



# TOWN COUNCIL – AGENDA REQUEST FORM

THIS FORM WILL BECOME PART OF THE BACKGROUND INFORMATION USED BY THE COUNCIL AND PUBLIC

Please submit Agenda Request Form, including back up information, 8 days prior to the requested meeting date. **Public Hearing requests must be submitted 20 days prior to requested meeting date to meet publication deadlines** (exceptions may be authorized by the Town Manager, Chairman/Vice Chair).

## MEETING INFORMATION

Date Submitted: February 18, 2020  
Submitted by: Town Manager Eileen Cabanel  
Department:  
Speakers:

Date of Meeting: February 27, 2020  
Time Required: 30 minutes  
Background Info. Supplied: Yes:  No:

## CATEGORY OF BUSINESS (PLEASE PLACE AN "X" IN THE APPROPRIATE BOX)

Appointment:	<input type="checkbox"/>	Recognition/Resignation/Retirement:	<input type="checkbox"/>
<b>Public Hearing:</b>	<input type="checkbox"/>	Old Business:	<input type="checkbox"/>
New Business:	<input checked="" type="checkbox"/>	Consent Agenda:	<input type="checkbox"/>
Nonpublic:	<input type="checkbox"/>	Other:	<input type="checkbox"/>

## TITLE OF ITEM

Saint-Gobain Performance Plastics Petition to Appeal Town of Merrimack Industrial User Permit #20 Discussion

## DESCRIPTION OF ITEM

The Town Council to be presented with the details of Saint-Gobain Performance Plastic's petition which appeals and requests reconsideration of the terms and conditions of the Industrial User Discharge Permit issued by the Town of Merrimack's Public Works Wastewater Division.

## REFERENCE (IF KNOWN)

RSA:	Warrant Article:
Charter Article:	Town Meeting:
Other:	N/A

## EQUIPMENT REQUIRED (PLEASE PLACE AN "X" IN THE APPROPRIATE BOX)

Projector:	<input type="checkbox"/>	Grant Requirements:	<input type="checkbox"/>
Easel:	<input type="checkbox"/>	Joint Meeting:	<input type="checkbox"/>
Special Seating:	<input type="checkbox"/>	Other:	<input type="checkbox"/>
Laptop:	<input type="checkbox"/>	None:	<input type="checkbox"/>

## CONTACT INFORMATION

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## APPROVAL

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February 5, 2020

**R E C E I V E D**

FEB 05 2020

Merrimack Town Council  
Merrimack Town Hall  
6 Baboosic Lake Road  
Merrimack, NH 03054

**TOWN OF MERRIMACK  
TOWN COUNCIL'S OFFICE**

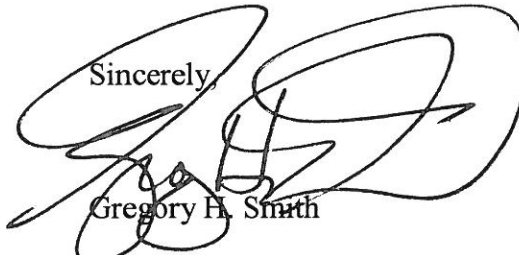
**Re: Saint-Gobain Performance Plastics Petition to Appeal Town of Merrimack  
Industrial User Permit #20**

Dear Councilors:

Saint-Gobain Performance Plastics ("SGPP") submits the enclosed Petition that appeals and requests reconsideration of the terms and conditions of the Industrial User Discharge Permit issued by the Town of Merrimack Department of Public Works Wastewater Division ("DPW") on January 6, 2020 ("Permit") to SGPP's plant located at 701 Daniel Webster Highway in Merrimack, New Hampshire ("Plant"). In accordance with Section 158-57 of the Town of Merrimack's ("Town") Sewer Use Ordinance ("SUO"), the Petition contains a brief statement of the facts, SGPP's objections to the Permit conditions, reasons for the appeal and requested alternate Permit conditions.

Enclosed is an original and seven copies of the appeal for distribution to each Town Councilor. SGPP also respectfully requests a meeting with the Town and/or DPW to discuss the issues discussed herein. SGPP looks forward to working with the Town to resolve this matter.

Sincerely,



Gregory H. Smith

GHS:amd

February 5, 2020

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Cc: Gabriel Caridade, Saint-Gobain Performance Plastics  
William Kempkie, Saint-Gobain Performance Plastics  
Christopher Angier, Saint-Gobain Performance Plastics  
Brett Slensky, Esq., Saint-Gobain Corporation  
Adam Dumville, Esq., McLane Middleton, P.A.  
Sarita Croce, Assistant Director of Public Works, Merrimack Dept. of Public Works  
Phillip Appert, Pretreatment Manager, Merrimack Dept. of Public Works

TOWN OF MERRIMACK NEW HAMPSHIRE  
DEPARTMENT OF PUBLIC WORKS

**PETITION TO APPEAL SAINT-GOBAIN PERFORMANCE PLASTICS’  
INDUSTRIAL USER DISCHARGE PERMIT**

Saint-Gobain Performance Plastics (“SGPP”) submits this Petition to Appeal the Industrial User Discharge Permit issued by the Town of Merrimack Department of Public Works Wastewater Division (“DPW”) on January 6, 2020 (“Permit”) to SGPP’s plant located at 701 Daniel Webster Highway in Merrimack, New Hampshire (“Plant”). *See* Exhibit 1. In accordance with Section 158-57 of the Town of Merrimack’s (“Town”) Sewer Use Ordinance (“SUO”), a brief statement of the facts, SGPP’s objections to the Permit conditions, reasons for the appeal and requested alternate Permit conditions are described below.

