

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

DOCKET NO. 2020-0058

PLYMOUTH VILLAGE WATER & SEWER DISTRICT, RESOURCES
MANAGEMENT, INC., CHARLES G. HANSON, AND 3M COMPANY

V.

ROBERT R. SCOTT AS COMMISSIONER OF THE NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES

**BRIEF OF AMICI CURIAE
NATURAL RESOURCES DEFENSE COUNCIL, INC. AND
CONSERVATION LAW FOUNDATION, INC.
IN SUPPORT OF DEFENDANT**

Counsel for Natural Resources
Defense Council, Inc.

Amy Manzelli, Esq. (No. 17128)
BCM Environmental & Land Law,
PLLC
3 Maple Street
Concord, NH 03301
manzelli@nhlandlaw.com
(603) 225-2585

Robert Gustafson, Esq. (admission
pro hac vice pending)
Natural Resources Defense Council
1152 15th Street NW Suite 300
Washington, DC 20005
rgustafson@nrdc.org
202-717-8357

Counsel for Conservation Law
Foundation, Inc.

Thomas F. Irwin, Esq. (No. 11302)
Conservation Law Foundation
27 North Main Street
Concord, NH 03301
tirwin@clf.org
(603) 225-3060

April 29, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 3

QUESTION PRESENTED 5

STATUTORY AND REGULATORY PROVISIONS 6

STATEMENT OF THE CASE AND FACTS 7

SUMMARY OF ARGUMENT..... 12

ARGUMENT 13

I. Until the preliminary injunction is reversed, hundreds of thousands of people and DES will be deprived of critical information about PFAS levels in New Hampshire’s public drinking water..... 13

II. The preliminary injunction is depriving hundreds of thousands of people of information they need to better protect themselves 17

III. The trial court erred by ignoring the substantial public benefits of the testing provisions..... 20

CONCLUSION 23

ORAL ARGUMENT..... 23

CERTIFICATE OF SERVICE..... 24

CERTIFICATE OF WORD COUNT 25

TABLE OF AUTHORITIES

Cases

| | |
|---|--------|
| <i>DuPont v. Nashua Police Dep't</i> , 167 N.H. 429 (2015)..... | 13 |
| <i>Johnson v. Shaw</i> , 101 N.H. 182 (1957)..... | 21 |
| <i>Kukene v. Genualdo</i> , 145 N.H. 1 (2000)..... | 20 |
| <i>Meredith Hardware, Inc. v. Belknap Realty Trust</i> , 117 N.H. 22 (1977)..... | 22 |
| <i>Pike v. Deutsche Bank Nat'l Trust Co.</i> , 168 N.H. 40 (2015)..... | 21 |
| <i>Thomas Tool Servs., Inc. v. Town of Croydon</i> , 145 N.H. 218 (2000)..... | 9 |
| <i>Unifirst Corp. v. City of Nashua</i> , 130 N.H. 11 (1987)..... | 13, 20 |
| <i>Vigitron, Inc. v. Ferguson</i> , 120 N.H. 626 (1980)..... | 20 |

Statutes

| | |
|-------------------|----|
| RSA 485:1-a | 15 |
| RSA 485:3 | 20 |
| RSA 485:41 | 17 |
| RSA 485:58 | 20 |

Rules

N.H. Admin R. Env-Dw 103.11 15
N.H. Admin R. Env-Dw 103.38 15
N.H. Admin R. Env-Dw 705.06 14, 18
N.H. Admin R. Env-Dw 708.09 19
N.H. Admin R. Env-Dw 712.23-24 17
N.H. Admin R. Env-Dw 712.25 14
N.H. Admin R. Env-Dw 712.27 17
N.H. Admin R. Env-Dw 712.29 19
N.H. Admin R. Env-Dw 719.02-07 17
N.H. Admin R. Env-Dw 801.03-08 19
N.H. Admin R. Env-Dw 801.11 19
N.H. Admin R. Env-Dw 801.17 19
N.H. Admin R. Env-Dw 808.27-30 19
N.H. Admin R. Env-Dw 811.02-03 17
N.H. Admin R. Env-Dw 811.09 17

QUESTION PRESENTED

Whether the record fails to support a showing of harm sufficient to support a preliminary injunction with respect to either the Maximum Contaminant Levels or the Ambient Groundwater Quality Standards (Defendant's Question No. 6).¹

¹ Parties' Jan. 24, 2020, Joint Interlocutory Appeal Stmt. at 6 ¶ 6.

