

# Senate Energy and Natural Resources Committee

## *Griffin Roberge 271-2878*

**SB 121**, relative to the MS 4 list of the department of environmental services.

**Hearing Date:** February 7, 2017.

**Time Opened:** 10:00 a.m.

**Time Closed:** 11:38 a.m.

**Members of the Committee Present:** Senators Avar, Bradley, Innis, Fuller Clark and Feltes.

**Members of the Committee Absent:** None.

**Bill Analysis:** This bill requires the department of environmental services to send the MS4 list to the environmental protection agency.

**Sponsors:**

Sen. Sanborn

Sen. Watters

Rep. Cordelli

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**Who supports the bill:** Rick Sawyer (Bedford), Senator David Watters (District 4), John Storer (Rochester), Dean Peschel (Dover), Gordon Leedy (Amherst), Cordell Johnston (NH Municipal Association), Bruce W. Berry, Jim Stanford, Dawn Tuomala, Kyle Fox (Merrimack), Bill Boyd (Merrimack).

**Who opposes the bill:** Jeff Barnum (Conservation Law Foundation), Ted Diers (NHDES), Jim O'Brien (The Nature Conservancy).

**Who is neutral on the bill:** N/A.

**Summary of testimony presented in support:**

*Senator Andy Sanborn*

*Senate District 9*

- Provided written testimony.
- For about 10 years, there has been an ongoing effort on the part of the federal government, under the Clean Water Act, to require municipalities to manage stormwater runoff on public and private land.
- There are two components of this monitoring requirement: there is a list created every two years called the 303(d) list and a permit that is to come out every five years. The permit and being on the list is not a designation that allows a municipality to operate, but is more of a designation that a community is in the wrong in regards to the regulations. That community needs to alter its behavior and make changes in the management of stormwater runoff.

- One of the challenges, beyond the fact that the requirements are themselves very steep, is that both the federal government and the NHDES have fallen behind in recognizing all the good work these NH municipalities have done in addressing this problem.
- Senator Sanborn also made note per Senate ethics rules that he may or may not have a conflict of interest in regards to this legislation as a NH taxpayer, but chooses to continue in the process.
- There has been a significant effort over the past few years by some communities to defend their local taxpayers in this process. These affected communities are: Amherst, Atkinson, Barrington, Bedford, Brentwood, Candia, Chester, Danville, Derry, Dover, Durham, East Kingston, Epping, Exeter, Farmington, Fremont, Goffstown, Greenland, Hampstead, Hampton, Hampton Falls, Hollis, Hooksett, Hudson, Kensington, Kingston, Lee, Litchfield, Londonderry, Madbury, Manchester, Merrimack, Milford, Milton, Nashua, New Castle, Newfields, Newington, Newmarket, North Hampton, Pelham, Plaistow, Portsmouth, Raymond, Rochester, Rollingsford, Rye, Salem, Sandown, Seabrook, Somersworth, Stratham, and Windham.
- Despite the best efforts of NH municipalities, the EPA and the NHDES have fallen behind in recognizing the work they have done. The list used for the allocation of MS4 permits is based on the 2012 303(d) list. The 2014 list was just released, but was not released in time for the new permits. Coincidentally, this list was released on January 18<sup>th</sup>, two days before the inauguration of President Trump.
- The requirements under the new permit list are as follows: if this permit goes into effect on July 1<sup>st</sup> of next year, it will require that any economic development in the NH municipalities listed will need preapproval from the NHDES and the EPA. That is essentially saying that NH will close its doors to any economic development. The potential risk to the NH economy is not just the federal government approving any economic development, but the real concern is the estimated \$400 million cost in requirements from the MS4 permits.
- For example, Rochester is facing a \$25 million dollar bill in addressing stormwater runoff and Bedford has a small pond surrounded by private residences that requires an estimated \$10 million dollar treatment program on that pond.
- Clean water is an important topic. Everyone wants it. But creating a standard that runs the risk of financially distressing NH communities in an unfunded mandate sent down by the federal government, combined with arresting future economic development, is beyond what NH wants.
- The MS4 permits out today are based on data from the 303(d) list given out in 2012 and does reflect current data and the progress made by communities. The 2014 numbers just came out recently and will require NH communities to go through a process to have that data incorporated into the permit. They will then have to do it again to reflect the 2016 numbers.
- Senator Sanborn also referenced a handout from the NH legal community that not only illustrates how this process is harsh, but also legally questionable.
- In addition, Senator Sanborn presented a letter from Center for Regulatory

Reasonableness that operates on behalf of the Stormwater Coalition in NH, which represents 20 of the 41 NH communities affected by the MS4 permits. The letter questions if the EPA's program is lawfully permitted and whether the additional cost from permits with outdated data is necessary.

