EXHIBIT 33 (AR N.37)

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

City of Dover, et al.

v.

New Hampshire Department of Environmental Services

Docket No. 217-2012-CV-00212

STATE'S MOTION FOR SUMMARY JUDGMENT

AND

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOW COMES the New Hampshire Department of Environmental Services ("DES or "Department") through its counsel, the Office of the Attorney General, and moves for summary judgment in this matter for the reasons that follow. A Memorandum of Law and Appendix in support of this motion is attached hereto.

1. No Petitioner has standing to bring this declaratory judgment action under RSA 541-A:24. This argument is more fully developed in the State's Motion to Dismiss, filed on May 30, 2012.

2. The record in this case and the attached affidavits establish that summary judgment in the State' favor is warranted. The document issued in June 2009 by the New Hampshire Department of Environmental Services (DES) entitled "Numeric Nutrient Criteria for the Great Bay Estuary" (the "2009 Guidance Document")[1] merely guides DES in its interpretation of statutes and duly promulgated regulations. It is not binding on anyone, including DES. In addition, it does not set

[1] The 2009 Guidance Document was previously filed by the State on April 20, 2012 as Exhibit B to the State's Motion for Protective Order.

a standard of conduct for which there are legal consequences if the standard is violated. Because it lacks these essential attributes of generally applicable rules, formal rulemaking under RSA Ch. 541-A was not required prior to its issuance or use by DES.

WHEREFORE, the State respectfully requests that the Court:

A. Grant this motion for summary judgment, and

B. Grant such other relief as it deems just and appropriate

Respectfully submitted,

State of New Hampshire
Department of Environmental Services

By its attorneys,

Michael A. Delaney
Attorney General

Dated: August 15, 2012

By: _____
Evan J. Mulholland
Assistant Attorney General
NH Bar No. 18038
Office of Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301
(603) 271-3679

Certificate of Service

I certify that a copy of this Motion for Summary Judgment, Memorandum of Law and Appendix has been mailed first-class postage prepaid this 15th day of August 2012 to John E. Peltonen, Esq., George Dana Bisbee, Esq., E. Tupper Kinder, Esq., and Andrew W. Serell, Esq.

_____
Evan J. Mulholland

EXHIBIT 33 (AR N.37)

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

City of Dover, et al.

v.

New Hampshire Department of Environmental Services

Docket No. 217-2012-CV-00212

MEMORANDUM OF LAW IN SUPPORT OF THE STATE'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the New Hampshire Department of Environmental Services ("State") through its counsel, the Office of the Attorney General, and submits the following Memorandum of Law in Support of the State's Motion for Summary Judgment.

I. INTRODUCTION

Petitioners, five municipalities which own and operate Publically Owned Treatment Works ("POTWs") that discharge in to the Great Bay Estuary, assert that the document issued in June 2009 by the New Hampshire Department of Environmental Services (DES) entitled "Numeric Nutrient Criteria for the Great Bay Estuary" (the "2009 Guidance Document")[2] was a rule adopted without undertaking the rulemaking process provided by RSA Ch. 541-A. DES admits that it did not follow the formal rulemaking process set forth in RSA Ch. 541-A when it issued the 2009 Guidance Document. However, as set forth below, DES's position is that the 2009 Guidance Document and the numeric values therein are not rules. DES has not, will not and cannot, apply the Document and the numeric values therein against any class of persons. The values in the 2009 Guidance Document are unenforceable by design. DES considers the

[2] The 2009 Guidance Document was previously filed by the State on April 20, 2012 as Exhibit B to the State's Motion for Protective Order.

Document and the numeric values therein to be a site-specific policy interpretation lacking the binding force and effect of law.

II. FACTS

A. DES's duty to analyze surface water quality.

Pursuant to RSA 485-A:4, II, the State of New Hampshire Department of Environmental Services is charged with the responsibility to "study and investigate all problems connected with the pollution of the surface waters or groundwaters of the state." The General Court further specified that DES must "formulate a policy relating to long-term trends affecting the purity of the surface waters or groundwaters of the state." RSA 485-A:4, XIV. As a basis for establishing such a policy addressing impacts to water quality, DES must sample and analyze the State's waters on an ongoing basis. See id. (DES must conduct "a continuing program of sampling and subsequent chemical or biological analysis, or both, … to establish patterns and reveal long-term trends [in water quality].") (emphasis added).