STATUTORY AND REGULATORY PROVISIONS

The appendix to this brief includes the text of all cited statutory and regulatory provisions, as well as full-text copies of the rules preliminarily enjoined by the trial court and the legislation that prompted Defendant New Hampshire Department of Environmental Services to develop the rules: Laws 2018, ch. 368 (SB 309, *introduced* Jan. 2018, signed by Gov. Sununu July 10, 2018). *See* Appendix (“Apx.”) at 461.

STATEMENT OF THE CASE AND FACTS

The rules enjoined by the trial court follow years of work by Defendant New Hampshire Department of Environmental Services (DES) and the Legislature to address a matter of unprecedented and broad public concern: per- and polyfluoroalkyl substance (PFAS) pollution that threatens public health.² PFAS chemicals remain in the environment for years, can build up in the human body over time, and are highly toxic.³ Drinking water is a particularly significant source of exposure to PFAS chemicals for those whose water is contaminated and untreated,⁴ and infants, children, and older adults are particularly threatened by PFAS contamination in drinking water. *See infra* Argument I. DES's rulemaking record indicates that many of New Hampshire's public water sources are or are likely to be contaminated. *Id.*

In addition to setting numeric standards for four PFAS chemicals in drinking and ambient groundwater, DES's rules require public water

² *See generally* Nov. 26, 2019, Order at 10-11 (noting that DES was working to redress PFAS contamination as early as 2016); Laws 2018, ch. 368 (SB 309, *introduced* Jan. 2018, signed by Gov. Sununu July 10, 2018), Apx. at 331-337; Affidavit of Sean Mahoney ("Mahoney Aff."), ¶ 4, Apx. at 4.

³ DES June 2019 Technical Background Rpt. ("DES Tech. Rpt."), included as Attachment 1 in Exhibit 2 to Plaintiffs' Sept. 30, 2019, Complaint ("Pls.' Compl.") at 2, Apx. at 242; Natural Resources Defense Council (NRDC) Apr. 2019 comment letter to DES on PFAS rulemaking, Affidavit of Erik D. Olson ("Olson Aff."), Ex. A ("NRDC Ltr."), at 6, 10, Apx. at 24, 28.

⁴ NRDC Apr. 2019 science report on PFAS, referenced in and attached to NRDC Apr. 2019 comment letter to DES, Olson Aff., Ex. B ("NRDC Rpt."), at 14-15, Apx. at 51-52.

systems across the state—which collectively serve more than 800,000 people—to conduct routine tests for those chemicals and share the results with DES and the public. *See infra* Argument I-II. But for the preliminary injunction, testing would have started in the fourth quarter of last year. *Id.* Testing and reporting are the only steps public water systems must take with respect to PFAS, in the first year following the rules’ effective date.⁵

The testing provisions are a critical part of the regulatory scheme the trial court preliminarily enjoined. Without routine testing, it will be difficult for the hundreds of thousands of people served by the regulated systems to know how best to protect themselves from PFAS exposure. *See infra* Argument I-II. Other important provisions, such as heightened warning and treatment requirements for PFAS contamination, either will not take effect or are very unlikely to apply until each system has completed a year’s worth of PFAS tests. *See infra* Argument II.