**I. Introduction**

As the Town is aware, SGPP has voluntarily taken steps to treat and remove per- and polyfluoroalkyl substances (“PFAS”) from its process wastewater. In 2018 and 2019, it installed a pretreatment system designed to effectively remove all PFAS substances from its wastewater. The system is now in operation and is effectively removing PFAS from SGPP’s wastewater.

Nevertheless, the Town has issued an indirect discharge permit to SGPP that imposes a non-detect discharge level of PFAS, among other related conditions. The non-detect level imposed by the permit has no scientific underpinning. Indeed, the relative volume of wastewater discharged to the Town’s wastewater treatment facility (“WWTF”) by SGPP is trivial—about 3/10000ths, or 0.03%, of the daily volume treated by the WWTF. Likewise, the relative level of PFAS in SGPP’s wastewater is scientifically insignificant—again about 1/10000ths, or 0.01% of the PFAS being discharged to the Town’s WWTF—99.99% of all of the PFAS that is present at the WWTF comes from other sources. Indeed, after pretreatment of its wastewater by SGPP, there simply is no meaningful discharge of PFAS to the Town’s WWTF—and certainly not at a level that affects operation of the WWTF.

Quite plainly, the imposition of a non-detect level on SGPP, as well as the other conditions discussed herein, is unlawful. In addition to the lack of scientific basis for doing so, there is no legal authority for the Town to single out SGPP and impose a limit that is not required by federal, state or local laws or regulations. The Permit is quintessential ad hoc regulation by the Town that will not withstand legal scrutiny. Rather than impose an arbitrary and capricious standard, among the other related conditions, that will not hold up under judicial review, SGPP respectfully requests that the Town reconsider and revise the permit in the manner discussed herein.

**II. Brief Statement of Facts**

The Plant manufactures various coated fabric products. As part of its manufacturing process, SGPP uses water provided by the Town and other PTFE based chemical additives to coat fabrics which are used in multiple applications like military shelters, radomes, and in many

industrial and consumer markets. After the coating process, SGPP uses water provided by the Town to rinse totes, tools and other process equipment.

Historically, after use in the manufacturing process, the process water would pass through gravity settling tanks at the Plant before being discharged to the Town's WWTF. The effluent from SGPP's Plant is combined with all other industrial and sanitary waste collected throughout the Town, is treated at the WWTF, and is eventually discharged to the Merrimack River in accordance with the terms of its National Pollutant Discharge Elimination System ("NPDES") permit issued by the United States Environmental Protection Agency ("USEPA").

Although no legally adopted regulatory standard required SGPP to do so, in 2018 and 2019, without any federal, State, or local requirement, SGPP voluntarily designed and installed a new wastewater pretreatment system to remove PFAS from its discharge of process water. This action by SGPP was in furtherance of its ongoing and proactive responses to address PFAS even where there is no regulatory obligation to do so. SGPP completed an industrial discharge request ("IDR"),<sup>1</sup> and received approval from both the Town and the New Hampshire Department of Environmental Services ("NHDES"), to install the new system. As part of SGPP's IDR application, SGPP's consultants prepared and submitted a Design Basis Report for the new process wastewater pretreatment system. *See* Exhibit 2.

The Design Basis Report described the new system as a batch pretreatment process to treat wastewater using pH adjustment, coagulation with gravity settling, and granular activated carbon (GAC) to remove PFAS. This approach was developed after several months of off-site bench and pilot testing treatment approaches. While this pretreatment system was being designed with the goal of discharging water with PFAS concentrations below the typical method reporting limits,<sup>2</sup> the IDR application did not propose or commit to obtaining such results on a regular or continuous basis. In fact, at the time of the IDR submittal, SGPP had not yet installed or tested the new pretreatment system on-site and could not possibly guarantee performance at this level. While some off-site pilot testing of the treatment system demonstrated that the new system would operate effectively, SGPP did not guarantee that its process wastewater would achieve PFAS non-detection, and it was not feasible to do so before installation of the new system.

In addition to seeking approval for its IDR application from the Town and NHDES, SGPP also applied for a renewal of its Industrial User Discharge Permit on October 29, 2018. *See* Exhibit 3. That permit application submitted the results of the off-site pilot testing, that demonstrated an average daily concentration of perfluorooctanoic acid ("PFOA") and

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<sup>1</sup> In order to discharge to the WWTF, and to comply with federal, State, and local law, the Plant requires an indirect discharge permit from the Town. *See* Env-Wq 305.10 (describing indirect discharge request). An "indirect discharge" is a "facility that discharges waste into a publicly owned treatment works (POTW) from any nondomestic source regulated under Section 307(b), (c) or (d) of the [Clean Water] Act." Merrimack Sewer Use Ordinance, Section 158-6. *See also* 40 C.F.R. § 403.3(i).

<sup>2</sup> The Design Basis Report stated that the new "industrial wastewater pretreatment systems are being designed to meet the requirements of the current pretreatment permit (Town of Merrimack, December 2017) and produce treated water with PFAS concentrations below the current, typical method reporting limits from Eurofins Lancaster Laboratories (ELLE) observed during the pilot-testing program as a target PFAS standards are not currently available." *Id.* at 3.

perfluorooctanesulfonic acid (“PFOS”) at non-detect levels could potentially be achievable, but it did not propose or commit to such a permit limit.

