NO. _____

In the
Supreme Court of the United States

EXXON MOBIL CORPORATION AND EXXONMOBIL OIL CORPORATION,

Petitioners,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

On Petition for Writ of Certiorari to the New Hampshire Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause permits a state to use *parens patriae* standing and statistical proof to recover hundreds of millions of dollars in a "Trial by Formula" that eliminated individualized defenses that have uniformly prevented courts from certifying comparable cases as class actions and allowed the state to recover for contamination of unidentified wells and wells that do not yet exist.

2. Whether a state-law tort duty is preempted when it retroactively outlaws the only feasible option for complying with a federal mandate.

PARTIES TO THE PROCEEDING

Exxon Mobil Corp. and ExxonMobil Oil Corp. are petitioners here and were defendants-appellants-cross-appellees in the New Hampshire Supreme Court. The State of New Hampshire is respondent here and was plaintiff-appellee-cross-appellant below.

CORPORATE DISCLOSURE STATEMENT

Exxon Mobil Corp. is a publicly held corporation, shares of which are traded on the New York Stock Exchange under the symbol XOM. Exxon Mobil Corp. has no parent corporation, and no entity owns more than 10% of its stock. ExxonMobil Oil Corp. is wholly owned by Mobil Corp., which is wholly owned by Exxon Mobil Corp.

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PETITION FOR WRIT OF CERTIORARI

This case involves the largest jury verdict ever rendered in the State of New Hampshire—a $236 million verdict against petitioners Exxon Mobil Corp. and ExxonMobil Oil Corp. (Exxon). The astronomical verdict was the result of litigation brought by New Hampshire itself seeking damages on behalf of every private and public well owner in the state for alleged contamination of wells that were never identified and, in many cases, *do not even exist*. Despite the inherently individualized nature of well contamination, the New Hampshire courts nevertheless permitted New Hampshire to prove its case on a statewide basis using aggregate statistical evidence, thereby obliterating Exxon's ability to defend itself and notwithstanding Exxon's compliance with federal and state law at every step of the way. This unprecedented and unjust judgment cannot stand.

In 1991, New Hampshire voluntarily opted into the federal reformulated gas (RFG) program established by the Clean Air Act Amendments of 1990. That program required gasoline refiners to add an oxygen-containing chemical—an "oxygenate"—to all gasoline sold in participating areas. During the time New Hampshire participated in the RFG program, the only oxygenate feasible for use in New Hampshire was methyl tertiary butyl ether (MTBE), which improved air quality but posed risks to groundwater. Nonetheless, the State's legislative and executive branches repeatedly chose to remain in the RFG program, and when they ultimately decided to prohibit the use of MTBE, they did so only

prospectively and with a transition period. Exxon supplied MTBE gasoline in New Hampshire during the relevant period in compliance with both New Hampshire's positive law and the federal mandate.

Then, lawyers for the State working with contingency-fee counsel decided that Exxon's prior compliance with federal law was, in fact, illegal *ab initio* as a matter of New Hampshire common law. New Hampshire sued Exxon for the alleged groundwater contamination purportedly resulting *not* from Exxon's mishandling of MTBE gasoline but from simply supplying MTBE gasoline in New Hampshire. Yet MTBE did not get into New Hampshire groundwater because Exxon supplied MTBE gasoline in the state. Rather, MTBE entered the groundwater because it was spilled or leaked during storage, handling, or dispensing by numerous third parties. The precise mechanism and fault for each of those spills varies considerably, so much so that every federal court to confront a request to deal with MTBE cases via class action has recognized the predominance of individual issues and refused.

But New Hampshire had a "solution" for avoiding the individual issues inherent in litigating the alleged contamination of thousands of wells in a single suit. It brought a *parens patriae* suit asserting standing on behalf of each of the approximately 250,000 well owners in the state and future owners of 50,000 wells yet to be dug. And instead of satisfying the necessary individualized proof of liability and damages, the State was permitted to hold Exxon accountable on a statewide level based on aggregate statistical data, eliminating Exxon's ability to raise defenses regarding

the fault of third parties for particular MTBE contamination.