The trial court did not consider the public’s substantial interests in the testing provisions of DES’s rules before preliminarily enjoining them. *See generally* Nov. 26, 2019, Order. Its order refers only to the prospect that Plaintiffs would be harmed without an injunction, because “Plaintiffs will never be able to recoup the expenses they incur” from DES. *Id.* at 23. The order does not specify those expenses, and the argument and testimony preceding it show that the only short-term expenses at issue were the

⁵ *See generally* final text of PFAS rules adopted to be effective Sept. 30, 2019, Exhibit 1 to Plaintiffs’ Sept. 30, 2019 Complaint (“Pls.’ Compl.”), Apx. at 402-414; *see also infra* Argument II.

modest costs plaintiff Plymouth Village Water and Sewer District—a regulated system—would incur to start quarterly testing.⁶

Because of the preliminary injunction, more than 800,000 people—including more than 200,000 particularly vulnerable infants, children, and older adults—are being deprived of valuable information about PFAS levels in their drinking water, information they could use to protect themselves from exposure. *See infra* Argument I-II.

Amici curiae Natural Resources Defense Council (NRDC) and Conservation Law Foundation (CLF) file this brief, with the parties’ consent, to highlight the substantial public interests the trial court ignored when it preliminarily enjoined the testing provisions. *See Thomas Tool Servs., Inc. v. Town of Croydon*, 145 N.H. 218, 221 (2000), as amended (Feb. 1, 2001) (amici may “make useful suggestions to the court on matters of law which may escape the court’s attention”).⁷ Amici participated in DES’s development of the rules and have members who, but for the

⁶ Plaintiffs and the court characterized these testing costs as modest. Oct. 1, 2019, Hearing Tr. at 20:20-22:22 (colloquy between Plaintiffs’ counsel and court) (identifying Plymouth’s costs to begin testing as the only immediate cost to Plaintiffs and “not a huge amount of money” (Plaintiff’s counsel’s words) or “not a great deal of money” (court’s words)); *see also* Oct. 16, 2019, Pls.’ Reply to Def.’s Obj. to Mot., Ex. 1, ¶ 24, Apx. at 454 (affidavit of Plymouth superintendent stating that “the first year under the PFAS rules will involve sampling only”). DES agreed, and offered to pay them. *See* Oct. 18, 2019, Hearing Tr. 60:22-61:5; DES Oct. 10, 2019, Obj. to Mot. for Prelim. Inj. (“DES Oct. 10 Br.”), Apx. at 418 (estimating Plymouth’s quarterly testing costs).

⁷ Amici seek to focus the Court’s attention on the rules’ testing and reporting provisions, which the trial court overlooked. Amici believe the injunction was unwarranted and assume that DES will brief the merits issues.

preliminary injunction, would now have the benefit of routine testing and reporting on PFAS levels in their drinking water.⁸

Amicus NRDC is an international nonprofit environmental organization with more than 350,000 members, including more than 2,500 people who live in New Hampshire.⁹ NRDC has worked for decades to protect people from toxic water pollution in drinking water, including by leading efforts to strengthen the federal Safe Drinking Water Act and by encouraging New Hampshire and other states to fill gaps in federal drinking-water rules by adopting their own standards for contaminants including PFAS.¹⁰

CLF is a New England-wide environmental advocacy organization with offices in New Hampshire, Massachusetts, Maine, Vermont, and Rhode Island and more than 5,000 members, including 665 in New Hampshire.¹¹ CLF has a long history of working to protect water resources and the public from toxic pollution, and has been active in New Hampshire and across the region in addressing the public health threat posed by PFAS.¹² One of CLF's members, Merrimack Citizens for Clean Water, similarly participated in DES's rulemaking process and has been active in

⁸ See DES's compiled public comments on PFAS rulemaking, <https://www4.des.state.nh.us/nh-pfas-investigation/wp-content/uploads/REVISED-Public-comments-with-attachments-1.pdf> (last visited Apr. 28, 2020), at .pdf pages 387 through 506 (NRDC) and 552 to 566 (CLF).