On November 27, 2018, the Town issued Industrial User Discharge Permit #20 to SGPP, which contained certain commissioning requirements for the new pretreatment system. *See* Exhibit 1. The November 2018 permit did not include an effluent limit on the discharge of PFAS, but simply included a requirement that SGPP monitor and report the discharge of PFAS compounds. Also on November 27, NHDES issued approval of SGPP’s IDR request and specifically approved a “[d]ischarge of 850 gpd monthly average, 2,000 gpd maximum, of wastewater from pretreatment system for PFAS contaminated discharging processes in the tote-rinsing, formulation and laboratory areas.” *See* Exhibit 1 at 29–30. The IDR approval did not establish any effluent discharge limits for PFAS. *Id.*

On November 8, 2019, SGPP applied for a renewal of its Industrial User Discharge Permit. *See* Exhibit 4. Again, the application made no reference to a PFAS permit limit. The Town issued a renewal permit on January 6, 2020.<sup>3</sup> The newly issued Permit unlawfully requires SGPP’s effluent from its process wastewater to achieve non-detectable levels for PFAS Compounds. The Permit specifically states in three separate locations that “Per [SGPP’s] Industrial Wastewater Indirect Discharge Request (IDR) Application received on October 31, 2018, the treatment system shall remove all PFAS compounds from process wastewater to non-detectable levels.” *Town of Merrimack Industrial User Discharge Permit* at 6–8 (1/6/20).

From July 2019 to January 2020, on average, SGPP discharged approximately 553 gallons per day of treated wastewater to the WWTF. The amount of treated process wastewater that SGPP discharges to the WWTF is indisputably insignificant in comparison to the 2.2 million gallons per day (ranging from 3.45 to 1.73 million gallons per day) of wastewater treated by the WWTF—SGPP’s discharge represents three ten thousandths (3/10000ths), or 0.03%, of the average daily flow through the WWTF, which certainly cannot adversely affect the operation of the WWTF. Moreover, based upon data provided by the Town and calculations performed by SGPP, PFOA in SGPP’s effluent represents only one ten thousandth (1/10000th), or 0.01%, of the total PFOA at the WWTF.<sup>4</sup>

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<sup>3</sup> The Permit provides that “The Facility is subject to Categorical pretreatment standards which have not yet been promulgated for existing and new indirect dischargers for the textile mills point source category. Therefore, the Facility is subject only to General Pretreatment Regulations (40 CFR 403).” The General Pretreatment Regulations do not regulate the discharge of PFAS to POTWs.

<sup>4</sup> According to the Town’s data from the October 2019 sampling, PFOA was detected at the influent to the wastewater treatment plant a concentration of 25 nanograms per liter. During an average day, the Town provides 8,327,906 liters of water to the WWTF. This flow at this concentration would contain 0.208197648120 grams of PFOA. Conversely, on the day of the Town’s October 2019 sampling event the SGPP process water treatment system discharged 1,211 liters. According to the Town’s data from October 2019 sampling, PFOA was detected in the process water effluent a concentration of 25.4 nanograms per liter. This flow at this concentration would contain 0.000030767827 grams of PFOA.

### III. Objections to Permit Conditions

SGPP objects to the following permit conditions that are unlawful and unreasonable, each of which are included as the subject of this appeal:

- 1) The Permit requirements that the Plant's effluent must meet a non-detect discharge limit for all PFAS compounds, *Town of Merrimack Industrial User Discharge Permit* at pages 6–8 (1/6/20), and Part 3, *Prohibited Discharge & Local Limits*, pages at 7–8.
- 2) The Permit requirements contained in the Permit at Effluent Conditions, Part 1, Section B, Conditions 1–5. *Id.* at 6.
- 3) The Permit requirement that: “All measurements, tests, and analyses of the characteristics of waters and wastes to which reference is made in this permit shall be determined in accordance with the EPA-approved methods published in the Code of Federal Regulations, Title 40, Part 136 (40 CFR 136), or if none are available, then sampling and analysis shall be performed using validated analytical methods or other applicable procedures approved by the Town. Sampling methods, location, times, duration, and frequencies are to be determined on an individual basis subject to approval by the Town.” *Id.* at 8 (emphasis added).

In addition to the objections to specific conditions, SGPP objects to the fact that the Permit incorrectly states that there are existing maximum contaminant levels (MCL) in drinking water and ambient groundwater quality standards for the following PFAS compounds: PFOA (12 ng/l), PFOS (15 ng/l), PFHxS (18ng/l) and PFNA (11 ng/l). *Id.* at 4. These standards have been enjoined by the Superior Court and are not in effect as enforceable standards.<sup>5</sup>

### IV. Reasons for Objections to Permit Conditions

The Town's DPW, in implementing its industrial discharge permitting program, must comply with all applicable federal, State and local laws and cannot establish conditions in an indirect discharge permit that are contrary to existing law.<sup>6</sup> Moreover, the Town may not undertake *ad hoc* rule-making. *See Appeal of Nolan*, 134 N.H. 723, 728 (1991). The Permit terms and conditions set forth in Section II above do not adhere to these principles and as further

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<sup>5</sup> As of today, only PFOA and PFOS have enforceable ambient ground water quality standards of 70 ppt. Effective December 31, 2019, NHDES was enjoined from enforcing the newly adopted ambient groundwater quality standards (“AGQS”) for PFCs. *See Plymouth Water & Sewer District, et al. v. Scott*, No. 217-2019-CV-00650, *Order on Request for Preliminary Injunction*, McNamara, J. (Nov. 26, 2019); *Order Denying State's Motion for Reconsideration* (Dec. 16, 2019).

