the JLCAR hearing on the rules and 5 days prior to its deadline to submit said rules (July 3, 2018). From these facts, the plaintiffs' claim violations of what they call "statutory due process" and constitutional due process, alleging that "*Plaintiffs* and other interested and affected public [sic] *had no notice* of the numeric MCLs and AGQS *such that they could have provided public comment*." Memo., pg. 16 (emphasis added).

1. The Plaintiffs Fail to Show a Violation of Constitutional Due Process

The plaintiffs claim, essentially, that either the timeline related to rulemaking was too short or that NHDES' final rule was significantly different from the original proposed rule and, therefore, the rulemaking process should have started over with new notice, new hearings, and the like. The plaintiffs' claims related to constitutional due process are misplaced. Rulemaking is not an adjudicative function; it is a quasi-legislative function.[8] In fact, the endpoint of rulemaking is distinctly legislative as the rules must pass through JLCAR and are eventually given to OLS for publication. The APA also give the General Court notice so that it may cure any alleged defect. RSA 541-A:13, VII.

When examining whether enactment of a zoning ordinance "without notice and hearing" violated due process, the Indiana Supreme Court found such acts "to be an exercise of the legislative power of State government, and as such [] exempt from the due process requirements of a trial-type hearing." *Krimendahl v. Common Council of City of Noblesville*, 256 Ind. 191, 197–98, 267 N.E.2d 547, 551 (1971). It went on to find that such acts "[are] not subject to the requirements of the state and federal due process provisions requiring a trial-type hearing with prior notice and the application of standards." *Id.*; *see also Rassi v. Trunkline Gas Co.*, 262 Ind. 1, 8, 240 N.E.2d 49, 53 (1968) (finding determination of public need in eminent domain proceeding to be a legislative determination such that judicial review "would violate the doctrine of separation of powers," and that such decisions are, in any event, not subject to procedural "due process").

[8] Part of the NHDES process could be described as "discretionary" rather than "legislative," but it is in no sense "adjudicatory."

The U.S. Supreme Court similarly held that legislative decisions do not trigger due process considerations. In *N. Laramie Land Co. v. Hoffman*, 268 U.S. 276 (1925), the plaintiffs in an eminent domain proceeding alleged "a denial of an opportunity to plaintiff in error to be heard." *Id*. at 278. The Court held that: "the necessity and expediency of the taking of property for public use 'are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.'" *Id*. at 284; *see also Rindge Co. v. Los Angeles Cty.*, 262 U.S. 700, 709 (1923) ("The necessity for appropriating private property for public use is not a judicial question. This power resides in the Legislature, and may either be exercised by the Legislature or delegated by it to public officers").

Nevertheless, nothing indicates that the process in this case violated some fundamental notion of due process. NHDES promulgated its rule package in January. It described the likely change in the numerical limits and identified the studies upon which they were based 19 days before the last public hearing and 42 days before the deadline to submit comments. By way of comparison, the N.H. Court System also engages in rulemaking. SUP. CT. RULE 50. SUPREME COURT RULE 50 anticipates that the public will only be given 30 days notice prior to adoptance of a rule and does not require a public hearing at all unless the Supreme Court justices so require. The rule also anticipates that the final rule may differ from the proposed rule. No one believes that this timeframe violates due process.

The Legislature itself reviews many hundreds of pieces of legislation each year. The Legislature often schedules public hearings with far less advanced notice than the 47 days given by NHDES since the first notification or the 19 days given after informing the public of new studies. Amendments may occur on the House of Senate floor or in committee of conference with little to no chance for public comment. No party can raise procedural due process concerns

with these non-adjudicative functions. The same is true here. Instead, the only real question in this case is whether the process met the requirements of the APA.

2. The Plaintiffs' Allegations Fail to Support any Violation of What They Call "Statutory Due Process"

The plaintiffs allege that the rulemaking process allegedly violated their "statutory due process" rights. New Hampshire has not recognized any separate cause of action for alleged violations of "statutory due process." Federal courts that have used the phrase "statutory due process" appear to use it merely to refer to alleged violations of statutory procedures.

> Bankruptcy proceedings involve both statutory and constitutional due process rights. Statutory due process rights arise from the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. … violation of a "right granted by a procedural rule," without more, does not rise to the level of a constitutional violation.

