



The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Thomas S. Burack, Commissioner

February 1, 2011

The Honorable Carol McGuire, Chairman
House Executive Departments and Administration Committee
Legislative Office Building, Room 306
Concord, New Hampshire 03301

Re: HB 211, relative to the review and approval of proposed agency rules under the administrative procedures act.

Dear Representative McGuire and members of the Committee:

Thank you for the opportunity to testify on HB 211, relative to the review and approval of proposed agency rules under the administrative procedures [*sic*] act. The Department of Environmental Services supports the concept of having policy committees provide more input on proposed rules, but does not support this bill.

Section 1 of HB 211 (and a portion of section 2) would amend RSA 541-A:10, I, in substantially the same way as HB 159, which is pending in the House Legislative Administration Committee (hearing was held on January 25). The primary difference is that HB 211 does not define the phrase "appropriate ... standing policy committees." The Department has the same concerns with this section of HB 211 as it does with HB 159, namely that the bill as submitted creates substantial uncertainties about how it would be implemented. Further, more efficient and cost-effective ways for legislators to become aware of proposed rules already exist.

However, HB 211 also proposes to take away the discretion currently held by the Joint Legislative Committee on Administrative Rules ("JLCAR") to make reasoned decisions on proposed rules. Section 3 of the bill removes the JLCAR's option to only enter a final objection to a proposed rule, and instead would require the JLCAR to enter a joint resolution if the agency's response to a preliminary or revised objection does not remove the basis for objection or creates a new basis for objection (page 2, lines 14-15). This might be more reasonable if the conclusion that a basis for objection exists were always black and white, but it is not. The JLCAR's current ability to decide whether a joint resolution is warranted allows the JLCAR to effectively manage the legislative oversight of agency rulemaking. Eliminating the JLCAR's discretion on this issue is not in the best interests of the JLCAR, the Legislature as a whole, or the agencies who have been directed by the Legislature to adopt the rules.

The bill also would leave an agency with no remedy if the JLCAR fails to approve or object to a rule within 45 days of its filing (page 2, lines 6-8; page 3, lines 9-10) or fails to act within the specified time on a response to an objection (page 3, lines 14-16), or if a joint resolution is not actually filed or is not acted on by the Legislature (page 2, lines 23-31; page 3, lines 18-19). This essentially gives six legislators -- less than 2% of the General Court -- the power of a "pocket veto" over proposed rules, without ever being accountable to those who may benefit from the rules being adopted. This also could seriously jeopardize an agency's ability to comply

with its legal obligations to implement state statutes as well as any legal obligations it may have to implement federal programs.

The General Court is not obligated to delegate rulemaking authority to executive branch agencies. However, if and when such authority is delegated, the General Court should make its intent clear and unambiguous so as to establish clear expectations for rulemaking. Doing so will benefit not only the JLCAR and the agencies charged with adopting the rules, but also those who will be subject to the rules.

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

Sincerely,


for Thomas S. Burack
Commissioner

cc: Rep. C. McGuire
Rep. S. Palmer
Rep. Seidel