<sup>6</sup> The law is well settled that “[t]owns are merely subdivisions of the State and have only such powers as are expressly or impliedly granted to them by the legislature.” *Public Serv. Co. v. Town of Hampton*, 120 N.H. 68, 71 (1980) (citing *Lavallee v. Britt*, 118 N.H. 131, 383 A.2d 709 (1978); *City of Dover v. Wentworth-Douglas Hospital Trustees*, 114 N.H. 123, 316 A.2d 183 (1974)). “Whatever power towns have to regulate [sewers] . . . that power cannot be exercised in a way that is inconsistent with State law.” *Id.* “Local regulation is repugnant to State law when it expressly contradicts a statute or is contrary to the legislative intent that underlies a statutory scheme.” *State v. Driscoll*, 118 N.H. 222, 385 A.2d 218 (1978); *State v. Boisvert*, 117 N.H. 291, 371 A.2d 1182 (1977). *See also Attitash Mountain Serv. Co. v. Schuck*, 135 N.H. 427, 429 (1992) (stating that “an agency’s interpretation of its own regulations is erroneous as a matter of law when it fails to embrace the plain meaning of its regulations”).

discussed below, are contrary to law and the Town is without any legal authority or basis in fact to impose these conditions in the Permit.

- A. The Town's Inclusion of Permit requirement that SGPP's treatment system must remove all PFAS compounds from process wastewater to non-detectable limits is Arbitrary and Capricious As a Matter of Law
1. The Minute Concentrations of PFAS Discharged from the Plant's Pretreatment System, if any, Cannot Be Measured At the WWTF and Have No Effect on the WWTF's Receiving Water Body (the Merrimack River)

The Town has no factual basis whatsoever to require process wastewater from SGPP's pretreatment system to meet a non-detection limit for PFAS. The Plant is permitted to discharge a maximum of 2,000 gallons per day of process wastewater to the WWTF, which may contain extremely low levels of PFAS. On average, the Plant only discharges approximately 553 gallons per day. The Plant also discharges sanitary wastewater to the WWTF. Significantly, the influent water used by the Plant is supplied by the Merrimack Valley District ("MVD") and the Town's notice to its citizens shows that this water, as supplied to MVD's customers within Town contains PFOA ranging from 11.98 to 24.00 ppt and PFOS ranging from 1.78 to 2.16 ppt. *See* Exhibit 5 (MVD Notice of New MCLs & AGQS Effective 10/1/19).

The WWTF has a facility design flow of 5.0 million gallons per day. The WWTF's average monthly discharge to the Merrimack River from the treatment facility is approximately 2.2 million gallons per day, with a maximum of 3.45 million gallons per day and minimum of 1.73 million gallons per day. *See* Fact Sheet for NPDES Permit No. NH0100161 at 6, Attachment B (March 20, 2014). The Plant's permitted discharge of 2,000 gallons of wastewater equates to nine ten thousandths (9/10000ths) of the Town's average daily treatment, and based upon 553 gallons per day, the Plant's discharge equates to three ten thousandth (3/10000ths) of the Town's average daily flow and treatment. Based alone on these numbers, the Plant's discharge of wastewater is factually and legally insignificant and its discharge of PFAS in process wastewater, if any, cannot be detected at the WWTF or in the Merrimack River. In addition, SGPP's discharge of process wastewater is already significantly lower than concentrations of PFAS in the water supply provided by the Town.

As such, imposing a non-detection level for PFAS on a trivial amount of wastewater, as compared to the volume of waste water that the Town receives and treats every day at the WWTF is entirely unsupported by the facts, unreasonable as a matter of law and the Town is without any legal basis to do so under any authority the Town may have relative to its industrial discharge permitting program. In addition, SGPP is unaware of any other indirect discharger subject to a PFAS non-detection standard. Selectively targeting one facility and imposing such a discharge limit for process wastewater is arbitrary and capricious and unlawful. Singling out SGPP for regulatory purposes is a violation of the Equal Protection and Due Process Clauses under the State and Federal Constitutions. NH Const. part I, art. XV, U.S. Const. amend. V, XIV.



2. There are No Applicable Surface Water Quality Standards for PFAS

There are no legally adopted Surface Water Quality Standards (SWQS) for PFAS. Therefore, the Town has no legal authority or factual basis to impose a non-detection discharge limit for PFAS in the Permit based on the claim that process wastewater from the Plant could lead to an exceedance of a SWQS. While NHDES has been tasked with developing a plan to consider establishing SWQSs for PFOS, PFOA, PFNA, and PFHxS for Class A and Class B waters, the Legislature has not authorized, and NHDES has not promulgated, any such surface water standards.<sup>7</sup> The Town's imposition of a non-detect limit in the Permit is premature and arbitrary, capricious and unlawful; to the extent surface water standards are adopted in the future, the permit could be amended at that time to ensure the WWTF complies with its NPDES permit.