Fed. Nat'l Mortg. Ass'n v. Meeko, No. 3:15-CV-01200-AA, 2016 WL 1108941, at *4 (D. Or. Mar. 17, 2016). Such allegations do not invoke constitutional due process rights. The sole issue is whether the agency conformed to the statute, in this case, the APA.

The APA requires an initial notice of rulemaking. A public hearing on the proposed rule must occur at least 20 days after this initial notice and the agency must give notice of the public comment period. RSA 541-A:6 ("The agency shall give at least 20 days' notice of its intent to hold a public hearing and shall also give notice of the cut-off date for the submission of written testimony"). NHDES satisfied all of these provisions, publishing its intent on January 24, 2019, and holding not one, but three public hearings on the proposed rules on March 4, 5, and 12.

Part of the information received during this process consisted of a study by Goeden et al. based partly on information from the Minnesota Department of Health. NHDES notified the public of this information on its "blog" on February 21, 2019. Exhibit C.1. NHDES also stated that the "standards for PFOA and PFOS would potentially be lowered significantly below the

initial proposal figures of 38 parts per trillion (ppt) and 70 ppt, respectively." Exhibit C.1. It was under no obligation to provide any of this information. *See* APA generally; *see also* RSA 541-A:3 (describing what must occur to initiate rulemaking and having no requirement to provide background information).

NHDES accepted comments on proposed rules until April 3, 2019. As stated above, 3M submitted over 50 pages of detailed comments including ones in its complaint. Exhibit C.4.[9] After NHDES had reviewed all of the comments and information available to it, it determined that the final rule should include lower standards. The APA does not preclude this. To the contrary, the APA anticipates that the final rule may be influenced by the information received during the public process and may differ from the proposed rule. In fact, the APA does not allow the agency to alter its proposed rule *before* the public hearing. RSA 541-A:10 states:

> I. At the same time the notice required by RSA 541-A:6, I is filed, the agency shall file the text of the proposed rule with the director of legislative services. The text of the proposed rules as filed by the agency pursuant to RSA 541-A:3, III *shall not be changed prior to the hearing* held pursuant to RSA 541-A:11, I(a).

RSA 541-A:10 (emphasis added). Further, the text of the rule cannot be finalized by the agency until after the public hearing and after the end of the comment period:

> II. *The agency shall not establish the text of the final proposal until after the conclusion of the public comment period* established pursuant to RSA 541-A:11, I(b). If the agency elects to solicit comment pursuant to RSA 541-A:11, I(c), the agency shall prepare a draft final proposal that is annotated to show how the rules as initially proposed are proposed to be changed. In response to comment received, the agency may revise the draft prior to filing the final proposal in accordance with RSA 541-A:12.

RSA 541-A:10 (emphasis added). The APA does allow the agency to hold a second public hearing with a revised proposal but this decision is purely discretionary.

[9] Exhibit C.3 also includes the NHDES response to many of the comments received by the public.

> (c) An agency *may* hold a public hearing or otherwise solicit public comment on a draft final proposed rule prior to filing the final proposed rule pursuant to RSA 541-A:3, V.

RSA 541-A:11; *see also Appeal of Rowan*, 142 N.H. 67, 71 (1997) (reiterating the "general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory"). An agency need only specify how the final rule changed from the proposed rule. RSA 541-A:12, II(d) states:

> The final proposal shall include . . . [a] copy of the fixed text of the final proposed rule annotated clearly to show how the final proposed rule differs from the rule as initially proposed, if the text has changed.

RSA 541-A:12. Therefore, NHDES adhered to the terms of the APA.[10]

The plaintiffs also find fault with the effective date of the rule. The effective date is not part of the rule and NHDES was under no obligation to announce what it predicted to be the effective date. The APA allows the agency to choose an effective date simply by sending a letter to OLS after adoption: "Adopted rules shall become effective under RSA 541-A:16, III on the day after filing by the agency, or at a later date, *provided that the agency so specifies in a letter to the director of legislative services*…." RSA 541-A:14, IV (emphasis added). The APA further allows the agency to change the effective date, also simply by filing a letter: "If the agency has specified a later effective date, the agency may modify the date by providing a statement to the director of legislative services which shall indicate the new effective date and all reasons for modifying the date." *Id*.

The plaintiffs also level claims against JLCAR. JLCAR is, of course, a legislative

[10] The plaintiffs also take issue with the fact that NHDES addressed Part I, Art. 28-a in its rulemaking notice but not RSA 541-A:25; however, the APA only requires an agency to provide "a statement that the proposed rule does not violate the New Hampshire constitution, part I, article 28-a." RSA 541-A:3, I. There is no requirement to explain its relationship to all other state laws.

committee. RSA 541-A:2. Claims of due process do not apply to JLCAR for the reasons discussed above. The APA also does not require JLCAR to hold a public hearing. RSA 541-A:2, III states: "The committee *may* hold public hearings on a proposed or previously adopted rule on its own initiative." RSA 541-A:2, III (emphasis added). If JLCAR decides to hold a public hearing, it need only give notice "7 days in advance." *Id*. For its part, NHDES simply had to ensure that it transmitted its final proposal to JLCAR "no later than 14 days before a regularly scheduled committee meeting…." RSA 541-A:12. NHDES transmitted its rule to JLCAR on June 28, 2019, several days before it was due. There is no provision requiring JLCAR to accept public comment. Therefore, JLCAR fulfilled the APA requirements in this case.

C. The NHDES Rulemaking Is Not An "Unfunded Mandate"

The plaintiffs make two arguments regarding what for purposes of this objection can be be called "unfunded mandates": (1) a constitutional argument under N.H. Constitution, Part I, Art. 28-a; and (2) a statutory argument under RSA 541:A-25. Although the "plaintiffs" request an injunction based on these arguments, only the Plymouth Water District has standing to raise them. The State will address each of these arguments in turn.

1. The NHDES Rulemaking Does Not Violate Part I, Art. 28-a

Article 28–a provides:

> 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. pt. I, art. 28–a. The rule, required by SB 309, does not place any new responsibility on municipalities. Municipalities are not required to own or operate water

systems. By way of example, Exhibit A lists 45 municipalities that do not have a municipal water system, a village district, a school, or a standalone municipal building system that would have to test for PFAS. Exhibit A.

"Invoking the constitutional prohibition requires *both a mandate of responsibility* to the political subdivision and a requirement of additional local political subdivision expenditures by virtue of the mandate." *Opinion of the Justices (Materials in Solid Waste Stream)*, 135 N.H. 543, 545 (1992). Municipalities clearly have no responsibility to own or operate a water system.

Municipalities that own and operate water systems have historically done so in a manner consistent with laws and rules related to public health and safety. In a previous case involving town roads, the N.H. Supreme Court noted that "because [t]owns have historically been responsible for the local roads within their boundaries, [w]e … concluded that the reclassification was not an unconstitutional unfunded mandate." *City of Concord v. State,* 164 N.H. 130, 137 (2012), *as modified on reconsideration* (Sept. 28, 2012) (internal quotations and citations omitted) interpreting *Town of Nelson v. N.H. Dept. of Transportation*, 146 N.H. 75 (2001). The same is true here.

The Plymouth Water District has also provided no information as to what Plymouth or any subdivision of the town "funded prior to the adoption of Article 28–a." *City of Concord v. State*, 164 N.H. at 139. In fact, the plaintiffs, including the Plymouth Water District, concede that monitoring or treating for PFAS is already the practice and will remain the practice. Specifically, to support their argument that "NHDES will suffer no, or virtually on harm if an injunction issues," the plaintiffs state that "An injunction will not bar regulation of PFOA, PFOS, PFNA and PFHxS. They will simply be regulated at the current levels, which were the levels NHDES initially proposed, pending the proper adoption of new rules." Memo., pg. 24.

