

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Nelson Kinder + Mosseau PC
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NOTICE OF DECISION

**E. Tupper Kinder, ESQ
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99 Middle Street
Manchester NH 03101**

Case Name: **City of Dover, et al v New Hampshire Department of Environmental Services,
et al**
Case Number: **217-2012-CV-00212**

Enclosed please find a copy of the court's order of November 07, 2012 relative to:

Order

November 07, 2012

William S. McGraw
Clerk of Court

(629)

C: Andrew W. Serell, ESQ; John E. Peltonen, ESQ; George Dana Bisbee, ESQ; Evan J. Mulholland,
ESQ; John C. Hall, ESQ

The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

City of Dover, et al

v.

New Hampshire Department of Environmental Services

NO. 2012-CV-00212

ORDER

This case involves the promulgation by the New Hampshire Department of Environmental Services ("DES") of Numeric Nutrient Criteria for the Great Bay Estuary. The Petitioners, the cities of Dover, Portsmouth, and Rochester, New Hampshire, and the towns of Exeter and Newmarket, New Hampshire, allege that DES failed to promulgate the 2009 Criteria as a rule, as required by the New Hampshire Administrative Procedure Act, RSA 541-A ("APA"). DES objects and has twice moved to dismiss Petitioners' claims. In addition, Petitioners and DES have cross moved for summary judgment. Finally, Petitioners seek a preliminary injunction. For the reasons stated herein, the Court declines to issue declaratory judgment in Petitioners' favor, DES' Motion to Dismiss is GRANTED, and the Cross Motions for Summary Judgment and Petition for Injunctive Relief are DENIED as moot.

I

In June 2009, DES issues a document entitled "Numeric Nutrient Criteria for the Great Bay Estuary" ("2009 Criteria"). Petn. Delc. J. & Prelim & Permanent Injunctive Relief 1 ("Pet."). This document sets out water quality criteria for nitrogen, chlorophyll 'a',

and light attenuation for tidal waters in the Great Bay Estuary. Id. Petitioners allege that prior to the 2009 Criteria, DES relied solely on narrative criteria established at N.H. Admin. Rules, Env-Wq 1703.14. Following the promulgation of the 2009 Criteria, DES declared the Great Bay Estuary “impaired” for nitrogen, chlorophyll ‘a’, and light attenuation, meaning the Estuary contained too much nitrogen. Pet. 1. Petitioners allege that the U.S. Environmental Protection Agency (“EPA”) then used this impairment finding to modify National Pollutant Discharge Elimination System (“NPDES”) permits that it had previously issued to the Petitioners. Petitioners explain that these modified permits now limit nitrogen discharge, and in order to comply, Petitioners will be required to collectively spend upwards of \$100 million dollars to alter or reconstruct currently existing water treatment facilities.

In ruling on a Motion to Dismiss, the Court must determine whether the Plaintiffs’ allegations are “‘reasonably susceptible of a construction that would permit recovery.’” Bohan v. Ritzo, 141 N.H. 210, 212 (1996) (quoting Wenners v. Great State Beverages, 140 N.H. 100, 102 (1995), cert. denied, 516 U.S. 1119 (1996)). This determination requires the court to test the facts contained in the petition against applicable law. Jay Edwards, Inc. v. Baker, 130 N.H. 41, 44 (1987). In rendering such a determination, the Court “assume[s] the truth of all well-pleaded facts alleged by the plaintiff and construe[s] all inferences ‘in the light most favorable to the plaintiff.’” Bohan, 141 N.H. at 213 (quoting Wenners, 140 N.H. at 102). “The plaintiff must, however, plead sufficient facts to form a basis for the cause of action asserted.” Mt. Springs Water Co. v. Mt. Lakes Vill. Dist., 126 N.H. 199, 201 (1985).