With respect to the Great Bay Estuary, DES has compiled and analyzed thousands of data points relating to the levels of nitrogen, dissolved oxygen, chlorophyll-a, nuisance seaweed, eelgrass and water clarity over time in various regions of the estuary. See Affidavit of Theodore E. Diers at ¶4 (attached hereto). For more precision, DES has administratively split the Estuary into several segments known as "assessment units." See Diers Affidavit at ¶12.

B. Purpose and Use of Water Quality Standards

The General Court has set a goal that all surface waters attain and maintain certain levels of quality established by the State's Water Quality Standards (WQS). RSA 485-A:8. The State's surface waters are divided into water classifications: Class A and B. See RSA 485-A: 8; Env-Ws 1702.11. According to statute, Class B surface waters (which include the Great Bay

Estuary[3]) must be acceptable for fishing and swimming and must not receive sewage discharges that are "inimical to aquatic life or to the maintenance of aquatic life." RSA 485-A:8, II. In addition, DES has promulgated by rule additional standards applicable to Class B waters:

1. Class B waters shall contain no phosphorus or nitrogen in such concentrations that would impair any existing or designated uses, unless naturally occurring. Env-Wq 1703.14(b).
2. Existing discharges containing either phosphorus or nitrogen which encourage cultural eutrophication[4] shall be treated to remove phosphorus or nitrogen to ensure attainment and maintenance of water quality standards. Env-Wq 1703.14(c)
3. [All] surface waters shall support and maintain a balanced, integrated, and adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of similar natural habitats of a region. Env-Wq 1703.19(a).

These rules, along with the statutory language of RSA 485-A:8, II, are what are referred to as "narrative criteria" intended to be protective of the existing and designated uses of the water body.

Per RSA 485-A:8, the State has set as a goal that all surface waters attain and maintain the specified standards of water quality for their class. DES is required to enforce the applicable water quality standards for each waterbody and ensure that no person discharge any waste into any stream, lake, pond or estuary if the discharge lowers the quality of the receiving water so that the water body no longer meets the relevant standards. See RSA 485-A:12, I. In addition, DES

[3] All waters in the Great Bay Estuary are classified as a Class B surface waters. See 485-A:11.

[4] Cultural eutrophication is discussed in Part II (C), infra.

is authorized to issue permits to allow discharges of sewage or waste to surface waters. See RSA 485-A:13, I. According to the statute, DES may independently issue state permits with effluent limitations crafted to "abate pollution." Id. In practice, all discharges to surface waters in the state require a NPDES permit from the U. S. Environmental Protection Agency (USEPA). See Diers Affidavit at ¶20. Once the federal NPDES permit is issued, DES adopts it verbatim as a state permit under RSA 485-A:13, I. See id. at ¶21. DES does not independently issue permits for the discharge of sewage to state surface waters. See id.

C. Water Quality Standards and the Great Bay Estuary

DES has noted that it is widely accepted that excessive nitrogen levels in estuaries can cause eutrophication. See 2009 Guidance Document at 4; Diers Affidavit at ¶5. Eutrophication describes the process by which excess nutrient levels, including nitrogen, result in excessive plant growth and a decrease in dissolved oxygen in the water. See Env-Wq 1702.15; see also Upper Blackstone Water Pollution Abatement Dist. v. United States EPA[5], 2012 U.S. App. LEXIS 16145 at *4-5 (1st Cir. 2012) (hereinafter cited as Upper Blackstone) (describing the effects of cultural eutrophication). At some level of nitrogen concentration, the eutrophication process may result in a violation of the applicable narrative WQS for nutrients applicable to Class B waters. See Diers Affidavit at ¶6. This begs the question, however, of how much nutrient enrichment is too much? In other words, at what level of nitrogen will the waters of the Great Bay Estuary begin to:

(a) be inimical to the maintenance of aquatic life (RSA 485-A:8, II), and

(b) fail to support all designated uses, including the maintenance of a balanced, integrated, and adaptive community of organisms having a species composition,

[5] Upper Blackstone Water Pollution Abatement Dist. v. United States EPA, decided August 3, 2012, is attached for the court's reference.

diversity, and functional organization comparable to that of similar natural habitats of a region (Env-Wq 1703.14(b) and 1703.19(a))?

In order to use the narrative standards in the Great Bay Estuary, DES determined it needed a method for comparing the language in the codified standards on the one hand, to the data from the estuary it had compiled, on the other. See Diers Affidavit at ¶7.