⁹ Olson Aff. ¶ 4, Apx. at 10.

¹⁰ NRDC Ltr., Olson Aff., Ex. A, Apx. at 18-36; Olson Aff. ¶¶ 10-11, Apx. at 11-12.

¹¹ Mahoney Aff. ¶ 2, Apx. at 3.

¹² *Id.* ¶¶ 3-5, Apx. at 3-5.

addressing the threats to the Merrimack community caused by PFAS contamination—including contamination of public and private wells—associated with air emissions from the Saint-Gobain Performance Plastics Facility.¹³

¹³ *Id.* ¶ 6 & Ex. A, Apx. at 5-8.

SUMMARY OF ARGUMENT

Preliminary injunctive relief, where warranted, preserves the status quo pending a final determination of the case on the merits. The only thing the rules the trial court preliminarily enjoined require public water systems to do, for the first year the rules are in effect, is to start testing for PFAS and share the results with DES and their customers. The regulated systems supply drinking water to more than 800,000 people, more than 200,000 of whom are in age groups DES has recognized are especially vulnerable to PFAS in drinking water. The limited data available suggest that PFAS chemicals are present in many of the regulated water systems, but—because the testing requirements have been suspended—no one knows precisely how many or which ones.

The trial court's preliminary injunction order does not address the public's interests in letting the rules stand, let alone purport to find that the minimal short-term costs of testing outweigh those public interests. This is error: the court could not lawfully enjoin the rules without considering the substantial and overriding public interests in requiring systems to begin routine PFAS testing. The trial court's error is already depriving hundreds of thousands of people of information they could be using to better protect themselves from exposure. It is also deferring heightened warning and treatment requirements for systems whose PFAS levels (once tested) turn out to violate DES's numeric standards or otherwise threaten public health. This Court should reverse and reinstate the rules as soon as possible.

ARGUMENT

Preliminary injunctive relief is a provisional remedy that preserves the status quo pending a final determination of the case on the merits. *See DuPont v. Nashua Police Dep't*, 167 N.H. 429, 434 (2015) (quotations omitted). Before enjoining the rules, the trial court was required to balance the public's interests in leaving the rules in place against the potential costs to Plaintiffs of testing, during the pendency of the case. *See Unifirst Corp. v. City of Nashua*, 130 N.H. 11, 13-15 (1987). The court erred by ignoring the substantial public benefits of the testing provisions.

I. Until the preliminary injunction is reversed, hundreds of thousands of people and DES will be deprived of critical information about PFAS levels in New Hampshire's public drinking water

As DES recognized in developing the rules the trial court has enjoined, PFAS pollution poses serious threats to human health. DES found that the health effects associated with exposure include liver toxicity; suppressed immune response to vaccines; impaired female fertility; changes in thyroid and sex hormone levels; early-life growth delays; neurobehavioral effects; and potentially testicular and kidney cancer risk.¹⁴

DES also understood that infants, children, and older adults are especially vulnerable to PFAS contamination in their drinking water.

¹⁴ DES Tech. Rpt. at 1, Apx. at 241. Federal and international agencies have also linked exposure to some regulated PFAS to increased cancer risks: The World Health Organization's International Agency for Research on Cancer classifies PFOA as a possible human carcinogen, and EPA's Office of Water has found suggestive evidence that both PFOA and PFOS have carcinogenic potential in humans. NRDC Rpt. at 19, Apx. at 56.