The resulting trial bore little resemblance to any traditional tort suit, but instead was precisely the kind of "Trial by Formula" that this Court has condemned in the class action context. Indeed, the reliance of statistical formulae in lieu of traditional proof was so complete that Exxon was held liable for the contamination of 287 wells *that do not yet exist*. Freed from the traditional constraints on tort suits involving actual plaintiffs and specific spills, and confronted with a well-heeled out-of-state corporation, a New Hampshire jury awarded New Hampshire $236 million in damages. The New Hampshire Supreme Court affirmed in relevant part, reversing only the trial court's modest effort to ensure that the State would actually use the damages awarded to it for future, not-yet-incurred damages to remediate groundwater contamination.

This manifestly unjust outcome demands this Court's attention and presents two issues for review. *First*, the New Hampshire courts permitted the State to use *parens patriae* standing and statistical proof to facilitate an abstract, aggregate, statewide case and to eliminate individualized defenses that have precluded class litigation of comparable claims. The State was permitted to establish *liability and damages* based on aggregate, statewide statistical evidence that obliterated Exxon's ability to present its defenses—the very "Trial by Formula" this Court rejected in *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2561 (2011). The State extrapolated from studies showing contamination at just a handful of wells to "prove" that

thousands of unidentified wells throughout the state were contaminated. So pervasive was the departure from ordinary modes of proceeding that the State recovered for 287 wells that do not yet exist. Because the overwhelming majority of the extant wells (and, needless to say, all the non-existent ones) were unidentified, Exxon had no opportunity to dispute the presence of contamination at any particular well or to identify third parties who were responsible for such contamination. This sort of adjudication-by-aggregate-extrapolation violates due process. The New Hampshire Supreme Court's ruling to the contrary is in conflict with the California Supreme Court's decision in *Duran v. U.S. Bank National Ass'n*, 325 P.3d 916 (Cal. 2014), is in serious tension with *Dukes*, and raises issues similar to those raised in *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146. The Court's plenary review is plainly warranted to make clear that protection from such a "Trial by Formula" is not something reserved to those fortunate enough to litigate in federal court, but is a fundamental guarantee of the Due Process Clause.

Second, the retroactive no-MTBE duty imposed by the New Hampshire courts is preempted because at all relevant times, MTBE was the only feasible means of complying with the federal oxygenate mandate in New Hampshire. Exxon presented overwhelming evidence that the only theoretical alternative to MTBE—ethanol—suffered from a host of practical, technical, and environmental obstacles that rendered it wholly infeasible in the Northeast. And unlike other cases in which state-law liability was imposed for specific spills of MTBE gasoline, here the State's abstract theory means that Exxon was held liable merely for

supplying MTBE gasoline. But there was no other feasible way to supply gasoline that complied with the federal oxygenate mandate. Thus, the decision below imposes a state-law penalty for using the only feasible means of complying with a federal mandate. That result is squarely preempted, and the New Hampshire Supreme Court's contrary determination evinced a profound misunderstanding of this Court's precedents.

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court is reported at 126 A.3d 266 and reproduced at App.1-87. Relevant opinions of the New Hampshire Superior Court are unreported and reproduced at App.90-197.

JURISDICTION

The New Hampshire Supreme Court issued its opinion on October 2, 2015, and denied reconsideration on October 22, 2015. App.88-89. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the U.S. Constitution and the Clean Air Act Amendments of 1990, 42 U.S.C. §7545 (2000), are reproduced in the petition appendix.

STATEMENT OF THE CASE

A. The Clean Air Act Amendments of 1990 and New Hampshire's Participation in the RFG Program

In the Clean Air Act Amendments of 1990, Congress established the RFG program, 42 U.S.C. §7545(k) (2000), which mandated that all gasoline sold in the most smog-ridden areas have a minimum two-percent oxygen content, *id.* §7545(k)(2)(B). To meet this federal mandate, refiners were required to add an "oxygenate" to all gasoline sold in those areas. *Id.* §7545(m). Oxygenates reduce harmful emissions by allowing more complete combustion, reducing smog, and displacing airborne toxics. *E.g.*, N.H.App.802;[1] S. Rep. No. 106-426, at 4 (2000).

States like New Hampshire that were not required to use RFG could "opt-in" to the RFG program. 42 U.S.C. §7545(k), (m). In 1991, the State of New Hampshire opted in, requiring the sale of federally-compliant RFG in the State's four southeastern counties by 1995. N.H.App.717.