D. Issuance and Use of 2009 Guidance Document as Translator

Prior to the late 2000's, DES did not have sufficient data regarding the Great Bay Estuary to develop a method to assess whether the Estuary's assessment units were meeting the State's narrative WQS applicable to nitrogen levels. See Diers Affidavit at ¶9. As a result, prior to 2009, DES had not made any determination as to whether the Great Bay Estuary's assessment units were meeting WQS for nutrients. See id. Beginning in 2002, DES began assessing all available data regarding the Great Bay Estuary, and undertook a program of analysis aimed at developing a method for translating the applicable nutrient WQS for use in the Estuary. See id. After several years of study and discussion with stakeholders, including with many of the Petitioners in this case, DES issued the 2009 Guidance Document. See id. at ¶10. The purpose of the document was to inform the public of the State's intentions as to how it would interpret the narrative nutrient standards in the Great Bay Estuary on a biannual basis. See id. The 2009 Guidance Document was not intended to be used for any other marine estuary in the State, for instance, Hampton Harbor. See id. In addition, by promulgating the numeric values in the 2009 Guidance Document as a non-binding policy statement, DES is able to respond quickly to new data and analysis, when it becomes available, by refining the numeric thresholds for all or part of the Estuary, if the new information or analysis so dictates. See id. at ¶8.

Through an analysis of all the available data, and with consideration of the thresholds established for nearby estuaries in other states, DES proposed certain numeric target values as thresholds for DES's own use in relating the data from the Great Bay Estuary to the narrative standards. See id. at ¶11. These numeric values are listed in Chart One, below.

CHART ONE

Designated Use / Regulatory Authority	Parameter	Threshold	Statistic[5]	Comments
Primary Contact Recreation [1,2] (Env-Wq 1703.14)	Chlorophyll-a	20 ug/L	90th percentile	This criterion has been used by DES for 305(b) assessments since 2004.
Aquatic Life Use Support – to protect Dissolved Oxygen [1,3] (RSA 485-A:8 and Env-Wq 1703.07)	Total Nitrogen	0.45 mg N/L	Median	
	Chlorophyll-a	10 ug/L	90th percentile	
Aquatic Life Use Support – to protect Eelgrass [1,4] (Env-Wq 1703.14)	Total Nitrogen	0.30 mg N/L 0.27 mg N/L 0.25 mg N/L	Median	The range of values for the criteria corresponds to the range of eelgrass restoration depths: 2 m, 2.5 m, and 3 m.
	Light Attenuation Coefficient (Water Clarity)	0.75 m^{-1} 0.60 m^{-1} 0.50 m^{-1}	Median	

See 2009 Guidance Document at 68. Typically, and as described in the State's Consolidated Assessment and Listing Methodology (CALM)[6], if the available data shows that a specific segment of the Great Bay Estuary fails to meet both the applicable nitrogen threshold and the threshold for either chlorophyll-a or water clarity, DES considers the segment as failing to meet the codified water quality standards. See 2012 CALM at 58-65; Affidavit of Philip R. Trowbridge at ¶6 (discussing the stressor response matrix). Importantly, DES does not consider the numeric values and the stressor response matrix in the CALM to be **binding** in deciding

[6] The 2012 CALM is available online at http://www.des.state.nh.us/organization/divisions/water/wmb/swqa/2012/documents/2012-calm.pdf

which segments of the Great Bay to list as failing to meet the codified water quality standards. See Diers Affidavit at ¶7, 11; Deposition of Theodore E. Diers[7] at page 42, lines 1-10; Exhibit Trowbridge-1 at 13, note 1 ("If conditions warrant, DES reserves the right to deviate from this matrix."). In fact, in 2012, DES deviated from the result generated by the numeric values and the stressor response matrix in making decisions regarding at least one assessment unit. The Lamprey River North Assessment Unit was listed as impaired despite data showing a median TN concentration of 0.444 mg/L (which is lower than the applicable 0.45 threshold) based on other data collected locally. See Diers Affidavit at ¶13.

To date, DES has only used the numeric values in the above chart for planning and assessment, not enforcement. See Diers Affidavit at ¶14. Specifically, DES has used the numeric values to assist DES staff in determining which parts of the Great Bay Estuary are meeting water the WQS with respect to nutrients. Id. Once the determination is made that the assessment units are not meeting the WQS for nutrients, they are included on a list[8] of "impaired" waters. Id. When DES includes a certain segment of the Great Bay Estuary on the list of impaired waters (by declaring that segment contains excessive nitrogen levels for example), it is stating that the segment no longer meets the narrative water quality standards applicable to Class B tidal waters, as set forth above. See Diers Affidavit at ¶16.