Infants and children are disproportionately exposed to this contamination because they drink more water relative to their body weight than adults.¹⁵ Additionally, infants and children have increased sensitivity to PFAS due to their rapid growth and development.¹⁶ Finally, both children and older adults tend to spend more time at home and depend more on residential drinking water sources than people in other age groups.¹⁷

The rules enjoined by the trial court require more than one thousand of the state’s public water systems—including municipal, school and factory systems—to regularly test for PFAS and provide the results to the public.¹⁸ *See infra* Argument II (detailing the testing and reporting requirements). Those systems collectively serve more than 800,000

¹⁵ DES June 2019 Summary of Public Comments and Responses (“DES Comment Responses”), included in Ex. 2 to Pls.’ Compl., at 11, Apx. at 219; NRDC Rpt. at 13, Apx. at 50. Infants can be exposed through placental transfer, consumption of breast milk, and water-based formula, and are “considered to be the most sensitive population to potential adverse health effects.” DES Comment Responses at 11, Apx. at 219.

¹⁶ *Id.*; NRDC Rpt. at 13-14, Apx. at 50-51.

¹⁷ *Id.*

¹⁸ The testing provisions apply to community water systems and to non-community non-transient water systems. *N.H. Admin. R. Env-Dw 705.06(a)*. These categories encompass about 1,100 systems. *See* DES 2018 Annual Compliance Report on Public Water System Violations (“2018 Compliance Report”) 2 (issued July 1, 2019), available at <https://www.des.nh.gov/organization/commissioner/pip/publications/wd/documents/r-wd-19-23.pdf> (last visited April 28, 2020) (705 active community systems and 455 active non-transient non-community water systems as of December 31, 2018). Systems must test for PFAS at entry points to their distribution system, and/or points that are representative of each water source, following any relevant treatment. *See* Env-Dw 712.25.

people.¹⁹ About 158,000 of those served are older than sixty-five, and 41,000 are younger than five (approximately 7,000 of whom were born in the last year).²⁰

Although across-the-board testing has not begun because of the preliminary injunction, the limited data available suggest that many of the

¹⁹ The community systems serve more than 875,000 people, and the non-transient non-community systems serve more than 84,000 people. *See* 2018 Compliance Report at 2 (showing 876,074 people served by community water systems as of December 31, 2018); Olson Aff. ¶¶ 18-20 & Ex. C, Apx. at 13-14 & 140-147 (compiling and summarizing information from DES's public website showing the number of people served by non-transient non-community systems).

Community systems have at least 15 service connections used by year-round residents and/or regularly serve at least 25 year-round residents and include municipal systems. RSA 485:1-a, I; 2018 Compliance Report at 2; *see also* Env-Dw 103.11 (referencing RSA 485:1-a, I). Non-community non-transient water systems serve at least 25 of the same people over 6 months of the year and include school and factory systems. RSA 485:1-a, XI; 2018 Compliance Report at 2; *see also* Env-Dw 103.38 (referencing RSA 485:1-a, XI). Some people may get drinking water from more than one regulated system (for example, from a community system at home, and from a non-transient non-community system at school or work).

²⁰ These counts are for the population served by community systems. *See* Olson Aff. ¶¶ 27-28 & Ex. G, Apx. at 16 & 157-160 (applying census and Centers for Disease Control data on what proportion of the people in New Hampshire are older than 65 (18.1%), younger than 5 (4.7%), and born in the last year (0.8%) to the latest reported number of people served by community systems 876,074). Non-transient non-community systems also supply water to a substantial number of people, including those in the most vulnerable age groups. *See id.* ¶¶ 18, 21-26 & Exs. D-F, Apx. at 13-16 & 148-156 (summarizing data showing that regulated systems supply water to about 6,678 young children and staff at 102 daycare centers; 56,680 students and staff at 171 schools; and 3,668 staff and residents at 46 senior housing facilities).

regulated water systems are threatened by PFAS contamination. DES's rulemaking record includes PFAS test data for just over 400 of New Hampshire's public water sources, a small fraction of the thousands that supply the state's public water systems.²¹ The data show that all four of the PFAS chemicals regulated by DES were found in multiple sources; PFOS and PFHxS were found in more than ten percent; and PFOA was found in more than a third.²² DES has also estimated that about half of the state's public water systems are contaminated with PFOA, and that one-fifth are contaminated with PFOS.²³ But because of the trial court's injunction, current, comprehensive, and system-specific information about the extent and severity of the PFAS contamination is still not available to DES, or to hundreds of thousands of people who drink water from the regulated systems. *See infra* Argument II (describing the testing and reporting elements of the enjoined rules).