Although the RFG program formally gave suppliers a choice from a preapproved list of six oxygenates to add to gasoline, in practice, the options were extremely limited. At the national level, the Environmental Protection Agency (EPA) acknowledged that refiners across the country would primarily use "two major oxygenates" to satisfy the federal mandate: MTBE and ethanol. 57 Fed. Reg. 47,849, 47,852 (Oct. 20, 1992). For gasoline supplied

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[1] "N.H.App." refers to petitioners' appendix in the New Hampshire Supreme Court.

in New Hampshire, refiners had no choice at all; MTBE was the only safe, feasible option. Ethanol was not then widely available outside the Midwest; more important, it was incompatible with then-existing transportation and storage systems in the northeast United States. Substantial modifications to production and distribution processes were required before sufficient ethanol-based RFG gasoline could be distributed outside the Midwest.[2] Ethanol also had major pollution risks. A joint study by Northeast states, including New Hampshire, cautioned against increased ethanol use because it "results in substantial … increases of acetaldehyde emissions … far in excess of health-based risk standards in the Northeast." N.H.App.804. And "[u]nless all gasoline sold in the region contains ethanol, the blending or commingling of ethanol with non-ethanol gasoline blends in vehicle gas tanks [would] result in a significant increase" in harmful emissions. *Id*.

MTBE's benefits to air quality came with known risks to groundwater. MTBE "is very soluble in water," "often travels farther than other gasoline constituents," and can be more difficult to remediate than gasoline releases not containing MTBE. 65 Fed. Reg. 16,094, 16,097 (Mar. 24, 2000). EPA was aware of these groundwater concerns before it approved MTBE's use in the RFG program. *E.g.,* N.H.App.529 (noting in 1988 "concern about MTBE contamination of ground water" and stating that "MTBE will probably contribute to an increase in incidents of

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[2] *E.g.*, N.H.App.218-24, 261-63, 348, 776, 778, 805; Tr. 5510, 5518-27, 5664-65, 6805, 6880, 6887, 7081-82, 7104-07, 7180-82, 7252-58, 7305, 7320-23.

contamination"); N.H.App.552 (noting in 1988 that "MTBE is extremely soluble in water"); N.H.App.641 (noting in 1988 that MTBE can make remediation "considerably more expensive").

After New Hampshire opted into the RFG program, and in order to comply with the federal oxygenate mandate, Exxon and all other suppliers brought MTBE gasoline into the state, where it was handled, sold, and used by numerous third parties. Over the next several years, New Hampshire's executive and legislative branches reaffirmed their support for the RFG program and MTBE. For example, in 1997, the New Hampshire Department of Environmental Services (NHDES) recommended that the Governor continue New Hampshire's voluntary participation in the RFG program, and the Governor did so. *See* N.H.App.761-62. In 1999 and 2001, NHDES opposed bills that would have banned MTBE. *See* N.H.App.772-79, 846-52. According to NHDES, banning MTBE would "effectively create an ethanol mandate," N.H.App.850, causing "significant environmental, regulatory, and economic ramifications," N.H.App.846. NHDES also recognized ethanol's scarcity in New Hampshire, warning that "[r]equiring a gasoline that [was] not commercially available may have significant impacts on the supply and pricing of gasoline." N.H.App.852. The legislature did not pass either bill, declining to ban MTBE gasoline.

Only in 2004 did New Hampshire finally enact a law banning MTBE gasoline. N.H. Rev. Stat. Ann. §146-G:12. Recognizing the practical impossibility of complying with the federal RFG mandate while

immediately forswearing MTBE, however, the law provided for a nearly three-year transition period to allow modification of supply and distribution systems. *Id*. Exxon has not sold MTBE gasoline in New Hampshire since 2006. Tr.2749.

B. Procedural History

1. In 2003, the State—after encouraging Exxon's use of MTBE for almost a decade—sued Exxon for using MTBE. The State did not allege that Exxon had negligently handled or spilled MTBE gasoline, but rather that MTBE gasoline was defectively designed, Exxon was negligent in using MTBE as a gasoline additive, and Exxon failed to warn the State about MTBE gasoline's dangers. In 2008, the State added *parens patriae* claims for MTBE contamination to hundreds of thousands of privately-owned wells, including for wells that had not yet been dug.

