



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 222, relative to administrative rules which contain a fee increase, allowing political subdivisions to object to a proposed rule, and eliminating certain statutory provisions granting general rulemaking authority.

Dear Representative McGuire and members of the Committee:

Thank you for the opportunity to testify on HB 222, relative to administrative rules which contain a fee increase, allowing political subdivisions to object to a proposed rule, and eliminating certain statutory provisions granting general rulemaking authority. The Department of Environmental Services agrees with some of the concepts embodied in the bill, but does not support this bill as written.

HB 222 addresses fees in several sections. HB 222, §2 would add a requirement to RSA 541-A:11 for the rulemaking notice for proposed rules that increase a fee (pursuant to statutory authority to set a fee by rule) to specifically state that the fees are proposed to be increased (p. 1, lines 7-12). The Department believes that this is sound policy and supports this requirement, with the suggestion that it would be more appropriately placed in RSA 541-A:6, I, which specifies what must be included in the rulemaking notice.

HB 222, §6 proposes to add a new section to prevent an agency from adopting a rule that increases a fee "until the fee increase is approved in legislation adopted by the general court" (p. 2, lines 3-9). Because the General Court is not in session year-round, this is likely to create a hardship on agencies or programs that rely on fees to support them. Because the Department has converted a number of programs over the years to be fee-funded in order to reduce the burden on the General Fund, we are not in favor of this provision.

The timing of when a rulemaking proceeding is initiated frequently is determined by factors beyond the control of an agency, such as the effective date of a new or amended state statute, the date of a controlling court decision, or the effective date of a new or amended federal requirement. The length of a rulemaking proceeding also is frequently affected by events outside of the agency's control, including a delay in having proposed rules reviewed by the Joint Legislative Committee on Administrative Rules ("JLCAR"). Thus, even if an agency is able to plan a rulemaking proceeding so that the approval could occur during the legislative session, events could intervene so that the session is adjourned prior to considering the fee rules -- which would result in a delay of six months or more in adopting the proposed rules. In the meantime, the agency would not be able to collect any fees because there would be no rules in effect. The provision in HB 222, §1, to allow a bill needed to approve a rule containing a fee increase to be

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introduced at any time during the session, will do nothing to alleviate the problem during the months that the General Court is not in session. Rather than establish a process that puts agencies and programs at risk, the General Court should simply not delegate authority for an agency to set fees in rules if it wants to have the final say over fee amounts.

HB 222, §4 and §7 would allow any political subdivision of the state “which determines that a proposed agency rule violates [RSA 541-A:25]” to notify the JLCAR of its objection (p. 2, lines 12-14) and then would **require** the JLCAR to enter an objection on that basis (p. 1, line 20). While the Department agrees that the JLCAR should (and does) consider testimony from representatives of political subdivisions, we believe it is inappropriate for the General Court to allow the judgment of a single political subdivision to overrule the informed decision of the JLCAR. Further, the ultimate determination of whether a rule violates that section (or the constitutional provision to which it relates) can only be made by the courts, not by political subdivisions.

HB 222 also attempts to eliminate all statutory provisions that confer “general” rulemaking authority on any agency, by specifying that such authority is insufficient unless it “includes specific content on the scope of such rules” (p. 1, lines 15-17) and by deleting or repealing such authority from over 40 separate statutes (§§8-16, p. 2, line 8 - p. 4, line 24).

The Department agrees that the General Court should be as specific as possible whenever it decides to delegate rulemaking authority. However, the potential for harm from the proposed broad-brush approach to repealing such authority significantly outweighs any benefits that may arise from repealing all general rulemaking authority with a single stroke.

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

Sincerely,


FC Thomas S. Burack
Commissioner

cc: Rep. Lambert
Rep. L. Jones