²¹ DES Jan. 2019 Summary Rpt. ("DES Summary Rpt."), Ex. 5 to Pls.' Compl., at 9-10, Apx. at 321-322 (compiling data for 402 of 1,880 sources of drinking water that supply non-transient water systems); Dec. 19, 2017 Fiscal Note to SB 309 as introduced, included in Ex. 5 to Pls.' Compl., Apx. at 399 (citing DES's estimate that about 4,200 public water sources would be subject to routine testing if the state adopted MCLs for PFAS).

²² DES Summary Rpt. at 10, Apx. at 322 (summation of columns showing number of systems with detections for each chemical: 45 systems, or 11%, with a PFHxS detection; 12 systems, or 3%, with a PFNA detection; 66 systems, or 16%, with a PFOS detection; and 149 systems, or 37%, with a PFOA detection).

²³ DES Summary Rpt. at 79 (Appendix 9 to Rpt.), Apx. at 391 (summation of columns showing projected number of water systems with detectable PFAS concentrations: 49.7% of systems with PFOA; 20.3% of systems with PFOS).

II. The preliminary injunction is depriving hundreds of thousands of people of information they need to better protect themselves

DES's rules require regulated systems to test for PFOA, PFOS, PFNA, and PFHxS for four consecutive quarters after the effective date, and to test quarterly, annually, or triennially thereafter (depending on measured contaminant levels).²⁴ Env-Dw 712.23-24, 27. Testing was to begin in the fourth quarter of 2019. Env-Dw 712.23(a); DES Oct. 10 Br. at 4. By the time this appeal is fully briefed, the preliminary injunction will have deprived the public and DES of nine months' worth of test data.

This delay matters not only because it may defer improved treatment and remediation measures, but because it deprives people of current information about PFAS levels in their drinking water that they could use to better protect themselves. Regulated systems must share their test results with DES, Env-Dw 719.02-07, which must make the results publicly accessible.²⁵ Systems must also note any PFAS detections in required annual reports to users, which are known as consumer confidence reports and are due July 1st of each calendar year. *See* Env-Dw 811.02(b), (d)(6), & (e), 811.03(a), 811.09(a)(1).²⁶

²⁴ Systems that detect no regulated PFAS in the first two quarters of initial testing may obtain a waiver from the second two quarters from DES and move to a triennial cycle. *See* Env-Dw 712.23(c)-(e), 712.24(a).

²⁵ RSA 485:41, VII. DES includes this data in a searchable online database, available at <https://www4.des.state.nh.us/DESOnestop/BasicSearch.aspx> (last visited Apr. 28, 2020).

²⁶ These annual reporting requirements apply to community systems (or "CWS"), the category that serves the largest number of people. *See supra* note 19.

People who learn that a regulated PFAS chemical has been found in their public drinking water may choose to switch to bottled water that has been tested and confirmed to be PFAS-free, or to do supplemental home treatment of their tap water. They may push their system operators, DES, and elected officials to make more concerted efforts to protect and treat public drinking water. They may encourage their friends and neighbors to take similar steps. But without regular test data from their water systems, it will be difficult for people to assess whether any of these steps are warranted. They must either risk unwittingly exposing themselves and their loved ones to PFAS in their tap water, or invest in personal protective measures (such as bottled water purchases and home-based testing and treatment) that may not be needed, and that are far less efficient than the centralized public testing and treatment for which the rules provide.

Routine public testing and reporting benefit the public even where it turns out that no PFAS are detected in a water system. Consistent no-detect results may relieve anxiety among people who are worried about PFAS contamination in their tap water, and help those people avoid unnecessary investments in personal protective measures.