- There are three components of SB 121:
  - The NHDES must publish the 2014 303(d) list.
  - The NHDES must publish the 2016 303(d) list. Mr. Pelletier told Senator Sanborn that that list is forthcoming.
  - The third part addresses who should have the authority to implement and manage the MS4 stormwater program. Today, the program is managed out of the EPA's Boston office. There is concern that the program that affects NH communities is being run by DC bureaucrats out of a Boston office. These officials lack the understanding of local issues and work made by NH communities in complying with the process. SB 121 would consider delegating that authority to the NHDES to implement the MS4 permit process.
    - Massachusetts is currently making an application to the EPA to have that authority delegated. All other states in New England have delegated authority. Should Massachusetts get delegated authority, NH would be the only state in New England that has MS4 permit authority with the EPA. The last set of permit documents from federal oversight for NH is 260 pages long. All the other states in New England have less than 100 pages of permit documents.
- The NHDES has some reservations concerning SB 121. Senator Sanborn appreciates their concern about the need for additional staff and a growing budget. Senator Sanborn is concerned about the possibility of raising taxes to pay for this, but after hearing from local communities, there is no other option.
- While the new EPA administrator could ease the regulatory burden on NH communities, he has yet to be confirmed and NH should not place all confidence on one administrator to reverse the regulatory burden on NH's communities. NH should take the lead in addressing this problem on their part while hoping the new EPA administrator makes positive changes.
- Senator Avard asked how NH got behind when the permits were issued in January before the inauguration. Senator Sanborn said NH's communities have been working for years to both improve water quality and demonstrate that those towns have done that. There is a lack of recognition on that progress with the failure to use 2014 or 2016 303(d) list data. There was clearly a desire on the part of the EPA to get the permit out before there was a change in administrations.
- Senator Bradley asked that if EPA rules still apply even if authority is delegated over to the NHDES. Senator Sanborn said that in states which have overtaken management themselves (in a delegated authority), the declared rules are dramatically different. Senator Sanborn encouraged Senator Bradley to ask that question to members of the municipalities that testify on SB 121.

*Rick Sawyer*

*Town Manager, Bedford, NH*

- Mr. Sawyer is in support of Section III of SB 121.
- Bedford can make more informed decisions about their stormwater runoff with delegated authority given to the NHDES.
- NH is one of four states that has allowed authority to remain with the EPA. This permit has real potential to stifle economic development.
- Senator Bradley asked what gives Mr. Sawyer faith that they can comply with the rules in a tax-friendly way to the citizens of Bedford. Mr. Sawyer stated that Bedford has a solid working relationship with the NHDES. There is no direct answer, but Mr. Sawyer believes local control is better.
- Senator Bradley asked if local control would give NHDES the authority to waive certain permit requirements. Mr. Sawyer said there are better people to address that question.

*John Storer*

*Director of City Services, Rochester, NH*

- Provided written testimony.
- Rochester's focus on SB 121 is not so much on the levels of nitrogen or the threat of the MS4 permit. Rochester's concern is addressing the delays in issuing an updated 303(d) list, which explains the data in different municipalities.
- Rochester has not had a waste water plant permit issued in the last 20 years. They have lowered their nitrogen levels with minimal cost investments.
- What worries Rochester is the EPA is looking at data from the 2012 303(d) list. That data goes back to 2010 and 2011. It does not reflect current upgrades to stormwater management or improved water quality in those communities.
- Rochester is not afraid of the science. Rochester wants the science to catch up. While the city is sympathetic to the time it takes for the NHDES to compile the list, Rochester is facing a \$25 million cost to a water treatment facility that it is required to build. It is not needed when their water quality has already improved.
- Should the 2016 303(d) list come out, it will reflect much lower nitrogen levels in the water around Rochester.
- On the MS4 permits, Rochester feels there needs to be regulation, but the EPA's regulations are draconian and rely on old data from outdated 303(d) lists.
- Mr. Storer managed water treatment systems in Maine, specifically the Lewiston/Auburn area. Rochester is not looking for NHDES to lessen their regulations, but he firmly believes that dealing with local communities is much easier. All parties are interested in cleaner water within their local community. In dealing with EPA, Mr. Storer said they do not factor in cost implications in their permit applications. Forcing Rochester to build a \$25 million facility to lower their nitrogen levels even lower when they do not factor in cost implications is a problem for their community. Data from the 2014 303(d) list will show significant improvement if it was released.
- Senator Avard asked if Mr. Storer believed the NHDES will get lax in their

regulatory obligations. Mr. Storer said he does not believe that to be the case. Mr. Storer stressed the need for an updated list to be released to base their decisions on. Mr. Storer noted the lag time on the 303(d) list process.