DES has not applied the numeric values in the 2009 Guidance Document to any person or entity[9]. See Diers Affidavit at ¶17. It has not required any person or entity to alter or limit its

[7] The relevant portions of the transcript of the deposition of Theodore E. Diers are attached hereto.

[8] This list is known as a 303(d) List, pursuant to Section 303(d) of the Federal Clean Water Act. See 33 U.S.C. § 1313(d). The 303(d) List is updated and submitted by the State to USEPA every two years for review, approval, and formal adoption by USEPA. See Diers Affidavit at ¶15.

[9] DES staff has produced a planning document entitled "Analysis of Nitrogen Loading Reductions for Wastewater Treatment Facilities and Non-Point Sources in the Great Bay Estuary Watershed" in 2010 that set forth options for meeting various nitrogen concentration targets in the Great Bay Estuary through point source and non-point source

discharge to the Great Bay Estuary based on the numeric values in the 2009 guidance document and has not brought any enforcement action against any person or entity based said numeric values. See Diers Affidavit at ¶17; see also Petitioners' Responses to the State's Requests for Admission # 2 and 4.[10] DES does not consider the numeric values to have the binding effect of law. See Diers Affidavit at ¶11,18. It uses the values only to assist in interpreting the statutory and regulatory water quality standards currently in effect. See Diers Affidavit at ¶18.

III. STANDARD OF REVIEW

A motion for summary judgment must be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. RSA 491:8-a, III. The court must "construe the pleadings, discovery and affidavits in the light most favorable to the non-moving party to determine whether the proponent has established the absence of a dispute over any material fact and the right to judgment as a matter of law." Porter v. City of Manchester, 155 N.H. 149, 153 (2007).

IV. ARGUMENT

A. No Petitioner Has Standing to Bring This Action

Petitioners have brought this action under RSA 541-A:24. To maintain an action under RSA 541–A:24, a petitioner must demonstrate that he or she has standing to do so. See Avery v. NH Dep't of Education, 162 N.H. 604, 607 (2011). "A declaratory judgment action brought pursuant to RSA 541–A:24 must, as a threshold matter, meet the requirements for standing under

---

TN reductions. See Diers Affidavit at ¶19; Deposition of Philip R. Trowbridge at page 278; Deposition of Theodore E. Diers at page 56. This planning document was not meant to be, and is not, enforceable against anyone. See Diers Affidavit at ¶19.

[10] Alone among the Petitioners, the City of Portsmouth has asserted that the State has required it to expand or alter its sewage treatment plant, or alter its operation, to reduce nitrogen in its effluent. See Portsmouth's Responses to the State's Requests for Admissions #2 and #4. However, the basis for these denials is its statements in interrogatory answers # 5 and #8 which discuss sampling, planning and design, not physical alteration of the plant or its effluent. See attached Responses to Interrogatories from the City of Portsmouth.

the general declaratory judgment statute set forth in RSA 491:22." Avery at 607-08 (internal quotations omitted). Accordingly, a party must allege "an impairment of a present legal or equitable right arising out of the application of the rule or statute under which the action has occurred." Id. at 608; see also Lake v. Sullivan, 145 N.H. 713, 716 (2001) ("In evaluating whether a party has standing to sue, we focus on whether the [party] suffered a legal injury against which the law was designed to protect." (quotation omitted)).

1. The Petitioners' Allegations of Present Right

The Petitioners allege that they hold the "right and privilege to discharge [treated sewage] into waters of the state." Petition at ¶ 12; see also Petition at ¶ 12 (legal status rights and/or privileges …with respect to their wastewater discharges."). To the extent this right exists, it is completely circumscribed by the federal Clean Water Act (CWA)[11]. Because the Great Bay Estuary is a water of the United States, it is illegal to discharge thereto any pollutant except in accordance with a permit issued pursuant to the CWA under 33 U.S.C. § 1342 (a "NPDES Permit"). See 33 U.S.C. § 1311(a) (regarding the illegality of unpermitted discharges). Each Petitioner currently holds a NPDES permit, issued by the United States Environmental Protection Agency (USEPA) which limits the amounts and types of pollutants that each Petitioner may discharge from its POTW. See Diers Affidavit at ¶20; Petitioners' Responses to Requests for Admission #s 5 and 6.

Petitioners also allege that they have certain "legal rights and/or privileges…in regulatory proceedings, including federal NPDES permit proceedings." See Petition at ¶ 36. This statement is conclusory and insufficient to establish the Petitioners' standing in this state court lawsuit.

[11] See earlier discussion of state discharge permits at section II.B, supra.