The testing delays caused by the preliminary injunction are particularly harmful to people served by systems where PFAS chemicals may already be present at levels that (once measured) exceed DES's numeric standards, or maximum contaminant levels (MCLs), for PFAS. *See* Env-Dw 705.06(b) (specifying MCLs for PFAS). By definition, those people are facing exposure to PFAS at levels DES has found are too high to

protect public health.²⁷ DES's regulations include special and extensive public warning provisions for systems that violate MCLs.²⁸ But they also require DES to use a full year's worth of PFAS test results to determine MCL compliance. *See* Env-Dw 712.29(b). This means that the longer testing is delayed, the longer it will be before the warning provisions take effect. Testing delays may also make it harder for DES to force systems with dangerous PFAS levels to upgrade their treatment or take other

²⁷ *See* DES Tech. Rpt. at 1, Apx. at 241 (finding that the MCLs are necessary to adequately protect people "at all life stages" from the negative health effects associated with chronic exposure to the regulated PFAS).

²⁸ Systems must notify users of MCL violations within 30 days. Env-Dw 708.09, 801.08, 801.11. Notices must be designed to reach everyone the system serves. *Id.* 801.08(b), 801.11(b). At a minimum, systems must deliver notices door-to-door or by mail, or (for non-community systems) post them in a conspicuous location. *Id.* 801.08(b), 801.11(b). When these methods are inadequate to reach all users, systems must supplement with additional methods, such as internet posting, email, newspaper publication, or delivery to community organizations. *Id.* 801.08(c), 801.11(c). For MCL violations that have significant potential to cause serious adverse effects on human health as a result of short-term exposure, systems must notify users within 24 hours, by broadcast media, publication in a daily newspaper, door-to-door delivery, posting in conspicuous locations, or reverse 911 telephone service. *Id.* 801.04(c), 801.05(k), 801.07(b).

Notices must describe each violation and the people it threatens, including any vulnerable subpopulations; advise users on what steps to take, including whether to use alternative water sources; and explain how and when the system will bring itself back into compliance. *Id.* 801.03. Notices must also specify the known health risks of drinking any PFAS for which a system has violated the MCL. *Id.* 808.27-30. If a system fails to issue a required notice, in circumstances that may pose a risk to public health, DES must issue the notice itself. *Id.* 801.17(a)(1).

measures to protect their users under New Hampshire Safe Drinking Water Act provisions that use the MCLs as a reference point.²⁹

In short, the longer the preliminary injunction stands, the more information on PFAS levels in public water systems DES and the public will lose, the harder it will be for people served by the systems to protect themselves from PFAS exposure, and the longer it will be before anyone knows which systems are in violation of DES's numeric standards.

III. The trial court erred by ignoring the substantial public benefits of the testing provisions

Before granting preliminary injunctive relief, courts must consider whether that relief would be in the public interest. *See Unifirst Corp.*, 130 N.H. 11, 13-15 (1987). They must also balance the harm the plaintiff may suffer without an injunction against the harm to other parties and the public of granting the injunction. *See Kukene v. Genualdo*, 145 N.H. 1, 4 (2000) (noting that injunctive relief “requir[es] the trial court to consider the circumstances of the case and balance the harm to each party if relief were granted”); *see also Vigitron, Inc. v. Ferguson*, 120 N.H. 626, 632 (1980) (“In its determination, the court must balance all of the equities”). This

²⁹ *See* RSA 485:58 (authorizing DES to order a system to repair, install, or operate purification equipment; notify users; conduct supplemental testing; and/or stop distributing water “if [DES] determines that a primary standard has [been] violated, or that, in its judgment, a condition exists in a public water system which will cause a violation of a primary standard and may result in a serious risk to public health”); *id.* 485:3, I(b)(1) (identifying MCLs as one component of primary standards); *see also* DES Oct. 10 Br. at 4, Apx. at 418 (noting in the context of plaintiff Plymouth that “further action may be required such as the installation of treatment” if the first full year of test data show that Plymouth is in violation).