- Senator Bradley referenced Senator Watters's past legislation that led to updated science and better tax protection. Senator Bradley asked if SB 121 addresses the same issue. Mr. Storer said Rochester is trying hard to address the problem themselves, but the EPA is using old data and are not factoring in cost implications for a \$25 million facility that is not warranted.
- Senator Feltes referenced line 28: "The general court directs the department to act immediately and send to EPA a Final 2014 303(d) List that eliminates outdated or speculative impairment designations." Senator Feltes asked what the line means, and if nitrogen is speculative. Mr. Storer said current nitrogen levels are much lower than they were in the mid-90's. Mr. Storer asked why they do not look at other impacts – phosphorous, stormwater impacts, and herbicides. These and other factors have been excluded from consideration. Dover and Rochester said the data on Great Bay shows low levels of nitrogen, but wants to see if there are any other factors in play. The more updated 303(d) list will have tons of data will allow additional input to assess what is causing any changes to the ecosystem.
- Senator Feltes asked if, given his testimony, Mr. Storer believes nitrogen is speculative in impacting eelgrass. Mr. Storer said he goes to information he can reference. Mr. Storer believed a report argued there was hysteria about nitrogen and other factors could be at play. Mr. Storer does not believe a \$25 million plant is needed for Rochester based on data they have seen.
- Senator Feltes asked if the need for the \$25 million plant is based solely on nitrogen. Mr. Storer said they needed to work with an engineering plant to estimate its construction, but the plant would address nitrogen and phosphorus discharges. Mr. Storer said he could offer information as to the plant for the committee.
- Senator Feltes asked what the cost of the plant would be with the inclusion of phosphorus. Mr. Storer said you could split the cost in half: 12.5 million for nitrogen, 12.5 million for phosphorus.

*Dean Peschel*

*Former Environmental Project Manager, Dover, NH*

- Senator Avard asked Mr. Storer if municipalities would be open to a fee structure. Mr. Storer brought Mr. Peschel up to better address that.
- Mr. Storer said that recalling his time in Maine, Maine had a difficult time maintaining funding on its drinking water program to remain in a delegated authority. The Maine municipalities created an alternative funding mechanism (AFM) based on gallons produced or revenue generated in the form of a tax or fee. Municipalities realized that if they wanted delegated authority, they had to contribute. The fee was not that large. Other public water systems had a fee as well. He believes there is a value in having municipalities address this issue.
- Mr. Peschel worked at the city of Dover for more than 21 years and is speaking on their behalf. Many municipalities that testified are present on the part of a

stormwater coalition.

- Maine submitted their MS4 permit to the EPA and it was approved. Delegated authority can be done, and the requirements on municipalities will be the same. The resources needed will be much less when done at a local level.
- Senator Avard said that if SB 121 were not to take place, there can be a harm to economic development. Communities need to address this. Senator Avard looked for Mr. Pechsel's opinion. Mr. Pechsel said municipalities can take part. Communities need to come together and weigh in.
- Senator Feltes asked if the stormwater coalition would be willing to help. Mr. Pechsel said that it would be needed to happen. If they want delegated authority, they need to pay.