Petitioners assert that DES’ impairment finding directly influenced EPA’s permit

modifications:

Under Section 303(d) of the federal Clean Water Act (“CWA”), water quality criteria are used to identify waters that require pollutant reduction . . . and to establish the effluent limitations required to ensure such standards are attained EPA is also required to develop NPDES permits to meet the applicable water quality criteria developed by state agencies Thus, water quality criteria have a direct impact on the legal rights and/or privileges of the Petitioners within the meaning of N.H. RSA 541-A:24 because those criteria determine the effluent limitations for specific pollutants in permits which are imposed by NHDES and USEPA with which the Petitioners’ POTWs must comply.

Pet. 2–3. DES disagrees and explains:

The CWA requires each State to adopt water quality standards for its waters. Attainment and maintenance of State water quality standards are the goals of the NPDES Permit Program. . . . USEPA’s permit writers first determine whether a particular point source may discharge pollutants at “at [sic] a level which will cause, or have the reasonable potential to cause or contribute” to an exceedance of the narrative or numeric criteria set forth in state water quality standards. If USEPA determines that a discharge causes, has reasonable potential to cause, or contributes to an exceedance of a state water quality criterion, then the NPDES permit must include effluent restrictions in order to attain state water quality standards. USEPA is not absolved of this obligation because a State has only a narrative criteria for a certain pollutant. Instead, USEPA must set effluent limits based on ESEPA’s best assessment of the appropriate numeric equivalent of the narrative standard. In making this assessment, USEPA may, but is not required to, use any draft or proposed numeric criteria developed by the State.

Mem. Law. Support State’s Mot. Dismiss 6–7 (emphasis added) (citations and emphasis in original omitted) (“State’s Mem. Dismiss”). Essentially, DES argues that even if this Court rules that the 2009 Criteria constitute an improperly promulgated rule, and DES is forced to revoke the Criteria and the “impairment finding” for the Great Bay Estuary, DES explains that the EPA may still rely on the 2009 Criteria in issuing restrictive NPDES permits to Petitioners. Federal law permits this. See 40 CFR § 122.44(d) (2007) (requiring EPA to establish numeric criteria when a state has not).

The Court agrees with DES but on different grounds. Rather than Petitioners lacking standing, justiciability dictates that a declaratory judgment is inappropriate in this case.

II

As an initial matter, DES' Motions to Dismiss challenge Petitioners' standing to bring this case. It explains, "[b]ecause each Petitioner's right to discharge pollutants into the Estuary is completely regulated by the USEPA through the NPDES Permit program, the issuance by DES of the 2009 Guidance Document had no effect on those rights."

State's Mem. Dismiss 7. Petitioners bring this declaratory judgment action pursuant to RSA 491:22 and RSA 541-A:24, which states:

The validity or applicability of a rule may be determined in an action for declaratory judgment in the Merrimack county superior court if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

RSA 541-A:24 allows a plaintiff to seek a determination that a "policy" is in fact a "rule" under the APA, and that the "rule" impairs his or her legal rights or privileges. Asmussen v. Comm'r, N.H. Dep't Safety, 145 N.H. 578, 587 (2000). The APA defines "rule" in part as a "regulation, standard or other statement of general applicability adopted by an agency to . . . prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency." RSA 541-A:1, XV. The New Hampshire Supreme Court has interpreted this definition to include rules that have not been properly promulgated under the APA. Asmussen, 145 N.H. at 586. Accordingly, Petitioners may challenge the 2009 Criteria even if it does not constitute a rule.

However, a party will not be heard to question the validity of a law, or any part of it, unless he shows that some right of his is impaired or prejudiced thereby. Avery v. N.H. Dep't of Educ., 162 N.H. 604, 608 (2011) (citations and quotations omitted). And, a “party seeking declaratory relief pursuant to RSA 541-A:24 must prove that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, his legal rights or privileges.” Asmussen, 145 N.H. at 587 (citation and quotation omitted).

In this case, Petitioners allege that they will be required to construct new wastewater treatment facilities as a direct result of DES' reliance on the 2009 Criteria. More specifically, Petitioners explain that in previous years, the NPDES permits issued by the EPA did not limit nitrogen releases. Now, following DES' use of the 2009 criteria and the Great Bay Estuary's listing as impaired, the draft permits that the EPA has issued to Petitioners for the Great Bay Estuary strictly limit Petitioners' ability to discharge from their treatment facilities.

