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Subject: HB 1766

The City Manager has requested that a brief outline of the legal issues which would be presented in the event the New Hampshire legislature adopts HB 1766 ordering the City and other members of the Coakley Landfill Group to construct and operate a pump and treat facility at the Coakley landfill. In order to accomplish that task expeditiously I recast below testimony presented on behalf of the Coakley Landfill Group to the House Environmental and Agriculture Committee. That Committee recommended that the bill be sent to interim study, but that recommendation was overridden by the full House.

"As testified to, the Coakley site is governed by two consent decrees. Both consent decrees were entered as orders of the U.S. District Court in New Hampshire, the most recent in 1999. Since that time, the potentially responsible parties (PRPs) have implemented and continue to implement the EPA and DES approved remedy. The consent decree was signed by the U.S. Department of Justice and Environmental Protection Agency (EPA) on behalf of the United States, the Department of Environmental Services (DES), and the defendants identified as PRPs by the EPA. HB 1766 is an attempt to modify the terms of the consent decree, which is not permitted by law. The bill, if enacted, would violate multiple legal principles and legal norms, including:

1. **Separation of Powers:** The New Hampshire legislature has no authority to modify the Federal Comprehensive Environmental Response, Compensation, and Liability Act, known commonly as Superfund, which places in the authority of the EPA to enter into consent decrees with PRPs. Furthermore, the New Hampshire legislature has no authority to modify a federal court order, which in this case is the 1999 Consent Decree. No legislative body is able to modify the final outcome of a judicial decision. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 227 (1995).
2. **Retrospective laws, New Hampshire Constitution Part 1, Article 23:** HB 1766 has the effect of a retrospective law, a violation of the New Hampshire Constitution in that it seeks to modify a 1999 judicial decree.
3. **Equal protection under the New Hampshire and Federal Constitutions:** Equal protection guarantees that all persons similarly situated should be treated alike. HB 1766 would treat the Coakley Landfill PRPs differently than any other PRP group in New Hampshire or nationally. New Hampshire has twenty National Priorities List sites, but none of them are subject to a legislative determination of the remedy that should be implemented.
4. **Contract:** HB 1766 would breach the 1999 Consent Decree and is also unconstitutional under the Contract Clause of the New Hampshire Constitution (Part 1, Article 23). A consent decree is construed by the courts as a contract, and the parties to a consent decree can reasonably rely upon the terms of the agreement. *Frew v. Hawkins*, 540 U.S. 431, 437 (2004). Because the State signed the contract, it cannot breach the contract by an act of the legislature. In addition, any legislation that impairs the obligations of parties to a contract is unconstitutional and cannot be enforced. Since the Consent Decree is contractual rights and HB 1766 will impair the parties' rights under that agreement, the law would be deemed unconstitutional and unenforceable. See *Cloutier v. State*, 163 N.H. 445 (2012).

Here are links to the two consent decrees, one dated February 21, 1992 (available at <https://semspub.epa.gov/work/01/491593.pdf>) and the second dated October 6, 1999 (<https://semspub.epa.gov/work/01/491594.pdf>). “

To the foregoing I would add:

5. **Unfunded Mandate:** As applied to the City of Portsmouth, the Town of Newington and the Town of North Hampton HB 1766 would also appear to violate the Constitution of the State of New Hampshire at Part 1, Article 28-a which reads as follows:

[Art.] 28-a [Mandated Programs.] The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.

The proposed legislation now goes to the Senate. These legal issues will be raised at that level as they were in the House. If HB 1766 should nonetheless pass the Senate and be signed by the Governor, litigation raising these issues is a certainty.

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