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.
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> 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.
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> 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
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> (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