Court reverses injunctions that are predicated on “an error of law, unsustainable exercise of discretion, or clearly erroneous findings of fact.” *See Pike v. Deutsche Bank Nat’l Trust Co.*, 168 N.H. 40, 45 (2015).

Despite acknowledging its duty to consider the public interest before granting an injunction, Nov. 26, 2019, Order at 4, the trial court failed to do so. The court alluded to the possibility that plaintiff Plymouth Village Water & Sewer District would incur some testing costs if the rules were left in place, but never acknowledged the benefits to the public of allowing the required testing to proceed, in Plymouth or any of the other more than one thousand regulated systems. *Supra* Stmt. of the Case (citing Nov. 26, 2019, Order). This was error. Without considering how the testing provisions benefit the public, the court could not account for the public’s interests in letting the rules stand, let alone decide that those interests were outweighed by the putative harms to Plaintiffs of denying a preliminary injunction.³⁰

Although this Court sometimes presumes that a trial court has made the subsidiary findings necessary to support its general ruling, no presumption is warranted when the hardships imposed by the injunction are evident. *See Johnson v. Shaw*, 101 N.H. 182, 188-89 (1957). The preliminary injunction is depriving hundreds of thousands of people of valuable information about PFAS levels in their drinking water and postponing other important protections that are predicated on public water

³⁰ The court made passing references to public health in the context of its decision to postpone the injunction’s effective date to give the parties time to decide whether to appeal. Nov. 26, 2019, Order at 2, 23. But it never cited the testing provisions of the rules, let alone acknowledged the public-health implications of suspending them.

systems' collection of test data. *Supra* Argument I-II. The public harms associated with continuing to defer routine PFAS testing in water systems across New Hampshire are evident, substantial, and growing by the day, and outweigh the modest near-term expenses Plaintiffs would incur to test. *Id.*; *supra* note 6. Had the trial court considered the public's interests in letting DES's rules stand, as the preliminary injunction test required, it could not reasonably have found that the equities weighed in favor of an injunction. This Court should accordingly reverse, not remand for further consideration. *See Meredith Hardware, Inc. v. Belknap Realty Trust*, 117 N.H. 22, 24-25, 27 (1977) (dissolving an injunction that was predicated on the trial court's legal error).

CONCLUSION

The Court should reverse the preliminary injunction and allow DES's PFAS rules to take effect without further delay.

ORAL ARGUMENT

Amici NRDC and CLF respectfully request 5 minutes for oral argument, but only if that time is not taken from the total time allotted to Defendant Department of Environmental Services.

Respectfully submitted April
29, 2020

Natural Resources Defense Council, Inc.

By: /s/ Amy Manzelli
Amy Manzelli, Esq. (No. 17128)
BCM Environmental & Land Law, PLLC
3 Maple Street
Concord, NH 03301
manzelli@nhlandlaw.com
(603) 225-2585

Robert Gustafson, Esq. (application for
admission *pro hac vice* pending, New
York Bar No. 5650874)
Natural Resources Defense Council
1152 15th Street NW Suite 300
Washington, DC 20005
rgustafson@nrdc.org
202-717-8357

Conservation Law Foundation, Inc. (CLF)

By: /s/ Thomas F. Irwin
Thomas F. Irwin, Esq. (No. 11302)
Conservation Law Foundation
27 North Main Street
Concord, NH 03301

CERTIFICATE OF WORD COUNT

As required by the Rules of the Supreme Court, I hereby certify that this Brief contains 4,365 words, exclusive of the cover page, table of contents, table of authorities, statutory provisions and rules section, signature block, certificate of service, and certificate of word count.

/s/ Thomas F. Irwin

Thomas F. Irwin, Esq. (No. 11302)
Conservation Law Foundation
27 North Main Street
Concord, NH 03301
tirwin@clf.org
(603) 225-3060