3. There are No Biosolids Standards for PFAS

Similar to surface water standards, there are no legally adopted standards relating to PFAS for the use, disposal, or reclamation of sludge or biosolids. More specifically, none of the rules adopted by USEPA, *see* 40 C.F.R § 503.1, *et. seq.*, and DES, *see* Env-Wq 800 *et seq.*, regulate or even address PFAS.<sup>8</sup> Therefore, the Town cannot lawfully impose a non-detect limit in the Permit based on the premise that process wastewater from the Plant could lead to an exceedance of a sludge or biosolid standard applicable to the Town's WWTF.

Moreover, the Town of Merrimack receives dewatered sludge from five different towns, namely, Hooksett (44 dry metric tons), Bristol (20 dry metric tons), Jaffrey (35 dry metric tons), Henniker, NH (23 dry metric tons) and Amesbury, MA (97 dry metric tons)<sup>9</sup> and generates dewatered sludge from their own wastewater treatment facility (1,451 dry metric tons). Fact Sheet for NPDES Permit No. NH0100161 at 18. All of this sludge is treated in an on-site composting facility and a total of 2,385 dry metric tons of Class A biosolids is produced by the WWTF for land application each year. *Id.* The Town has no factual basis for the assertion that SGPP's discharge of minute concentrations of PFAS has any appreciable effect on the concentration of PFAS in the Town's biosolids.

4. The Concentrations of PFAS in SGPP's Wastewater Discharged to the WWTF Cannot and Do Not Contribute to Exceedances of the Ambient Groundwater Quality Standards ("AGQS")

The Plant does not discharge to groundwater and as discussed above, the Town is without any basis in fact that the Plant's discharge of minute concentrations of PFAS in process

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<sup>7</sup> See House Bill 1101, (July 2, 2018); Senate Bill 309 (July 13, 2018).

<sup>8</sup> See also DES Fact Sheet: Sludge Quality Certification (SQC) Program Requirements at 2 – 3. Without any state standards, the imposition of a non-detect for PFAS in the Permit is wholly arbitrary and capricious as a matter of law.

<sup>9</sup> SGPP is unaware of the Town imposing any PFAS standards or related restrictions on the dewatered sludge the Town accepts at the WWTF from these five towns. Singling out SGPP for regulatory purposes is arbitrary and capricious as a matter of law and a violation of the Equal Protection and Due Process Clauses under the State and Federal Constitutions. NH Const. part I, art. XV, U.S. Const. amend. V, XIV.

wastewater, if any, has any appreciable effect on the concentration of PFAS in the Town's biosolids. Accordingly, the Town cannot lawfully impose a non-detect limit in the Permit based on the premise that process wastewater from the Plant could ultimately lead to an exceedance of a AGQS from sludge or biosolids generated by the Town's WWTF or that the Plant's discharge of PFAS, if any, in the industrial wastewater contributes in any way to an exceedance of the ambient groundwater quality criteria.

5. The Town Does Not Have the Authority to Regulate PFAS Pursuant to Federal Law.

Section 307(b)(1) of the Clean Water Act requires the United States Environmental Protection Agency ("USEPA") to establish pretreatment standards for pollutants "which are determined not to be susceptible to treatment" by publically owned treatment works (POTWs) or "which would interfere with the operation of such treatment works." 33 U.S.C. § 1317(b)(1). The federal rules promulgated by USEPA establish pretreatment regulations that apply to all nondomestic sources of pollutants in the United States that discharge to POTWs, aka indirect dischargers. The purpose of these pretreatment standards is to prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW and to prevent the introduction of pollutants into POTWs which will pass through the treatment works or otherwise be incompatible with such works, among others. 40 C.F.R. § 403.2 (emphasis added).

The pretreatment regulations prohibit some specific pollutants altogether and prohibit others in certain amounts or concentrations.<sup>10</sup> 40 C.F.R. § 403.5(b). The regulations also require POTWs to establish local pretreatment limits, when necessary, to prevent interference<sup>11</sup> or pass through<sup>12</sup>—that is, only those pollutants that may cause interference or pass through can be regulated under federal law. 40 C.F.R. § 403.8.

The discharge of PFAS, if any, in process wastewater from the Plant to the Town's WWTF cannot lead to interference or pass through relative to the Town WWTF. As discussed above in Sections III.A.1–4, since there are no legally adopted regulations that govern the

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<sup>10</sup> Most pollutants in the federal rules are regulated to ensure that concentrations or amounts of one pollutant do not interfere with the POTW's operations—there is not an absolute ban or a requirement that a substance be non-detectable. *See e.g.*, 40 C.F.R. § 403.5(3)–(7) (prohibiting "(3) Solid or viscous pollutants in amounts which will cause obstruction to the flow in the POTW resulting in Interference; (4) Any pollutant, including oxygen demanding pollutants (BOD, etc.) released in a Discharge at a flow rate and/or pollutant concentration which will cause Interference with the POTW; (5) Heat in amounts which will inhibit biological activity in the POTW resulting in Interference . . . ; (6) Petroleum oil, nonbiodegradable cutting oil, or products of mineral oil origin in amounts that will cause interference or pass through; (7) Pollutants which result in the presence of toxic gases, vapors, or fumes within the POTW in a quantity that may cause acute worker health and safety problems") (emphasis added).

<sup>11</sup> "Interference" means a discharge that, alone or in conjunction with other discharges, (1) inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use or disposal; and (2) is a cause of a violation of any requirement of the POTW's NPDES permit or the prevention of sewage sludge use or disposal in compliance with applicable laws, regulations, and permits. 40 C.F.R. § 403.3(k).