Although the State has authority, pursuant to federal and state law, to issue water discharge permits, DES does not issue any such permits. Instead, EPA issues all permits and DES simply adopts EPA permits as written. DES applied the numeric 2009 Criteria to the previous, narrative criteria, in order to identify the Great Bay Estuary as an “impaired water.” This label imposes requirements on the EPA to establish discharge limitations that do not violate state law. In this way, there is a relationship between DES' actions and Petitioners' allegedly imminent harm, albeit an indirect relationship. For that reason Petitioners have standing to bring this action. Nonetheless, a declaratory judgment at this time would not permit “an intelligent and useful decision to be made through a decree of a conclusive character.” Wuelper v. Univ. N.H., 112 N.H. 471, 473–74 (1972).

III

Although Petitioners do have standing to seek review of the 2009 Criteria, separate from the standing analysis, to obtain a declaratory judgment, “the controversy must be of a nature which will permit an intelligent and useful decision to be made through a decree of a conclusive character.” Salem Coalition for Caution v. Salem, 121 N.H. 694, 696 (1981) (citation and quotation omitted); see Baer v. N.H. Dep’t of Educ., 160 N.H. 727, 731 (2010) (emphasis added). This justiciability issue requires a finding in favor of DES.

Even if the EPA had not relied on the 2009 Criteria or DES’ impairment finding,¹ the EPA would still bear an obligation to ensure that any NPDES permits it issued did not violate the narrative criteria detailed in Env-Wq 1703.14. See 40 CFR § 122.44(d)(1)(vi) (2007). The EPA would be required to establish some numeric criteria to make this determination. Id. Ultimately, the entity that makes any decisions that may harm Petitioners is the EPA. This Court has no jurisdiction over the actions of federal administrative agencies such as the EPA.

Further, there is no evidence that resolution of the currently pending dispute will resolve Petitioners’ challenge to the EPA’s permitting decision. Even if this Court ruled that a declaratory judgment is appropriate and that the 2009 Criteria constitutes a rule that was improperly promulgated, this ruling would not assist Petitioners. The ruling would prohibit DES from relying on the 2009 Criteria or enforcing water effluent limitations based on the 2009 Criteria. However, the NPDES permits EPA issues could still contain stringent nitrogen limitations.

¹ As an aside, the Court acknowledges DES’ argument that the EPA utilized the undisputed narrative criteria in formulating Petitioners’ NPDES permits and in fact, did not rely on the 2009 Criteria. The Court declines to find this as fact as it remains disputed between the parties.

While it is true that the availability of alternative relief does not necessarily preclude declaratory judgment, in this case, it is equally true that a definitive judgment from this Court will not prevent Petitioners' allegedly imminent harm. Asmussen, 145 N.H. at 589. As DES correctly argues, the EPA has ultimate authority to determine whether to list the Great Bay Estuary as an impaired waterway. 33 U.S.C. § 1313(c) (2000). EPA not only has ultimate authority to craft the NPDES permits issued to Petitioners, it is not bound by a ruling from this Court regarding the validity of the 2009 Criteria as a basis for permitting. The EPA could maintain the Great Bay Estuary on the 303(d) list, and Petitioners would be required to challenge the listing pursuant to federal rules and regulations. In fact, documents in the record indicate that the EPA was poised to list the Great Bay Estuary regardless whether DES recommended the listing. Although this information is not dispositive, the federal-state relationship at play in New Hampshire regarding water permits convinces this Court that no order would conclusively establish the rights between these parties.

The "lack of sufficient immediacy and reality" in the circumstances of the present case does not warrant a decision on the merits. See e.g., Salem Coalition, 121 N.H. at 697. The federal administrative process is better designed to address the parties' rights in this matter in a manner that would be truly final and conclusive. The Court declines to issue a declaratory judgment. The State's Motion to Dismiss is GRANTED. The Motions for Summary Judgment and Petition for injunctive relief are DENIED as moot.

11/7/12
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice