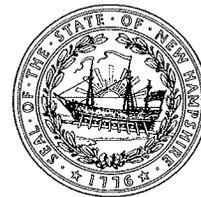




The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Thomas S. Burack, Commissioner

January 25, 2011

The Honorable Paul Mirski, Chairman
House Legislative Administration Committee
Legislative Office Building, Room 104
Concord, New Hampshire 03301

Re: HB 159, relative to review of proposed administrative rules by legislative committees

Dear Representative Mirski and members of the Committee:

Thank you for the opportunity to testify on HB 159, relative to the review of proposed administrative rules by legislative committees. The Department of Environmental Services supports the concept of having policy committees provide more input on proposed rules, but believes both that the bill as submitted creates substantial uncertainties about how it would be implemented and that there may be more efficient, cost-effective ways for legislators to become aware of proposed rules.

The bill proposes to amend RSA 541-A:10, I, to require agencies proposing rules to send the rules to the “appropriate house and senate standing policy committees for review” (lines 5-6) so that the committees may “submit recommendations or comments relative to the compliance of the proposed rule with the intent of the legislature in the authorizing legislation.” (lines 9-11) The bill also proposes to amend RSA 541-A:13, II(a) to require the Office of Legislative Services to notify an agency of any potential bases for objection identified by OLS or by “the standing policy committee” at least 14 days prior to when the JLCAR will consider the rules, if the agency has elected to proceed under RSA 541-A:12, I-a. (lines 16-23)¹

The “appropriate” policy committees are identified to “include any standing committee which held a hearing on legislation which enacted authority for the rule.” (lines 7-8) This language raises several questions, including who identifies the “appropriate” committees, what happens if a copy of a proposed rule is not sent to *all* such committees, and what happens in cases where rulemaking authority was enacted many years ago, such that the “appropriate” committees no longer exist (or at least no longer exist as constituted when the legislation authorizing the rules was considered). Section 2 of the bill (amendment to RSA 541-A:13, II(a)) also raises questions, including who decides which is “the” standing committee whose comments get sent to the agency if more than one policy committee identifies potential bases for objection, and whether an agency must elect the longer process in order to get the comments from the policy committee.

In any event, legislative intent is determined from the legislative history of an enactment, not from any particular legislator’s recollection of what was in his or her mind when voting. To

¹ RSA 541-A:12, I-a allows an agency to receive and respond to comments before the JLCAR considers the proposal but extends the time for getting on to the JLCAR agenda from 14 to not less than 28 days; it is rarely used.

charge a policy committee with reconstructing the legislative history of an enactment that may be decades old appears burdensome.

The issue of policy committee review of proposed administrative rules has been the subject of scrutiny for decades. RSA 541-A was originally enacted in 1973, with no requirement for review of rules by policy committees or by any other legislative committee. A requirement for agencies to notify "the chairman of the legislative committee having jurisdiction of the subject matter" was added in 1979. In 1982, this was revised to require agencies to mail notice to "the chairmen of the legislative committees having jurisdiction over the subject matter". In 1983 (the start of the "modern era" of rulemaking in New Hampshire), an amendment required agencies to *also* send notice to the House Speaker, Senate President, and Chairman of the Fiscal Committee. In 1998, the statute was amended to require agencies to send notice to the House Speaker and other listed legislators only upon request. This change was supported at the time by legislative leadership, who did not find it helpful to be inundated with proposed agency rules, and has been in effect since.

HB 159 would impose an additional across-the-board burden on state agency time and financial resources, when more efficient and cost-effective alternatives already exist for legislators to become aware of proposed rules. Specifically, committee chairs can request their agencies to send copies under the existing provision in RSA 541-A:6, III. Also, legislators who are interested in rules can read the *Rulemaking Register* (which is available to them free of charge) and follow-up on specific proposed rules of interest. New methods also are possible, including publishing the list of proposed rules (index) from the *Rulemaking Register* in the House and Senate publications.

Thank you again for the opportunity to comment on this bill. If you have any questions, please call me at 271-2958 or Gretchen Hamel of my staff at 271-3137.

Sincerely,



Thomas S. Burack
Commissioner

cc: Representative Renzullo
Representative Kappler
Representative B. Patten, Chair, Joint Legislative Committee on Administrative Rules