<sup>12</sup> "Pass through" means a "discharge which exits a POTW into waters of the United States in quantities or concentrations which alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of the POTW's NPDES permit." 40 C.F.R. § 403.3(p).

discharge of PFAS to POTWs, as a matter of law, PFAS could not cause an interference or pass through, nor could it result in a violation of the Town's NPDES permit on these grounds.<sup>13</sup>

6. The Town Does Not Have the Authority to Regulate PFAS Pursuant to State Law

NHDES has not established pretreatment standards for PFAS under its authority at RSA 485-A:4 and PFAS are not and cannot be considered a prohibited discharge to a POTW under RSA 485-A:5, III. In general, NHDES's pretreatment standards for indirect dischargers, like SGPP, require that all wastes introduced into a POTW shall not "(1) Interfere with the safety, operation, maintenance, or performance of the POTW; (2) Have an adverse effect on the receiving stream; (3) Prevent disposal of sludge in the manner used by the POTW; or (4) Otherwise endanger life, limb, public property, or constitute a nuisance." Env-Wq 305.04(c). The NHDES pretreatment standards prohibit twelve specific wastes from being introduced into the sewer system, none of which addresses PFAS. Env-Wq 305.06. However, there is no factual basis that the presence of PFAS, if any, in the concentrations discharged by in the Plant's wastewater falls under any of the prohibited wastes.

Therefore, none of the applicable State statutes or NHDES regulations permit the Town to establish any discharge level for PFAS, let alone a discharge level of non-detection for PFAS. As discussed above, a PFAS discharge in wastewater from the Plant, if any, to the Town's WWTF cannot lead to interference or pass through at the WWTF. In addition, as further discussed herein, the discharge of PFAS to the Town's WWTF does not lead to any other potential concern under NHDES's general pretreatment standards for indirect dischargers.

7. The Town Does Not Have the Authority to Regulate PFAS Pursuant to the Town's SUO

The Town's SUO does not provide a basis for the Town to include a non-detect effluent limit for PFAS in the Permit. The discharge of PFAS in process wastewater, if any, does not adversely affect the maintenance or operation of the sewer system, and therefore, cannot be regulated under RSA 149-I:6, I.<sup>14</sup> In the Permit, the Town has failed to state or demonstrate how limiting the discharge of PFAS to a non-detect level in the Permit is required to comply with the SUO. SGPP is left guessing as to what regulation the Town is relying on to support the issuance of a non-detect permit condition. Without citations to specific sections of the SUO, and without any scientific evidence or a basis in fact demonstrating a non-detect level is necessary, the Town's permit condition is arbitrary, capricious and unlawful. *See e.g., Pillai v. Civil Aeronautics Board.*, 485 F.2d 1018 (D.C. Cir. 1913) (agency actions that merely recite

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<sup>13</sup> The Town's NPDES permit does not contain any condition that would require the discharge of PFAS from the Plant, if any, to be non-detect. *See e.g.*, Effluent Limitations ¶ A.2, ¶ A.8(a), Sludge Condition ¶ F.1, and Sludge Condition ¶ F.2.

<sup>14</sup> This statute allows municipalities where sewage is pumped or treated to "adopt ordinances and bylaws relating to the sewage system, pumping station, treatment plant or other appurtenant structure as are required for proper maintenance and operation and to promote the objectives of the sewage system."

conclusions without explaining the factors or supporting rationale that the agency considered is arbitrary and capricious as a matter of law).

i. The Objectives of the Town’s Sewer Use Ordinance Do Not Confer Any Additional Legal Authority to the Town to Regulate PFAS to Non-Detect

Objectives in the Town’s sewer ordinance do not and cannot as a matter of law provide any authority to regulate PFAS to a non-detect level in the Permit, and even if objectives could provide any such authority, the Town’s sewer use ordinance does not contain any specific objectives that could reasonably be read to require the Plant to meet a non-detect level. Indeed, Section 158-2 (the “objectives”) merely sets out the goals to be achieved by the other provisions of the ordinance. Even if the “objectives” could be understood to grant authority to regulate, the Plant’s discharge of PFAS, if any, in such small concentrations, could not possibly contravene any of these listed objectives. The amount of PFAS from SGPP’s Plant, if any, does not interfere with the operation of the WWTF, including recycling and reclaiming sludge, it does not jeopardize worker or public safety, and it has no bearing on fees collected by the Town. Most importantly, precatory language in statutes and ordinances, such as purpose goals, intent, and objectives, are not the operative parts of the law, i.e., they confer no power or authority to act. Where the operative sections of an ordinance are clear and unambiguous, precatory language in the purpose section, or preamble, of a statute is "neither essential nor controlling in the construction of the [statute]."<sup>15</sup> Objectives or the purpose section of an ordinance may only be used as an aid in interpreting the operative provisions.<sup>16</sup> As such, the objectives of the SUO do not create any binding legal effects.

ii. PFAS in Low Concentrations is Not a Prohibited Waste

Section 158-38(A) prohibits certain pollutants and wastes from pass through or interfering, as defined at Section 158:112 of the SUO, with the operation or performance of the WWTF. As discussed above, the Town has not established that any specific PFAS concentration would cause a pass through or interference as defined under the Town’s SUO.