The case proceeded to trial. Over Exxon's strenuous objections, the trial court permitted numerous deviations from traditional methods of tort adjudication. Most pertinent here, in what it aptly called a "turning point" in the litigation, the trial court permitted the State "to prove injury-in-fact and damages on a state-wide" basis via "statistical" expert testimony, as opposed to an "individual" basis focusing on specific incidents of MTBE contamination at specific locations (like every other MTBE case that has been litigated). App.99. Thus, even though MTBE contamination overwhelmingly occurs because a particular third party—like a service station or junkyard operator—spills or leaks MTBE gasoline in a specific location, the trial court relieved the State of its burden to prove that Exxon (as opposed to some

other party) was responsible for contamination at any specific location.

Exxon argued that this statewide statistical approach violated due process by eliminating its ability to raise defenses regarding purported contamination at specific wells. *See, e.g.*, App.101; Mem. in Supp. of Defs.' Mot. to Exclude Opinions of Pl.'s Experts, at 2, 16, 25-26 (N.H. Super. Ct. Jan. 24, 2011). The trial court, relying largely on *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 113 F. Supp. 2d 345 (E.D.N.Y. 2000) (Weinstein, J.), nonetheless held that "the state-wide proof model is acceptable." App.116. Rejecting the due process claim, the court concluded that relieving the State of its requirement to prove injury and causation on an individual basis was permissible because "'modern adjudicatory tools must be adopted to allow the fair, efficient, effective and responsive resolution of claims'" for "'injured masses.'" App.119 (quoting *Blue Cross*, 113 F. Supp. 2d at 373) (brackets omitted).

As a result, the trial court admitted statistical evidence that amply demonstrated the dangers of permitting the State to argue its case on a statewide, aggregate basis. For example, the State extrapolated from two studies showing evidence of contamination at a grand total of *six* wells to claim that *5,543* unidentified wells were contaminated. The State's expert, Dr. Fogg, started with a study that sampled 100 wells and found contamination above the maximum contaminant level ("MCL") in just two of them. *See* Tr.970; N.H.App.853-60. Dr. Fogg multiplied that 2% detection rate by the estimated number of wells in the four RFG counties (about

150,000), turning 2 wells into 2,975 purportedly contaminated wells. *See* Tr.967-75; N.H.App.1158. Tellingly, the statistical confidence of this projection was so low that Dr. Fogg admitted that the margin of error included the possibility that zero wells were contaminated. Tr.1019.

Dr. Fogg then used a completely *different* data set for non-RFG counties, because comparable extrapolation from the previous study would have yielded zero contaminated wells in those counties. *See* Tr.979, N.H.App.853-60. The new data set contained samples from 177 wells, four of which were contaminated above the MCL. *See* Tr.982. Dr. Fogg extrapolated from that data to project that 2,568 wells in non-RFG counties are currently contaminated. *See* Tr.997-1001, 1005-1009. Thus, Dr. Fogg transformed contamination at six identifiable wells into contamination at 5,543 completely unidentified wells. And, to be clear, none of these projections so much as suggested that *Exxon*—as opposed to some other party—was responsible for any of the supposed contamination.

Dr. Fogg also estimated contamination at wells *that did not yet even exist*. He projected that 50,000 new wells will be dug over the next twenty years, and, of these, 49,813 would require no treatment, leaving 287 purportedly contaminated future wells. *See* N.H.App.1506. The State never identified those 287 wells, of course—because they do not exist and may never exist—yet it nevertheless was allowed to claim injury and obtain damages based on future treatment

of those nonexistent wells.[3]

The trial court also declined to hold that the state-law tort duty sought by the State was preempted by the Clean Air Act Amendments. At the summary judgment stage, the court rejected Exxon's argument that Congress intended to preserve a choice among oxygenates, preempting the State's claims regardless of whether there were any safer, feasible alternatives to MTBE. App.90-97. Later, the court refused to consider whether preemption would apply if Exxon in fact had no safer, feasible alternative besides MTBE when supplying gasoline to New Hampshire under the RFG program, as the evidence and New Hampshire's own actions (*e.g.*, adopting a three-year phase-out for MTBE) demonstrated. App.147, 192.