*Kyle Fox*

*Director of Public Works, Merrimack, NH*

- Provided written testimony.
- Merrimack is in support of SB 121. Merrimack has been a permittee under the NPDES since 2003. Merrimack is one of 61 communities subject to the requirements in the recently issued 2017 NH Small MS4 General Permit. Merrimack is deeply concerned with the requirements of the permit for three reasons:
  - Inability to comply with permit language.
  - Restriction on development.
  - Cost of permit compliance.
- The 303(d) list is the tool that the EPA uses through the MS4 permit to regulate the waters in each community. Having listed waters in our community will lead to the multi-million dollar expenditures. The recent permit is based on the 2012 list which uses data that was captured years previously. The need for the current data will ensure Merrimack's tax money is spent in a responsible manner.
- Merrimack has a solid working history with the NHDES to accomplish common goals. The newly issued permit based on outdated science puts future projects in jeopardy in favor of spending money to try to comply with the permit. It would be beneficial for the NHDES to file an application with the EPA to get delegated authority. Local experience will allow for the most responsible and effective funding of clean water projects in NH.
- Senator Avard asked if Mr. Fox would have a problem assuming a fee to pay for the delegated authority. Mr. Fox said the fee would be significantly less than the current money needed to fund projects under the current MS4 permit. Mr. Fox said Merrimack would have no problem with a fee.
- Senator Feltes asked if it is okay if the state tells municipalities to pay for the delegation. Mr. Fox said the federal requirements would remain, but the authority would stem from the NHDES. The NHDES needs to be funded to assume that delegation.
- Senator Fuller Clark said the EPA regulations cannot be changed at the state level. She sought comment from Mr. Fox on NHDES and their inability to alter the regulations. Mr. Fox said the regulations will not change, but the massive

overreach the EPA is making into municipalities will no longer take place. That can be demonstrated with their mandate on phosphorus levels. If there is a small amount, limits are imposed on municipalities.

- Senator Feltes asked why this process is necessary if the Trump administration can just change the EPA regulations. Mr. Fox said all the municipalities have been to meetings with the EPA. The EPA imposes limits or changes on the community, but offers no money to make those changes. Moving to a state-based authority makes lawmakers of the state determine where the money is best spent.

*Bill Boyd*

*Merrimack Town Council, Merrimack, NH*

- His comments reflect that of Mr. Fox, Mr. Storer, and Senator Sanborn.
- Senator Avard asked if Mr. Boyd would be open to a fee structure. Mr. Boyd said he would.
- Senator Feltes asked if it makes sense to go through the Trump administration rather than working through this legislative process. His comments reflect Mr. Fox's in that it would make better sense for Concord to decide how the money is best spent.
- Mr. Boyd also stated that the MS4 permit for Merrimack is critical. It holds up economic development. It would arrest growing development at the Merrimack Premium Outlets or the BAE Systems. It is vital for Merrimack to limit the amount of overreach of the EPA into the community to halt economic development.
- Mr. Boyd referenced Horseshoe Pond, a landlocked pond in Merrimack. The town has no access to it because it is surrounded by private property. That private property uses fertilizer to help their lawns. The Town of Merrimack has been ordered to clean the pond, with the MS4 permit requiring the town to reduce phosphorus levels by 75%. Phosphorus is impossible to get rid of. It would subject the town to litigation to access the pond and buy property near the pond. This is an example of federal overreach.

### **Summary of testimony presented in opposition:**

*Jeff Barnum*

*Great Bay-Piscataqua Waterkeeper, Conservation Law Foundation*

- Provided written testimony.
- There has been a commitment on the part of NH communities to reduce nutrient pollution in water.
- All major sewage plants are in a queue to upgrade, meet permit limits set by the EPA, are already in compliance, or are under construction. It has taken years to get to this point. A continued commitment to strong stormwater controls contained in the MS4 regulations are an essential component of nutrient reductions that will lead to the recovery of the Great Bay Estuary.
- At the heart of the Great Bay Estuary is eelgrass. There has been too much nitrogen coming into the ecosystem. Eelgrass is important: it produces oxygen,

anchors the sediment, provides an environment for aquatic life, and nearly takes in four times the amount of carbon of trees and other plants.