2. The Clean Water Act, Water Quality Standards and the NPDES Permit Program

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, was enacted in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As noted above, the CWA prohibits any person from discharging any pollutant into the waters of the United States from any point source, except as authorized by NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a). Most states have been delegated the authority to issues NPDES permits; however, New Hampshire has not sought and has not been granted such delegation.[12] See Diers Affidavit at ¶20. In New Hampshire, NPDES permits are issued by USEPA's Region 1 office. See id.

Under the CWA, NPDES permits must include effluent limits that are necessary to meet State water quality standards, or any applicable water quality standard established pursuant by USEPA. See 33 U.S.C. § 1311(b)(1)(C); see also 40 C.F.R. § 122.4(d)[13]; Upper Blackstone at *11-12. Federal regulations establish how USEPA determines whether specific permit conditions are necessary to achieve state water quality standards. See 40 C.F.R. § 122.44(d).

USEPA's permit writers first determine whether a particular point source may discharge pollutants at "at 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. 40 C.F.R. § 122.44(d)(1)(i); see also Upper Blackstone at *68. If USEPA determines that a discharge causes, has a 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. See 40 C.F.R. §§122.44(d)(1), 122.44(d)(5). USEPA is not absolved of this obligation because a State (like New Hampshire) has only narrative criteria for a

[12] See http://cfpub.epa.gov/npdes/statestats.cfm; and http://www.epa.gov/region1/npdes/issuers.html
[13] A copy of 40 CFR § 122.44 (2011) is attached hereto for the court's reference.

certain pollutant. Instead, USEPA must set effluent limits based on ***USEPA's*** best assessment of the appropriate numeric equivalent of the narrative standard. See 40 C.F.R. § 122.44(d)(1)(vi); American Paper Inst. v. United States EPA, 996 F.2d 346, 353 (D.C. Cir. 1993) (denying challenge to 40 C.F.R. § 122.44(d)(1)(vi) and upholding EPA's authority to interpret States' narrative criteria in issuing NPDES permits). See also Upper Blackstone at *23. In making this assessment, USEPA may, but is not required to, use any draft or proposed numeric criteria developed by the State. See id.; see also Upper Blackstone at note 23 and accompanying text (listing the different sources of information consulted by USEPA in setting a nitrogen limit in the treatment plant's NPDES permit).

Once issued by USEPA in final form, a NPDES permit may be appealed to the Environmental Appeals Board (EAB) at USEPA. 40 C.F.R. § 124.19. If a request for EAB review is filed, the contested permit conditions are administratively stayed pending final agency action. 40 C.F.R. § 124.16(a). Once the EAB issues a decision, the permittee may seek judicial review of the permit in the appropriate circuit court of appeals. 33 U.S.C. § 1369(b)(1)(F).

Similarly, a state discharge permit issued under RSA 485-A:13, I, may be appealed to the N.H. Water Council. See RSA 485-A:19 and 21-O:14, I-a. The Water Council's decision is appealable to the N.H. Supreme Court. See RSA 21-O:14, III and RSA 541:6; cf. Appeal of Garrison Place Real Estate Inv. Trust, 159 N.H. 539, 541 (2009) (appeals of Wetlands Council decision).

3. The 2009 Guidance Document Has Not Impaired Any Petitioner's Rights

The issuance by DES of the 2009 Guidance Document, and DES's use thereof, has not injured the Petitioners. The Guidance document has had no effect on the rights alleged by the Petitioners. The 2009 Guidance Document merely establishes thresholds for the State's own use

in translating certain of the State's WQS for nutrients in the Great Bay Estuary. The promulgation of the WQS by themselves has had no effect on the Petitioners. See American Paper Inst., 996 F.2d at 350 ("Of course, the water quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits."). For the same reason, the issuance of the 2009 Guidance Document to assist DES in translating its own WQS has not abridged any right of the Petitioners. The State has not required any of the Petitioners to expand or alter their sewage treatment plants to address the nitrogen concentration in their discharges. See Diers Affidavit at ¶17; see also Petitioners Responses to the State's Requests for Admission # 2 and 4.[14] Hypothetically, if DES were to alter the Petitioners' existing permits issued under RSA 485-A:13, I, or take some other enforcement action against the Petitioners based on DES's interpretation of the WQS for nutrients, the Petitioners would have a right to appeal that decision of DES and challenge DES's basis therefor, including DES's use of the 2009 Guidance Document to the extent DES was guided by it in making its decisions. There mere existence of a policy document that DES has not used to the Petitioners' detriment is an insufficient basis for the Petitioners to challenge it in this proceeding.