Section 158-38(B) lists a variety of other prohibited pollutants, none of which, is applicable, except for possibly those in subsection (18), which prohibits:

Any substance which may cause the POTW's effluent or treatment residues, biosolids or scums to be unsuitable for reclamation and reuse or which may interfere with such reclamation and reuse process. In no case shall a substance discharged to the POTW cause the POTW to be in noncompliance with biosolids use or disposal criteria, guidelines or regulations developed under Section 405 of

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<sup>15</sup> *Hughes Tool Co. v. Meier*, 486 F.2d 593, 596 (10th Cir. 1973); see also *Westly v. Bd. of City Commis of Salt Lake City Corp.*, 573 P.2d 1279, 1280 (Utah 1978) (Supreme Court of Utah finding that a statute's preamble or declaration of policy section “confers no substantive rights and is only a manifestation of legislative intent. It does not constitute an enlargement of authority or power in excess of that contained in succeeding sections”).

<sup>16</sup> *State v. Wilson*, 169 N.H. 755, 763 (2017) (citing cases standing for the proposition that the statement of intent should be used as an aid in interpreting the entire statute as a whole).

the Clean Water Act, any criteria, guidelines or regulations affecting biosolids use or disposal developed pursuant to the Solid Waste Disposal Act, ambient ground water quality regulations, the Clean Air Act, the Toxic Substances Control Act or state or local standards applicable to the biosolids management method adopted by the city.

Section 158-38(B)(18). But, as discussed above, the Plant's discharge undoubtedly complies with all applicable federal, State, and local regulations for the treatment and reuse of biosolids.<sup>17</sup>

8. PFAS Standards for Surface Water and Groundwater are Set by State Law—The Town is Pre-Empted from Adopting Lower Standards

In New Hampshire, the Legislature has authorized solely the DES to adopt surface water and ambient groundwater quality standards. The Legislature has not granted authority to municipalities to impose different or lower standards for PFAS. Indeed, the authority to regulate surface water and groundwater is held solely by the State, and the Town is preempted from establishing new or different standards. See *JTR Colebrook, Inc. v. Town of Colebrook*, 149 N.H. 767, 770 (2003) (citing *Town of Hooksett v. Baines*, 148 N.H. 625, 627 (2002); *Casico v. City of Manchester*, 142 N.H. 312, 315 (1997)). As such, in this case a Permit limit of non-detect for PFAS runs afoul with State law and is arbitrary and capricious.

9. The Imposition of a PFAS Non-Detect Standard Violates the State and Federal Constitutions

The imposition of a non-detect standard in the Permit also violates constitutional due process and equal protection under the law. In New Hampshire, Article 12 and Article 15 of the New Hampshire Constitution protect the right to due process and equal protection of the laws. The Fourteenth Amendment to the United States Constitution protects the due process rights of SGPP. U.S. CONST., amend. XIV, § 1.<sup>18</sup>

In determining whether particular procedures violate due process, the courts apply a two-part test. Initially, it must be determined whether legally protected interest has been implicated. *In re Town of Bethlehem*, 154 N.H. 314, 328 (2006) (citing *Bragg v. Dir., New Hampshire Div. of Motor Vehicles*, 141 N.H. 677, 678 (1977)). Then it must be determined whether the procedures provided afford appropriate safeguards against a wrongful deprivation of the protected interest. *Id.* (citing *Bragg*, 141 N.H. at 678-79). “The

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<sup>17</sup> To the extent the Town argues that the Public Works Director may impose other limitations in the Permit, the Town's SUO is vague and overbroad as a matter of law. The due process provisions and equal protection provisions of the New Hampshire Constitution in Part 1, Articles 1, 2, 10, 11, 12, and 14 protect people from unconstitutionally vague laws that authorize or encourage arbitrary and discriminatory enforcement. *State v. Wilson*, 169 N.H. 755, 770 (2017); *MacPherson v. Weiner*, 158 N.H. 6, 11 (2008); see also *Jordan v. Pugh*, 425 F.3d 820, 828 (10th Cir. 2005) (“Overbreadth and vagueness may overlap when the challenged statute is so unclear in its scope that officials enforce it in an overbroad manner.”). Here, the SUO is so vague and overbroad that those being regulated cannot reasonably predict what is allowed and what is not allowed.

<sup>18</sup> See also *supra* n.7.

fundamental requisite of due process is the right to be heard at a meaningful time and in a meaningful manner.” *Bragg*, 141 N.H at 678.

The Permit conditions, if implemented, will deprive SGPP of its lawfully-held property and its liberty interests. The PFAS non-detect limit has not been set anywhere in State or local law and SGPP has not had a fair opportunity to be heard on such a condition. In addition, Permit restrictions that are devoid of any factual basis effectively deprive SGPP of any lawful use of its property.

10. The Imposition of a PFAS Non-Detect Standard Violates Numerous Laws and Regulations and is Arbitrary as a Matter of Law

In addition to the discussion above, the following are reasons why the imposition of non-detect PFAS concentration on the Plant’s wastewater discharge is arbitrary, capricious and unlawful:

- i) The Town has not followed the proper procedures to establish a numeric limit for PFAS, namely, *EPA’s Local Limits Development Guidance*, EPA 833-R-04-002A (July 2004).
- ii) The Town has, in effect, attempted to set a specific local effluent limit without providing notice to persons or groups who would be affected by the new effluent limit, 40 C.F.R. § 403.5(c)(3), and without seeking approval from NHDES or USEPA. 40 C.F.R. § 403.9(a); Env-Wq 305.08.
- iii) The Town’s permit conditions related to PFAS are vague and overbroad and violate the equal protection and due process clauses of the State and federal Constitutions. NH Const. part I, art. XV, U.S. Const. amend. V, XIV.
- iv) The SUO, as amended on October 26, 2017 has not been properly adopted, therefore, Section 158-38(B)(18) is void as a matter of law.