In addition, the State's Safe Drinking Water Act originated in 1977 (originally RSA 148-B, re-codified in 1989). "Accordingly," testing water quality was "previously mandated by other statutes." *City of Concord v. State*, 164 N.H. at 136. Indeed, "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."[11] *Id.* at 140. To the extent the Plymouth Water District argues that it may have to incur slightly higher costs to test for two new PFAS compounds, "an increase in expenditures alone is not dispositive of whether a program or responsibility has been expanded or modified." *Id.*

The Plymouth Water District provides nothing but speculation as to what costs municipalities in general may experience without any analysis of what the district itself will incur. Again, the Plymouth Water District already performed testing for two PFAS compounds (PFOA and PFOS) which came back "non-detect" at the then-available detection limit of 1-8 ppt. A claim regarding cost, therefore, would be "merely speculative." *City of Concord v. State*, 164 N.H. at 130. The N.H. Supreme Court in *New Hampshire Ass'n of Ctys. v. State*, 158 N.H. 284, 291 (2009) held that such speculative injury did not satisfy the requirement that "there must be a clear and substantial conflict with the constitution to declare a legislative act unconstitutional." *Id.* at 291.

Even the dissent in *City of Concord* would not find a violation of Part, I, Art. 28-a in this case. In her dissent, Justice Conboy relied on State law mandating participation in the State retirement system, pointing out that "local governments … do not have the option to withdraw." *City of Concord v. State*, 164 N.H. at 147. In this case, a municipality can simply choose not to

[11] The Plaintiffs point to a NHDES rule enacted prior to the N.H. Supreme Court cases on unfunded mandates. The rule, and exemption table affixed thereto, does not include many contaminants including the previous PFAS standard of 70 ppt.

own and operate what in many places is already a private enterprise.

NHDES successfully made the arguments above regarding the scope of Part I, Art. 28-a during prior rulemaking which, as the plaintiffs point out, prompted a change to the law – *not the constitution*. The plaintiffs note that during the passage of RSA 541-A:25, lawmakers noted that they believed the new statute embodied the "spirit" of the amendment. Memo. pg. 8. The "spirit" with which a lawmaker may have wanted the amendment invested does not change what the amendment actually says. In any event, the cited opinion stated that the new law captured the "spirit" that some aspired to in passing the amendment, not the actual requirements of Part, I, Art. 28-a. This Court must "not redraft the constitution in an attempt to make it conform to an intention not fairly expressed in it." *City of Concord*, 164 N.H. at 141 (internal quotation omitted). The constitution says what it says which is that the current standards at issue in this case do not qualify as an unfunded mandate. Again, the only real issue lies with the interpretation of the statute.

2. The NHDES Rulemaking Does Not Violate the "Unfunded Mandate" Provision in the APA

As the plaintiffs state, the Legislature amended the APA in 1994. Among other provisions, the Legislature created RSA 541-A:25. The first part of RSA 541-A:25 tracks the constitutional provision. The last sentence in paragraph I, as well as paragraphs II and III go beyond the constitutional language. RSA 541-A:25 states:

> 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 (emphasis added to show additional requirements). These changes statutorily addressed whether certain optional programs, like those enumerated, would be included in an analysis of whether or not a State law or rule created an unfunded mandate. It left unchanged, however, other analyses related to such mandates. For instance, the court must still analyze whether the activity was "previously mandated by other statutes" (*City of Concord v. State*, 164 N.H. at 136); must acknowledge that "some change in the scope of that responsibility does not result in a violation" (*id*. at 140); must acknowledge that "an increase in expenditures alone is not dispositive of whether a program or responsibility has been expanded or modified" (*id*. at 136); and that recourse is inappropriate if the injury would be "merely speculative" (*id*. at 130). All of these factors weigh heavily, at a minimum, in favor of denying the plaintiffs' request for a preliminary injunction. Instead, the Plymouth Water District should be required to make specific allegations, be required to provide affidavits regarding these allegations as well as issues such as actual cost and past practice, and the State should be allowed to obtain discovery on these topics.

In addition, although the Legislature enacted RSA 541-A:25, it also passed SB 309. SB 309 specifically requires NHDES to make the standards at issue in this case. It contains no exemption for municipalities. When the Legislature requires NHDES to make rules, it does just that.