Petitioners argue that the issuance of the 2009 Guidance Document, and the decision to propose to USEPA a § 303(d) list which listed as impaired certain assessment units within the Great Bay Estuary, mandated the "imposition of more restrictive effluent limitations under the Clean Water Act." See Petition at ¶ 10, 22. This is an inaccurate representation of the Clean Water Act. As explained above, USEPA is obliged to ensure that all NPDES permits for New Hampshire contain effluent limitations necessary to ensure compliance with all water quality standards applicable to the receiving water. Even if the 2009 Guidance Document had not been

[14] See note 10, supra.

released and even if New Hampshire did not list any assessment unit in the Great Bay Estuary as impaired, USEPA would have the same obligation with respect to the NPDES permits for the Petitioners' POTWs: to sufficiently restrict the discharges so that they do not cause or contribute to a violation of a New Hampshire Water Quality Standard. See Upper Blackstone at *23 (describing how USEPA used Massachusetts' and Rhode Island's narrative nutrient criteria to formulate numeric effluent limits in an NPDES permit for a POTW). Indeed, if DES or this court "rescinded" the 2009 Guidance Document, USEPA could not and would not ignore the information provided therein or, more importantly, the underlying data upon which the document is based. See 40 C.F.R. § 122.44(d)(1)(vi)(A) (providing that USEPA shall consider "other relevant information" in setting effluent limits in NPDES permits).

Conversely, the publication by DES of the 2009 Guidance Document has not altered the Petitioners' rights under their existing NPDES Permits. Each Petitioner's right to discharge pursuant to its NPDES permit has remained unchanged from June 2009 to the present. If and when these discharge limits are altered, they will be altered as a result of a decision by USEPA which may be appealed as described above.

The reasoning in Missouri Soybean Assoc. v. Missouri Clean Water Commission, 102 S.W. 3d 10 (Mo 2003)[15] is instructive in considering whether any Petitioner's rights have been affected. In that case, the Missouri Supreme Court affirmed a lower court's decision that Missouri's decision to list a certain water body on the 303(d) List of Impaired Waters was not a "rule." See id. at 14, 25. The court noted that by including a water body on the proposed 303(d) List to be submitted to USEPA, the "State has merely conducted an inventory of the waters in the state and compiled a list of those waters that fail to meet applicable water quality standards." Id. at 23. The court continued:

[15] This case is attached hereto for the court's reference. The quoted section is marked.

> A list of Missouri's impaired waters does not establish any "standard of conduct" that has the "force of law." The list does not command the appellants to do anything or to refrain from doing anything; no legal rights or obligations are created. By its definition, a rule must be of "general applicability." … Implicit in this concept is that something—the purported "rule"—will be applied to some as yet unnamed, unspecified group of people.

Id. (internal citation omitted). The court concluded that the proposed 303(d) List was not a rule as it would "not be used or applied to the appellants in any future proceeding to determine whether or not they have violated a norm embodied in said list." Id. As is the case in the Petitioners' action at bar:

> the list identifies the waters in the state that are impaired and is submitted to the federal government for review and approval or disapproval. The mere nomination of these waters has **no effect on the appellants' rights**.

Id. (emphasis added).

In sum, DES has merely described what it believes to be the ecological attributes of a water body – a water body which the State holds in trust for the public. Specifically, it has determined that, for the Great Bay Estuary body, nitrogen levels beyond a certain threshold have the potential to damage aquatic life. There is nothing that prohibits an agency, acting on behalf of the State, from analyzing its own water body and making a factual assertion about that water body.

Because no Petitioner has established a basis for standing under the test set forth in Avery, the State is entitled to a judgment in its favor as a matter of law.

B. The State is Entitled to Summary Judgment in This Matter Because the Actions of DES Cited in the Petition Did Not Violate RSA Ch. 541-A.

To prevail on summary judgment, the State must show that there are no material facts in dispute and that the law requires judgment in the State's favor as a matter of law. Because the 2009 Guidance Document does not affect any party's rights and is not binding on anyone,

including the State, the publication and use of the 2009 Guidance Document did not violate the Administrative Procedures Act, RSA Ch. 541-A.

1. A Non-Binding Statement of Policy That Is Not Generally Applicable Is Not a Rule.

Under New Hampshire's Administrative Procedure Act, RSA Ch. 541-A, a rule is distinguished from a non-binding statement of policy in RSA 541-A:1, XV. Per that statute, a rule is a:

> regulation, standard, form … or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency, whether members of the general public or personnel in other agencies.

