



The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Thomas S. Burack, Commissioner

February 3, 2011

The Honorable Andrew Renzullo, Chairman
House Resources, Recreation and Development Committee
Legislative Office Building, Room 305
Concord, New Hampshire 03301

Re: HB 256, relative to the administrative appeals process of the department of environmental services.

Dear Representative Renzullo and members of the Committee:

Thank you for the opportunity to testify on HB 256, relative to the administrative appeals process of the department of environmental services. HB 256 proposes to modify the process for appealing final decisions made by the Department of Environmental Services. None of the proposed revisions would make the process more efficient -- for appellants, the Department, or the councils -- and many of them create ambiguities. The Department opposes this bill.

HB 256 would amend RSA 21-O:14 to:

- Require aggrieved parties to first seek reconsideration from the Department
- Delete the recognition that other remedies may be available
- Allow appeal of the Department's decision on reconsideration either to the council or to superior court, with the provision that if appeals are filed in the same case at a council and superior court, the appeal to the superior court "shall take precedence"
- Delete the "unlawful or unreasonable" standard that the councils must apply
- Modify the appeal process from a council decision from "in accordance with RSA 541" to "to the supreme court"
- Define "person aggrieved" for purposes of the section as "the applicant and any person required to be provided with notice"

Both the first and last of the above-noted modifications appear to assume that all appeals filed are of permit-related decisions. However, of the 128 appeals filed in 2008, 2009, and 2010 combined, 24 (approximately 19%) were of administrative orders, not permit decisions. While specific language varies from one statute to another, the Department typically is authorized to issue an administrative order when a violation of a statute, a rule adopted under a statute, or a condition in a permit issued under a statute has occurred. And while the facts of each case are different, it almost always is more protective of public health and the environment if the violation(s) can be stopped promptly and any remediation needed can be initiated. Due to the serious legal nature of an administrative order, the Department has a stringent internal review protocol to ensure that any order issued is based on objective evidence. Requiring the respondent to request reconsideration prior to filing an appeal will, in the vast majority of cases, serve only to delay compliance. Further, when an administrative order is issued, there is no applicant -- and while the order is issued to the individual or entity believed to be legally responsible for the violation(s), issuing the order is not typically what is meant by being "entitled to notice."

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Another significant change, namely allowing an appeal to be filed either at a council or superior court, would also create issues. This option was considered -- and rejected -- during last year's debate on SB 480.¹ Part of the reason it was rejected was the uncertainty as to what would happen if an appeal of the same decision were filed in both forums. While HB 256 attempts to address this, having the court case "take precedence" would not resolve the question of whether the appeals must be consolidated in court or whether the council would have to defer its action until the court case was concluded. The requirement for a hearing at superior court to be *de novo* also is unclear, both as to whether the Department's decision is given any deference and as to whether the court would conduct a complete permit application review in permit-related appeals.

Allowing appeals to be filed in superior court would significantly disadvantage anyone not represented by an attorney and likely would increase costs to persons who are represented. Such appeals also would create a time and expense burden on the Department and on the Department of Justice (DOJ). Department staff usually represent the Department in appeals before the councils; Department's legal counsel at the DOJ is only occasionally asked to provide advice or more active assistance. For any appeal filed in superior court, the Department could not represent itself and so would have to be represented by the DOJ. Department staff still would have to participate in the case, through discovery and trial preparation and testifying at depositions and trials. Assuming that at least 40 hours would be required of 2 Department employees for each superior court case, no less than 80 hours of staff time would be required per case. Even if only 10 cases per year were filed with superior court instead of a council, over 800 hours of staff time per year would be diverted to superior court appeals (which would be in addition to time also spent on a council appeal of the same decision). Since the majority of appeals are related to permitting decisions, the additional time spent on superior court appeals would be taken away from staff time available for reviewing permit applications.

Additional issues would arise from deleting the standard by which DES decisions are judged and from the proposed change in how to appeal a council decision. The standard inserted last session into RSA 21-O is in RSA 482-A but not in other statutes; deleting it would cause uncertainty as to whether it can still be applied to RSA 482-A decisions and whether the councils could adopt it as a standard in their rules. The change in how to appeal council decisions (from "in accordance with RSA 541" to "to the supreme court") appears minor, but creates uncertainty regarding whether the reconsideration step required under RSA 541 would still be necessary.

For the above reasons, the Department urges the Committee to vote HB 256 Inexpedient to Legislate. 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,



Thomas S. Burack
Commissioner

cc: Representative Sorg

¹ Laws of 2010, Ch. 354 (eff. Sept. 18, 2010). The bill established a process, which has not had sufficient time to be fully implemented and evaluated, in which the legal and procedural aspects of council appeals are handled by an individual appointed by the Attorney General who has expertise in legal matters, while council members continue to apply their expertise to the substantive/factual issues.