- The loss in acreage of eelgrass is a massive loss. There is a massive amount of nutrient load coming into the estuary.
- The biomass of eelgrass in the Great Bay has been on a decline for years. In 1993, if all the eelgrass was pulled out, it would weigh about 1500 tons. Today, the weight of that eelgrass is nearly 200 tons.
- Great Bay is on the way to recovery due to high federal standards. The 303(d) list prepared by the state has a very high bar for the EPA to accept it. EPA has done a great job working with communities in the Seacoast region.
- MS4 has made dramatic reductions in nitrogen due to regulations in place. They are currently working on a massive water monitoring plan. NHDES has been doing a great job, even though it is understaffed and under resourced.
- This bill is untimely and unnecessary. The MS4 permits have not been burdensome in cleaning up the Seacoast's waters.
- Senator Bradley mentioned that Senator Watters introduced a bill in the past to compel the NHDES to use more modern data for nitrogen loading. All the communities in the Great Bay supported it, but NHDES resisted it. The agreement reached seemed to satisfy all the parties. That legislation led to many of the programs mentioned by Mr. Barnum. The communities found it more affordable to comply with the standards. Given that nitrogen loading is being addressed in the Seacoast communities, Senator Bradley asked why it was inappropriate to consider SB 121 to continue to mitigate the financial implications to taxpayers throughout NH. Senator Bradley is looking for Mr. Barnum to explain his opposition. Mr. Barnum said the current efforts addressing stormwater are just starting. Communities like Portsmouth, Rochester, or Dover are just taking notice and are stepping up to address the problems. Addressing these natural systems will take time and communities need to be engaged for the long-term. The EPA regulations ensure that.
- Senator Avard said Senator Sanborn claimed Maine has opted for local control. For example, Kittery has chosen to opt out and have local control. Senator Avard asked why NH would not do that same since Maine shares water with NH. Mr. Barnum said Maine has similar regulations, but they are delegated to the state. Senator Avard asked if that was the intention of SB 121. Mr. Barnum said SB 121 would propose to do that, but he believes the NHDES will be more lax on regulations than the federal government. Senator Avard claimed that NH would be trapped with burdensome regulations that will stifle economic growth. Senator Avard asked Mr. Barnum why NH would not try to mitigate costs. Mr. Barnum said that Kittery waste water treatment is doing alright. Most of the progress was made by the forward thinking made by the public works director of that town.
- Senator Fuller Clark said it is important to note the impact of passing SB 121. The EPA regulations would still stay in effect, but they would be overseen by NHDES. Senator Fuller Clark is looking for a clarification from Mr. Barnum on his concerns. Mr. Barnum said that SB 121 would create a substantial fiscal note and a burden on the NHDES to staff and regulate these permits. Mr.



Barnum again stated his fear that NHDES will be easier on municipalities than the EPA has been on reducing pollutants in waterbodies.

- Senator Fuller Clark asked if the cost to municipalities will lower over the next several years if water quality improves. Mr. Barnum said there would be a cost to maintaining the controls to manage stormwater. Those systems would already be in place. Mr. Barnum does not see the wastewater treatment plants cutting back on their standards if water quality improved.

*Ted Diers & Rene Pelletier*

*Administrator, Water Pollution Division, NHDES*

*Environmental Programs Administrator, Water Pollution Division, NHDES*

- Provided written testimony.
- Every two years, NHDES is required to submit to the EPA an assessment of all the waterbodies in the state, per the Clean Water Act. This assessment, known as the 303(d)/305(b) report, includes the list of waters of the state that do not meet the state water quality standards, which is the 303(d) list. The 303(d) list is specific to those impaired waters for which a cleanup plan is required. The EPA is required to approve that NH list or to make its own decisions about the status of the waterbodies. Mr. Diers made note that should NH assume delegated authority, that list will still need to be created every two years and require EPA approval.
- The most recent list that was approved by the EPA is the 2012 303(d) list. The EPA took nearly two years to approve the 2012 list, which caused work on the 2014 list to be delayed. The delay was due in large part to the issues discussed by other people who have testified about Great Bay. The 2012 is the current approved list. The draft 2014 list was advertised for public comment in 2015. A large number of public comments were received and NHDES made edits to the list, necessitating certain parts of the list to be re-advertised for public comment. That public comment period closes on 2/24/2017, and the final list will be submitted to the EPA by the end of March 2017.
- In addition, the NHDES is working on, and nearing completion of, calculations for the 2016 303(d) list which will be submitted to the EPA as a draft and advertised for public comment in April 2017. That list is due to be finalized by June 2017. Work on the 2018 list will begin in December 2017 and a draft is likely to be released by April 2018. This schedule will allow the NHDES to catch up in the listing cycle. It should be noted that the 2016 list includes over 3.5 million data points that cover thousands of miles of river and hundreds of lakes.
- Thoughts to SB 121's requirement to post 303(d) lists:
  - SB 121 reflects the importance of the list to many communities. The 303(d) list identifies problem areas, makes clean-up efforts eligible for federal funding, and sets priorities for additional monitoring. It also is used by the EPA to determine some permit requirements. Because NHDES is poised to complete the 303(d) list related tasks required in SB 121, those parts of the bill are unnecessary.
- Thoughts to SB 121's requirement of NHDES to assume delegation of authority

for the National Pollutant Discharge Elimination System Permit Program (NPDES):