The jury returned a verdict in the State's favor on all counts and awarded $816,768,018 in total damages. The jury then apportioned $236,372,664 to Exxon under the controversial "market share liability" doctrine—which the trial court had endorsed for the first time in New Hampshire history—after setting Exxon's MTBE supplier market share at 28.94%. App.4-5. More than half of the damages were earmarked for repeatedly sampling all 250,000 privately-owned wells in the state—plus another 50,000 wells that have not yet been dug—and to treat

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[3] The State took the same approach for 228 so-called "high risk" sites, *i.e.*, locations where MTBE gasoline was released into the environment, like gas stations. It presented no evidence whether each specific site was actually contaminated or required remediation, instead relying only on statistical averages to calculate costs associated with those sites. *See, e.g.*, Tr. 3947-54, 4534-35, 4969-76.

the wells found to be contaminated. App.4. The trial court denied Exxon's motions for new trial and judgment notwithstanding the verdict. App.149-197. It placed the damages for current and future monitoring and remediation into a trust to ensure that the State actually used the damages for groundwater cleanup, not for other budgetary needs. App.83-85.

2. Exxon appealed to the New Hampshire Supreme Court on numerous state and federal grounds, and the State cross-appealed on the trust issue. The New Hampshire Supreme Court rejected all of Exxon's arguments and affirmed the holding as to Exxon's liability and damages. It reversed only the trial court's imposition of a trust.[4]

As relevant here, the New Hampshire Supreme Court first held that the Clean Air Act Amendments do not preempt the retroactive state-law tort duty barring Exxon from supplying MTBE gasoline to the state since the beginning of time. It observed that "'[n]either the statute nor the regulations required Exxon to use MTBE, rather than other oxygenates, such as ethanol, in its gasoline.'" App.22 (quoting *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 98 (2d Cir. 2013). And it rejected preemption by noting that preserving "choice among oxygenate options" was not "a significant objective of the federal law." App.24.

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[4] Three of the New Hampshire Supreme Court's five Justices were recused from the case. The decision was issued by two sitting Justices and a retired trial court judge assigned to the case to achieve a quorum.

The New Hampshire Supreme Court then held that the State was permitted to rely on "aggregate statistical evidence rather than individualized evidence of particular water supplies and sites." App.58. As it had before the trial court, Exxon argued that "allow[ing] proof of injury on an aggregate basis through statewide statistical extrapolations" placed it in the "impossible position" of proving that it was "not liable for contamination in wells" that the State had "never identified" and often had "not yet been drilled," thereby violating "fundamental notions of Due Process." Br. for Appellants 4 (N.H. Nov. 3, 2014) (citing *Dukes*); *see also id.* at 54 (arguing that the State's approach deprived Exxon "a fair opportunity to mount a defense"). The New Hampshire Supreme Court tersely concluded that the trial court's determination "was not an unsustainable exercise of discretion." App.65. The court also affirmed the trial court's use of market share liability in lieu of traditional causation, App.54-58, making New Hampshire the first state to adopt market share liability in almost twenty-five years.

The New Hampshire Supreme Court denied Exxon's motion for reconsideration but granted Exxon's motion to stay the mandate pending a petition for certiorari. App.88-89.

REASONS FOR GRANTING THE PETITION

The departures of the proceedings below from the rules that govern ordinary tort actions could fill volumes. At every turn, legal obstacles to trying this state-law suit to the State's benefit were mowed down in the name of expedience. Never mind that every other court to consider such suits has concluded that

they need to be tried well-by-well; never mind that the State took six identified wells and turned them into 5,543 unidentified wells; never mind that New Hampshire had never before embraced market share liability; never mind that New Hampshire had affirmatively opted into the RFG program (twice) and phased it out only gradually; and on and on. The will to try this case to judgment for the State's benefit was stronger than any state-law legal obstacle that Exxon could invoke to slow down this juggernaut. Nonetheless, at least two federal issues remain and provide a solid basis for this Court's necessary review.