B. The Permit requirements found at page 6 of the 2020 Industrial User Discharge Permit, namely, conditions 1–5 are vague and overbroad and should be removed from the Permit.

Conditions 1-5 for the Process Water Treatment System are wholly vague and overbroad. SGPP cannot ascertain what is required of it to comply with the permit obligations, and therefore, must be struck as a matter of law.

C. The Permit fails to acknowledge that the existing MCLs and AGQS for PFAS compounds remains at 70 ppt.

The Permit incorrectly states that there are existing maximum contaminant levels (MCL) in drinking water and ambient groundwater quality standards for the following PFAS compounds: PFOA (12 ng/l), PFOS (15 ng/l), PFHxS (18ng/l) and PFNA (11 ng/l). These standards have been enjoined by the Superior Court and are no longer enforceable standards. *Id.*

at 4. Therefore, including such a statement in the Permit, or relying on these standards in any way, is unreasonable as a matter of law.

D. The Permit unlawfully and unreasonably does not establish a sampling location to test for PFAS.

The permit states that “All measurements, tests, and analyses of the characteristics of waters and wastes to which reference is made in this permit shall be determined in accordance with the EPA-approved methods published in the Code of Federal Regulations, Title 40, Part 136 (40 CFR 136), or if none are available, then sampling and analysis shall be performed using validated analytical methods or other applicable procedures approved by the Town. Sampling methods, location, times, duration, and frequencies are to be determined on an individual basis subject to approval by the Town.” Id. at 8.

As an initial matter, there are no current EPA-approved methods for detection and sampling of PFAS in wastewater. In addition, the sampling location to determine compliance with the Permit can only be located at the “end of process” from the newly installed treatment system. Indeed, the Permit regulates the discharge of process wastewater and the newly installed system only treats process wastewater. Therefore, the compliance point must be located immediately after the “end of process” and not downstream after the treated process wastewater is mixed with sanitary wastewater from other segments of the facility.

V. **Requested Alternate Conditions**

SGPP requests the following replacement language to the following permit conditions:

- 1) The Permit requirement that SGPP’s process wastewater treatment system remove all PFAS compounds from process wastewater to non-detectable limits.

**This Permit conditions should be changed to a requirement for SGPP to effectively operate the new pretreatment system and to monitor only for PFAS, as was the case in the November 2018 permit.<sup>19</sup>**

- 2) The Permit requirements found at page 6 of the 2020 Industrial User Discharge Permit, namely, conditions 1–5.

**These conditions should be deleted in their entirety. SGPP, with approval from the Town, has already established that the 2,200 gallon carbon change out control mechanism is the best available option for controlling the discharge of PFAS.**

- 3) The Permit inaccurately states that there are existing maximum contaminant levels (MCL) in drinking water and ambient groundwater quality standards for the

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<sup>19</sup> There have been no changes in the law that would permit the Town to establish more stringent PFAS conditions than those that were contained in the 2018 permits (i.e. monitor and report).

following PFAS compounds: PFOA (12 ng/l), PFOS (15 ng/l), PFHxS (18ng/l) and PFNA (11 ng/l).

**These standards should be removed from the permit and only a standard of PFOA and PFOS at 70 ppt should be included in the Permit.**

- 4) The Permit unlawfully and unreasonably states that: “All measurements, tests, and analyses of the characteristics of waters and wastes to which reference is made in this permit shall be determined in accordance with the EPA-approved methods published in the Code of Federal Regulations, Title 40, Part 136 (40 CFR 136), or if none are available, then sampling and analysis shall be performed using validated analytical methods or other applicable procedures approved by the Town. Sampling methods, location, times, duration, and frequencies are to be determined on an individual basis subject to approval by the Town.” Id. at 8.

**This condition should be modified to make clear that the sampling location for compliance with the permit shall be at the end of process from the process wastewater treatment system.**

## **VI. Conclusion**

Based upon the foregoing, the Permit terms and conditions set forth in Section II above are contrary to law, the Town is without any legal authority or basis in fact to impose these conditions in the Permit and the inclusion of these conditions on the Permit is arbitrary and capricious as a matter of law. SGPP respectfully requests that the Town Council remand the Permit to DPW with direction to issue a revised Permit with the revised conditions discussed herein so that such conditions are consistent with federal, State, and local law as further described herein.

SGPP also respectfully requests a meeting with the Town and/or DPW to discuss the issues raised herein. SGPP looks forward to working with the Town to resolve this matter.

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Respectfully submitted,

SAINT-GOBAIN PERFORMANCE PLASTICS

By Its Attorneys,

McLANE MIDDLETON  
PROFESSIONAL ASSOCIATION

Dated: February 5, 2020

By: 

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Certificate of Service

I hereby certify that on the 5<sup>th</sup> day of February, 2020, an original and seven copies of the foregoing Petition was hand-delivered to the Merrimack Town Council at Merrimack Town Hall.

  
Gregory H. Smith