RSA 541-A:1, XIV. Not every statement or pronouncement made by an agency is a rule, however. See In re Daly, 129 N.H. 40, 41 (1986) ("[E]very policy of the personnel department is not equivalent to a "rule," with the concomitant necessity to comply with specific rulemaking procedures."). The language of RSA Ch. 541-A specifically allows agencies to issue policy statements that may be used by the agency without undergoing the formal rulemaking procedures provided by RSA 541-A:3 and 541-A:6 to A:14. Specifically, RSA 541-A:16, II requires that each agency "[m]ake available to the public all written statements of policy or interpretations, **other than rules**, formulated or used by the agency in the discharge of its functions." (emphasis added). In addition, RSA 541-A:1, XV provides that the term "rule" does not include:

> (a) internal memoranda which set policy applicable only to its own employees and which do not affect private rights or change the substance of rules binding upon the public, [or]
> (b) informational pamphlets, letters, or other explanatory material which refer to a statute or rule without affecting its substance or interpretation.

The New Hampshire Supreme Court has not had many occasions to treat the dividing line between rules and statements of policy. In Maxi Drug North v. NH DHHS, 154 N.H. 102

(2006), the court concluded that a temporary rate change applicable to all pharmacies seeking reimbursement was "plainly" a statement of general applicability, and therefore a rule. Id. at 105. In Bel Air Assocs. v. NH DHHS, 154 N.H. 228 (2006), the court decided that a change to the State's Medicaid State Plan that reduced reimbursements to nursing homes "effect[ed] substantive changes binding on persons outside the agency," and was therefore a rule. Id. at 233. Similarly, the court in Asmussen v. NH Dep't of Safety, 145 N.H. 578 (2000) noted that when a agency issues "directives" that bind persons outside the agency to "substantive changes in agency policies, procedures or practice requirements", the directives must be promulgated according to the rulemaking procedures of the APA. Id. at 595 (internal quotation omitted).

These three cases shed scant light on the issue before the court in this case: was the 2009 Guidance Document a non-binding policy statement or a rule disguised as a policy statement. One way to distinguish rules from statements of policy is that rules have the force and effect of law, while statements of policy do not. See RSA 541-A:22, II ("Rules shall be valid and binding on persons they affect, and shall have the force of law…"), see also Petition of Mooney, 160 N.H. 607, 611-12 (2010) ("Rules and regulations promulgated by administrative agencies pursuant to a valid delegation of authority have the force and effect of law."); Chrysler Corporation v. Brown, 441 U.S. 281, 295 (1979) ("[P]roperly promulgated, substantive agency regulations have the force and effect of law."); Pacific Gas & Electric Co., v. Federal Power Commission, 506 F.2d 33, 38 (D.C. Cir. 1974) (A rule, in contrast to a statement of policy, must "establish[] a standard of conduct which has the force of law."); compare Downeast Energy Corp. v. Fund Ins. Review Bd., 756 A.2d 948, 953 (Me. 2000) ("An agency may, however, provide guidance for its employees and the public without adopting the guiding materials as

rules, as long as those materials are not intended to have, and are not given, the force and effect of law.")

This distinction is well developed in Pennsylvania. The courts there have distinguished between rules and statements of policy by stating that "a person may be charged with a violation of a statute or regulation, but not with a violation of a statement of policy. See Borough of Bedford v. Commonwealth, 972 A.2d 53, 61 (Pa Commw. 2009). The court in Bedford noted that "[i]t is always the agency's burden to convince the tribunal that its interpretation of the statute or regulation it seeks to enforce is correct, whether or not that interpretation has ever been promulgated in a statement of policy. Id. This self-evident proposition is consistent with New Hampshire precedent and can be adopted by this court.

2. The 2009 Guidance Document and the Numeric Values Therein Are Not Rules.

a. The 2009 Guidance Document does not have the force and effect of law.