Although NHDES may struggle at times to reconcile its Legislative directives with RSA

541-A:25, the import of SB 309 was clear. PFAS constituted a health threat that must be addressed at all public water systems. *See* SB 309 Fiscal Note (discussing methods for determining effects on "human health"). The Legislature intended it to apply to municipalities and municipalities knew that it would. Specifically, the Fiscal Note for SB 309 states: "a potential reduction in the current AGQS for PFOA and PFOS may result in additional indeterminable costs to local and county government…." Exhibit D (from SB 309 Senate file). Summarized testimony of Senator Dan Innis indicates that the Legislature familiarized itself with this Fiscal Note. Exhibit D (from SB 309 Senate file). Written testimony from the N.H. Municipal Association, as summarized in Senate reports, states: "A fiscal note prepared by DES states the additional costs to municipalities, while indeterminable, could be 'significant' and cost 'millions of dollars.'" Exhibit D (from SB 309 Senate file). The association specifically raised concerns regarding unfunded mandates. The bill passed regardless.

NHDES itself ensured that the Legislature knew that this bill would require local expenditures. A letter from NHDES Commissioner Robert Scott to Senator Kevin Avard, Chair of the Senate Energy and Natural Resources Commission, dated January 23, 2018, states: "costs to government entities and rate payers will result from establishing the standard." Exhibit D (from SB 309 Senate file). A similar letter from Commissioner Scott to Representative Chris Christensen, Chair, House Resources, Recreation, and Development Committee states: "The cost to municipalities and other stakeholders could be large, in the event that treatment technologies, industrial pretreatment programs, or remediation efforts may be required." Exhibit D (from SB 309 Senate file).

In addition, although the Plymouth Water District complains that the cost it may incur in coming into conformance with standards creates a conflict with RSA 541-A:25, other laws

already specifically subject municipal water systems to such requirements. Specifically, RSA 483:4 entitled "Power to Require Improvements" related to public health states:

> I. *The department is empowered to investigate the sanitary conditions and methods pertaining to the source, treatment, and distribution of all public water supplies for domestic use, and to require the application of any treatment or improvement in conditions and methods as it may deem necessary to insure fitness and safety and adequate protection of the public health. If the department determines that improvements are necessary,* ***the municipality****, corporation, or person shall be so notified in writing and the requirements so ordered shall be effected pursuant to RSA 38:25 within a reasonable time to be fixed by the department. Appeals of actions of the department may be made as provided in RSA 485:59.* The department may set intermediate goals and time frames to assist municipalities, corporations, or persons to abide by an order of the department under this paragraph.
>
> II. Upon complaint of not less than 10 customers of an existing public water system or not less than 10 residents not currently served by a public water supply, the department shall make an investigation of conditions regarding water quality or quantity problems described in the complaint. *If, as a result of any such investigation, the department concludes that a significant public health or safety problem exists due to water supply quality or quantity, it shall perform a preliminary analysis of alternatives which address the problem.* The department may request additional information from the complainants and nearby public water supply system owners, such as data on water supply quality and quantity, well characteristics, and water distribution system characteristics, as is necessary to perform its investigation and analysis. If the department determines that an extension of water service from an existing public water supply system to the area of impaired water quality or quantity is the most feasible and cost-effective alternative, that the extension is consistent with municipal master planning, local water system policies and rules, RSA 9-B, and RSA 162-C:2, V, and that the existing public water system has adequate water supply and system capacity to serve the problem area, ***the municipality***, corporation, or person who owns the public water system shall be ordered to allow connection to its water distribution system from the identified area, regardless of existing municipal or public water system service area boundaries. The connection so ordered shall be effected pursuant to RSA 38:25 within a reasonable time to be fixed by the department and may contain limitations on water system connections unrelated to the original petition in order to limit unintended land use impacts. Appeals of actions of the department may be made as provided in RSA 485:59. The department may set intermediate goals and time frames to assist municipalities, corporations, or persons to abide by an order of the department under this paragraph. The provisions of this paragraph or of any order issued under this paragraph shall not delegate any costs associated with a connection to the person receiving the order from the department.

> III. *The department may investigate the sanitary conditions and methods pertaining to pumper stations, piping, storage, and treatment facilities of privately owned redistribution systems which present a threat to public health and safety. If the department determines that action, such as disinfection, is necessary, the* ***municipality****, corporation, or person shall be so notified in writing and the action so ordered shall be effected within a reasonable time to be fixed by the department. Replacement of existing infrastructure shall only be required in response to a specific public health threat.* Appeals of actions of the department may be made under RSA 485:59. The department may set intermediate goals and time frames to assist municipalities, corporations, or persons to abide by an order of the department under this paragraph.

