STATE OF NEW HAMPSHIRE

DATE: April 17, 2012

FROM: K. Allen Brooks KAB **AT (OFFICE)** Department of Justice
Senior Assistant Attorney General Environmental Protection Bureau

SUBJECT: Summary of Testimony from the State of New Hampshire, Office of the Attorney General on House Bill 4345

TO: Committee on Energy and Commerce, Subcommittee on Environment and the Economy

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Summary of Testimony

Senior Assistant Attorney General K. Allen Brooks will testify on behalf of the New Hampshire Office of the Attorney General. Attorney Brooks is Chief of the Environmental Protection Bureau at the N.H. Department of Justice, Office of the Attorney General.

Attorney Brooks will provide testimony on the following topics:

- The existence and nature of an existing State case against petroleum companies related to the fuel additive Methyl Tertiary Butyl Ether (MTBE);
- The comprehensive nature of the State's program to reduce the introduction of fuel contaminants to the environment and specifically groundwater;
- Concerns that the section of the bill dismissing all existing lawsuits could be used by some defendants to try to dismiss the State's existing case or other meritorious lawsuits;
- Concerns that the section of the bill providing a "safe harbor" for any approved product is overly broad and could have a negative impact on the State's existing case and all cases given its broad scope; and
- Concerns that the State's existing comprehensive program for management of Underground Storage Tanks (UST's) could be negatively impacted.

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April 17, 2012

Congress of the United States
House of Representative
Committee on Energy and Commerce, Subcommittee on Environment and the Economy
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

RE: Testimony from the State of New Hampshire
Office of the Attorney General on House Bill 4345

Dear Commerce Committee on Energy and Commerce, Subcommittee on Environment and the Economy:

Thank you for allowing me to testify on behalf of the Office of the Attorney General for the State of New Hampshire on House Bill 4345. As you may know, since 2003, the State of New Hampshire has been actively litigating claims against various petroleum companies regarding the fuel additive MTBE. MTBE spreads faster, stays in the ground longer, and is harder and more expensive to clean than other fuel additives. Its introduction to the State's groundwater poses a health risk to the people of the State, nearly forty percent of whom rely on private wells for drinking water. Over the past nine years, the State's case has survived an exceptional number of legal challenges raised by the defendants, including multiple hearings in federal and state courts, as well as three appeals to the New Hampshire Supreme Court. Trial is finally scheduled to commence in state court on November 5th of this year.

In its suit, the State of New Hampshire alleges that the defendants violated various New Hampshire state laws, including the State's Consumer Protection Act and several common law

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requirements regarding product safety including a claim for the failure to warn of an inherently dangerous product. The State alleges that although some defendants knew of the insidious nature of MTBE as far back as 1984, they concealed that knowledge and publicly professed that the introduction of MTBE into the nation's gasoline supply would not pose an increased environmental risk. The State has uncovered evidence that certain defendants even misled the U.S. Environmental Protection Agency (EPA) about MTBE's increased propensity to result in widespread groundwater contamination. New Hampshire now has 1,551 sites known to be contaminated with MTBE. It is estimated that over 40,000 private wells and approximately 400 public water systems have been contaminated with MTBE. The cost to locate, treat, and monitor this widespread contamination amounts to hundreds of millions of dollars – a cost that, as of now, would be borne by the taxpayers of a State with a population of just 1.3 million people.

This case is only one aspect of the State's efforts to prevent the introduction of dangerous fuel additives to groundwater. The State has a robust regulatory program for Underground Storage Tanks (UST's) and has recently completed a comprehensive statewide effort that has successfully brought all of the State's Aboveground Storage Tanks (AST's) into compliance. The State has also created several funds that fairly distribute the costs of cleanup among fuel importers thereby providing protection for smaller station owners and innocent third parties. The State further regulates oil and gas terminals, including the implementation of contingency plans and spill response efforts, in coordination with relevant federal agencies.

We have significant concerns that the proposed legislation could be used to negatively impact our existing lawsuit and enforcement of our state's UST/AST program. First, the bill includes a provision for dismissal of any pending lawsuit without respect to the stage of the lawsuit, the culpability of defendants, or the egregiousness of the harm. The proposed legislation limits this provision to claims "resulting from the introduction of gasoline into motor vehicles or engines," ostensibly to provide comfort to small station owners or end users. We do not discourage reasonable measures designed to protect small businesses or end users. Indeed, our litigation was never directed at these entities because they do not possess either the knowledge or the means to prevent the harms for which we seek redress. However, given the sweeping nature of the immunity provided, we believe the petroleum company defendants will likely raise this immunity at every turn in an attempt to either dismiss or seriously curtail our groundwater contamination case. The specter of such immunity could provide even the most culpable violators with an avenue to argue that they cannot be responsible for violating states' common laws concerning defective products or statutes designed to guard against groundwater contamination.

Second, the proposed legislation provides a "safe harbor" provision stating that no product shall be considered a "defective product" if approved by the EPA. The effect of this language on pending litigation is not specified, which in itself creates further ambiguity. Regardless of its application, however, the broad prohibition against causes of action based upon allegedly defective products could prevent rightful recovery even where a defendant has intentionally introduced dangerous chemicals

into groundwater. The proposed legislation also fails to account for those times when EPA itself has been deceived – something the State of New Hampshire has alleged occurred with respect to MTBE. The "safe harbor" provision includes no limitation in its application. Essentially, it is a license for poor design and nondisclosure of potential harmful defects.

Finally, it is unclear to what extent the UST provisions of the bill could limit longstanding state regulation of underground tanks. New Hampshire currently requires several measures unrelated to a specific product, including frequent inspections and secondary containment measures. Without language specifically acknowledging the viability of these. programs, it is unclear whether some may claim that they fall under the rubric of "compatibility" and are, consequently, subject to preemption.

HB 4345 varies significantly from the majority of environmentally-focused legislation wherein state regulatory programs are allowed to be at least as stringent as the corresponding federal program. In addition, the legislation is bereft of a "savings clause," which preserves valid state rights or lawsuits that have already been filed at the time the legislation is enacted. The State of New Hampshire requests that it be given the opportunity to protect its natural resources and the health of its citizens.

Sincerely,

K. Allen Brooks
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Chief, Environmental Protection Bureau
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KAB