DES is required by statute to investigate the quality of the state's waters through a continuing program of sampling and analysis. RSA 485-A:4. It is also required to assess whether the condition of each water body is sufficient to meet the standards set forth in statute and regulation. Having compiled a large data set regarding the water quality of the Great Bay Estuary, it was entirely reasonable for DES to establish and issue guidelines for its own use in ensuring a transparent and consistent method for comparing the collected data to the narrative standards concerning nutrients applicable to the Estuary.[16] However, these guidelines, described in the 2009 Guidance Document and the CALM, do not, and were not intended to, have the force and effect of law. They certainly do not have any application to the Petitioners. No Petitioner,

[16] RSA 485-A:6 directs DES to issue rules in a large number of matters encompassed by RSA Ch. 485-A. However, RSA-485-A:6 does not direct DES to issue rules as to how it should interpret the narrative descriptions of the minimum characteristics of Class B waters in RSA 485-A:8, II. Cf. Stuart v. State, 134 N.H.702, 705 (1991) (promulgation of rules not necessary to carry out what statute demands on its face).

and no other person, may be cited for "violating" the 2009 Guidance Document or the numeric values therein. As described in the Diers Affidavit, the only purpose for which DES has used the 2009 Guidance document is to assist it in determining whether segments of the Great Bay Estuary are meeting the applicable narrative criteria in the State's water quality standards, or not. The 2009 Guidance Document simply does not have the force and effect of law which would require formal rulemaking under RSA 541-A. See King v. Gorczyk, 175 Vt. 220, 223-4 (2003) (formal rulemaking not required to implement guidelines that do not alter substantive legal rights).

b. The 2009 Guidance Document is not generally applicable.

As described in the Diers Affidaivt, the 2009 Guidance Document and the numeric values therein only apply to the assessment units of the Great Bay Estuary, and not to any other water body in the State. See 2009 Guidance Document at 1 (DES "has developed numeric water quality criteria for the Great Bay Estuary."). In comparison, the rate change reviewed in Maxi Drug North, 154 N.H. at 105, applied to all pharmacies seeking reimbursement. This was a basis for the court's decision that the rate changes were a rule of general applicability. Id.

c. The 2009 Guidance Document is not binding on DES, nor on the Petitioners.

It is well-established in New Hampshire that administrative agencies must follow their own regulations. See Appeal of Town of Nottingham, 153 N.H. 539, 554-5 (2006). Agency actions which violate the rules are invalid. See, e.g., Hunt v. Personnel Comm'n, 115 N.H. 713, 716-17, 349 A.2d 605, 608 (1975) (finding a discharge in violation of applicable personnel regulations to be invalid). However, when an administrative agency issues a statement of policy which, by its terms, gives the agency leeway in how to use the policy, the agency cannot violate it. In this case, DES retains significant discretion in its use of the thresholds listed in the 2009

Guidance Document. Specifically, DES has stated that it reserves the right to deviate from the stressor-response matrix that utilizes the numeric thresholds from the 2009 Guidance document. A pronouncement that contains such a qualification is not rule. In addition, as explained above, DES has deviated from the output of the matrix in at least one occasion, finding an assessment unit of the Estuary impaired despite data showing the nitrogen concentration to be below the relevant threshold.

The 2009 Guidance Document was meant to guide DES, not bind the Petitioners. It contains nothing that forces the Petitioners to act in a certain way or refrain from acting in a certain way. It does not limit or regulate the effluent from Petitioners' POTWs. Because it does not "establish[] a standard of conduct" to which the Petitioners must conform, the 2009 Guidance document should not be deemed a rule. Pacific Gas & Electric Co., 506 F.2d at 38.

The State acknowledges that the Petitioners believe that DES has chosen invalid and unsupported numeric values to translate the numeric WQS for nutrients in the Great Bay Estuary. The Petitioners also have alleged that, as a result of DES's flawed interpretation of New Hampshire's water quality standards, USEPA will issue NPDES permits to each Petitioner that will require each Petitioner to expend large sums of money to meet new effluent limitations for sewage treatment plant discharges containing nitrogen. See Petition at ¶ 35 and generally. This argument is insufficient to transform an internal DES statement of policy into a rule requiring formal promulgation per RSA Ch. 541-A.

If the court grants this motion and issues a ruling in the State's favor, the Petitioners would not be left without a path to challenge what the Petitioners perceive as DES's flawed science and analysis. If and when USEPA issues new, more restrictive NPDES permits to the Petitioners, each Petitioner will have the right to challenge its NPDES permit issued by USEPA

at the Environmental Appeals Board. In addition, each Petitioner may appeal any state discharge permit, issued under RSA 485-A:13, for the Petitioners' POTWs. In each of these appeals, each Petitioner may attack the assumptions and analyses that form the basis of the numeric values describe in the 2009 Guidance Document. The Document and the numeric thresholds will be deemed to be not binding, and will carry only the weight their "inherent persuasiveness commands." Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980). See also Pacific Gas and Electric Company v. Federal Power Commission, 506 F.2d 33, 38 (D.C. Cir. 1974) ("When [an] agency applies [a] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.").