RSA 483:4 (emphasis added). Therefore, a rule requiring a municipality to undertake corrective actions is not a new mandate, it is a longstanding statutory requirement.

Therefore, the rule pertains to an activity that municipalities generally do anyway, have been required to do for a long time, and to requirements related to corrective actions that always applied. There is no basis, on these facts, to issue a preliminary injunction.

III. NHDES PROPERLY CONSIDERED COSTS AND BENEFITS

The plaintiffs argue that NHDES did not thoroughly review the costs and benefits associated with the required rulemaking. The requirement to do so stems from SB 309 which "[a]mended RSA 485:3, I(b) with respect to the required rulemaking to say:

> (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:

(emphasis added). However, the plaintiffs own documents demonstrate significant "consideration" of costs and benefits. Memo., pg. 19. NHDES is in the process of producing copious information to the plaintiffs on this same topic. Some costs could not be numerically quantified but were considered nonetheless. *Id*. at 20 ("it was not able to monetize the avoided health impact costs"). The Court should note that neither the APA nor SB 309 require NHDES

to publish its cost and benefit consideration or justify it to the public.

The plaintiffs also state: "NHDES did not conduct an economic analysis of costs and benefits of the type or detail required of the federal government when it must do a cost-benefit analysis in setting an MCL." Complaint, pg. 10. But neither the APA nor SB 309 require NHDES to commence the arduous and expensive analysis required of the U.S. EPA under federal rules. 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), the N.H. Supreme 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.

Id. at 94 (internal citations omitted). In this case, NHDES simply had to give costs and benefits "consideration." It did so. The attached affidavit from Sarah Pillsbury, Administrator of the NHDES Drinking Water and Groundwater Bureau, and the two publicly-available cost/benefit reports attached thereto, provide information about this process. Exhibit C; C.2; and C.3. Everything indicates that NHDES considered costs and benefits to the best of its ability. Nothing more is required.

IV. 3M CANNOT USE THIS CASE AS A TOOL TO OBTAIN RESULTS IN A DIFFERENT CASE

3M attempts to use its possible liability in another case to demonstrate standing in this

case. Memo., pg. 18. However, the case filed by the State against 3M will proceed in accordance with Court rules, 3M will have every opportunity to argue whether and to what extent damages are justified, cross-examine witnesses, and generally enjoy all of the process afforded to all litigants. It is not appropriate to ask this Court to use this action related to rulemaking as a way for 3M to litigate its damages in that case.

V. THE PLAINTIFFS HAVE NOT DEMONSTRATED WHAT ALLEGED "LIBERTY INTEREST" MAY BE IMPACTED BY PFAS REGULATIONS

The plaintiffs allege that the current PFAS regulations will deprive them of a "liberty interest" in relation to their due process[12] claims addressed above. Memo., pg. 17. However, "[n]ot every [] liberty interest lends itself to judicial enforcement or vindication." *Baker v. Cunningham*, 128 N.H. 374, 378–80 (1986). Of the recognized "categories of such interests," the plaintiffs' complaint and motion have alleged violations of none. *Id*. In this respect, they "are not adequate pleadings, because courts should not be forced to engage in inference, or guesswork, to identify a specific liberty interest that might be thought to have been infringed by an alleged failure to afford procedural due process." *Id.*

[12] The State reserves its right to question "whether a municipality may assert a due process claim against a state agency under Part I, Article 15 of our State Constitution." *In re Town of Bethlehem*, 154 N.H. 314, 328 (2006).

WHEREFORE, for the reasons stated above, NHDES requests that this Honorable Court:

A. Deny the plaintiffs request for a preliminary injunction; and,

B. Grant such other relief as it deems just and equitable.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE
By its attorney,
GORDON J. MACDONALD
ATTORNEY GENERAL

Dated: October 10, 2019

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CERTIFICATE OF SERVICE

October 10, 2019

I state that on this date I am sending a copy of this document as required by the rules of the court. I am electronically sending this document through the court's electronic filing system to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case. I am mailing or hand-delivering copies to all other interested parties.

/s/ K. Allen Brooks
K. Allen Brooks