- Presently, NH is one of four states that are “nondelegated” for NPDES.
  - Assuming delegation would be very expensive.
  - There is an estimation that at least eleven new positions would need to be created. In addition, there is no current source of revenue for that work, so general funds or a fee would be required. If a fee was chosen, it would be quite high to cover the costs of the program. Those fees would most likely be taken from the municipalities. For these reasons, SB 121 should have a Fiscal Note.
- Therefore, NHDES cannot support SB 121 without an understanding of the costs and the sources of revenue to operate the new program. The NHDES is in support of HB 342, which would establish a study commission to examine the merits and costs of NPDES delegation.
- Senator Bradley asked if Section II was necessary given the time lines for the 2014 and 2016 303(d) lists. Mr. Diers said Section II was not necessary.
- Senator Bradley asked why the NHDES is opposed to Section III, which delegates authority to the NHDES. Mr. Pelletier said a similar bill was introduced in the House that would create a study commission to look at the issue. The NHDES has been looking at delegation since 1998. The NHDES currently holds its own authority on NH’s drinking water and wastewater. However, those two programs are fully funded, staff wise, by the feds. Should the NHDES assume authority on NPDES, there are no available federal funds to staff the program. Of the NHDES budget, 20% is general fund money, 10% is grant pass through. The cost is the greatest concern to the NHDES. SB 121 forces NHDES, with a lack of resources, to address this program.
- Senator Bradley stated there are tensions between state and federal regulations. If SB 121 were passed, Senator Bradley asked if the NHDES would have a cost estimate ready for the Senate Finance Committee. Mr. Pelletier said managing the wastewater and drinking water programs have been fine. The great workload in delegated authority on NPDES will be a cost in the millions of dollars. That is why the NHDES supports HB 342, which creates a study commission to look at the cost and what delegated authority would entail.
- Senator Bradley mentioned that if SB 121 were passed, Section II should be struck, the bill would go to the Senate Finance Committee, have a hearing, and then be taken up in the budget. He urged the NHDES and the Governor’s Office to work together on what a proposal would look like. He urged the municipalities to look into a possible fee structure. He urged Senator Sanborn to work with the Governor’s Office to contact the Vice President to explore an executive order to lessen the EPA regulations.
- Senator Avard asked Senator Sanborn if he would be content with striking Section II. Senator Sanborn said he was content, but as long as the list comes out. The NHDES has shown a commitment to have it out by May.
- Mr. Pelletier said a concern in passing SB 121 as is leaves the NHDES holding the bag with massive responsibilities and no way to pay for it. Senator Bradley said if SB 121 comes back from the Senate Finance Committee, the bill can be

tabled in the Senate until an idea is worked out.

- Senator Feltes said that with Senator Bradley's recommendation, in regards to line 6 on page 2, if it would make sense to push back the date from June 1, 2017. Mr. Pelletier said he would like an escape clause written into SB 121 if funding does not come through. Mr. Diers made note that the EPA has to approve their request for delegated authority. SB 121 does not make delegated authority complete. The EPA needs to be shown that the NHDES has the resources to assume that responsibility.
- Senator Feltes asked Mr. Diers how long it would take the EPA to go through a delegated authority application. Mr. Diers did not know, but has some memos on the issue and is willing to provide that to the committee.
- Senator Fuller Clark asked if EPA requirements will remain the same, should NHDES assume delegated authority. Mr. Pelletier said the EPA will assume those regulations should the EPA alter federal requirements. States can be more strict on regulations, but it cannot be more lenient.
- Senator Feltes referenced Section I, line 13-14: "In 2014, an independent peer review of the 2009 Numeric Nutrient Criteria concluded that the 2009 criteria was scientifically deficient and could not be relied upon." Senator Feltes then compared that statement to Mr. Barnum's written testimony, where he wrote, "The peer review of the NHDES's 2009 Numeric Nutrient Criteria did not conclude that nitrogen was not a cause of eelgrass loss, it simply concluded that there might be additional factors that the DES had not fully explored." Senator Feltes asked which statement was accurate. Mr. Diers said the two statements were not mutually exclusive. Mr. Barnum was correct in that the peer review did find there may be multiple factors at play in the loss of the eelgrass. The work done was not robust enough to look at each factor, but it did determine that nitrogen was a leading factor. The NHDES was left with a 'preponderance of the evidence' approach which was used in the 2014 list. It is possible for both statements to be true at the same time.
- Mr. Pelletier stated that it is good to have municipalities involved, but there is also the topic of non-municipal entities who need to be considered in the context of the fee structure, should one be established.

**Neutral Information Presented:** N/A.

**Future Action:** Pending.

GJR

Date Hearing Report completed: February 8, 2017