



The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Clark B. Freise, Assistant Commissioner

February 7, 2017

The Honorable Carol McGuire
Chair, House Executive Departments and Administration Committee
Legislative Office Building, Room 306
Concord, NH 03301

RE: HB 546-FN, An Act requiring a business impact assessment as part of the rulemaking process and relative to objections to proposed agency rules under the administrative procedure act.

Dear Chair McGuire and Members of the Committee:

The New Hampshire Department of Environmental Services (NHDES) appreciates the opportunity to comment on HB 546-FN. This bill would amend RSA 541-A, the Administrative Procedure Act, to require the Legislative Budget Assistant (LBA) to prepare a "business impact statement" for proposed rules and authorize the Joint Legislative Committee on Administrative Rules (JLCAR) to object to proposed rules if the rules "have a substantial business impact not recognized in the business impact statement", and would replace the existing process for sponsoring a joint resolution with a blanket provision that any rule adopted after a final objection would expire 90 days after becoming effective. NHDES opposes this bill.

An executive branch agency can adopt rules only when the General Court has delegated rulemaking authority to the agency. The General Court is responsible for establishing broader policy goals in the statutes, while rules typically establish specific procedures and criteria for doing what the statute authorizes. The rules then apply to anyone who engages in the activity regulated by the statute, whether an individual or entity. Many statutes -- and therefore many agency rules -- regulate activities in a way that benefits public safety, health, and welfare while placing some burden on the individuals or entities, including businesses, that engage in the regulated behavior.

While the proposed legislation puts the burden of preparing the business impact statement on the LBA, the bill also would require the agency proposing the rule to provide "the details and supporting data necessary to assess the business impact of the intended action." The existing process for obtaining a fiscal impact statement under RSA 541-A:5 already requires agencies to assess the fiscal impact of a proposed rule on independently owned businesses. To the extent a business impact statement would focus on fiscal impacts, it would be redundant. To the extent it would examine additional impacts, it is likely that most agencies will not have the expertise to provide meaningful input.

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The proposal to eliminate the established procedure for a joint resolution and instead cause the rules to expire after 90 days is likewise untenable. The joint resolution process was developed as a way for the General Court to exercise "veto authority" over administrative rules without violating the New Hampshire Constitution. The New Hampshire Supreme Court has specifically held that while "the legislature may delegate a portion of the legislative authority to an administrative agency ... it may not delegate its lawmaking authority to a smaller legislative body and thereby evade the requirement for action by a majority of a quorum of both legislative bodies." See Opinion of the Justices, 121 N.H. 552, 560 (1981) (citations omitted). Establishing that rules would expire 90 days after a final objection from the JLCAR does exactly what the Supreme Court has said it cannot.

Thank you for your consideration in this matter. If you have questions or need additional information, please contact me or Gretchen Hamel at gretchen.hamel@des.nh.gov.

Respectfully Submitted,



Clark B. Freise
Assistant Commissioner

cc: Sponsors of HB 546: Representatives Vose, Hennessey, Cordelli, Chirichiello, Murotake, Senator Gannon