First, certiorari is necessary to resolve the split that has emerged over the due process implications of this Court's holding in *Dukes*. In *Dukes*, this Court held that the Rules Enabling Act prevents a class from being certified under Rule 23 when the class proposes to use wholesale statistical evidence to estimate the number of injured plaintiffs, because that approach obliterates a defendant's right to present individualized defenses. Since the Court premised its decision on the Rules Enabling Act, it did not squarely address whether this "Trial by Formula" also violates the Due Process Clause.

This case squarely presents that question. New Hampshire, invoking *parens patriae* standing on behalf of its citizens, used precisely the same sort of aggregate statistical evidence the *Dukes* plaintiffs proposed, and then some. Rather than prove MTBE contamination at each well for which the State sought damages, the State was permitted to extrapolate from studies showing contamination at just six wells to suggest that thousands of unidentified wells across

the state—*including those that do not yet even exist*—were contaminated. This manner of proof completely decimated Exxon's ability to defend itself. It is, to state the obvious, impossible to show that someone else was responsible for the contamination of an unidentified well, much less a well that has not yet been dug. This case dramatically demonstrates that the protection against "Trial by Formula" is too fundamental for it to be denied to those who need it most—namely, those litigating in state court against the State. The decision is not just wrong and wildly unfair; it implicates a division among lower courts over whether the Due Process Clause forbids this sort of adjudication-by-aggregate-extrapolation.

Second, the retroactive state-law no-MTBE duty created by the courts below is preempted because it imposes hundreds of millions of dollars in liability for using the only feasible option to comply with a federal mandate. It is one thing to allow a state to eliminate one option when it leaves private parties with other practical means of compliance. But when there is no real-world choice—when a private party has no feasible alternative for complying with a federal mandate—a state-law duty retroactively foreclosing that "choice" is plainly preempted. The court below rejected that obvious conclusion only by profoundly distorting this court's case law on preemption.

I. Exxon Was Held Liable In A "Trial By Formula" Based On Aggregate, Statewide Proof, Violating Exxon's Right To Due Process.

1. This case provides the Court with the opportunity to disapprove the "novel project" of "Trial by Formula" as a matter of due process and not just the Rules Enabling Act. *Dukes*, 131 S. Ct. at 2561. In *Dukes*, this Court held that a plaintiff class cannot be certified when it proposes to overcome objections to class treatment by using statistical extrapolation to estimate the number of injured plaintiffs. *Id.* at 2560-61. The Court explained that aggregate adjudication of this sort would deprive defendants of their right to raise individualized defenses, in violation of the Rules Enabling Act. *Id.*[5] Because the Court premised its decision on the Rules Enabling Act, it did not squarely address Wal-Mart's alternative argument that such "Trial by Formula" violates the Due Process Clause. This case, which is a state *parens patriae* action rather than a federal class action, directly presents that question and makes abundantly clear that the protection against "Trial by Formula" is too fundamental not to extend to those who need it most—defendants sued by a State in the State's own courts.

Had this case been brought as a putative class action by private well owners, rather than by the State asserting *parens patriae* standing on behalf of those individuals, it would have suffered the same fate as every other MTBE case seeking class certification. Courts in those cases have universally denied class

[5] This portion of *Dukes* was unanimous.

status because of the predominance of individualized issues. For example, in *In re MTBE Products Liability Litigation*, 209 F.R.D. 323 (S.D.N.Y. 2002), the court refused to certify a class of private well owners due to lack of typicality, superiority, and predominance. The court explained that "[t]here are … differences in the level of contamination that the named plaintiffs allege, the source of the contamination, how the contamination affects each plaintiff, and the nature of relief that each will require." *Id.* at 344. Other courts have similarly rejected class treatment given the need for individualized proof of liability and damages. *E.g., Millett v. Atl. Richfield Co.*, 2000 WL 359979, at *13 (Me. Super. Ct. Mar. 2, 2000) ("The issue of causation presents a major obstacle … because it cannot be proven on a class-wide basis."); *Maynard v. Amerada Hess Corp.*, No. 99-CVS-00068, slip op. at 2 (N.C. Super. Ct. Jan. 29, 2002) ("Plaintiffs' [well owner] claims raise a host of site-specific liability, causation and damages issues.").

These courts recognize that MTBE does not just appear in groundwater of its own accord; rather, MTBE contaminates groundwater through individuals spilling gasoline or through leaky underground storage tanks. Thus, in MTBE cases, no common event ties together all the injuries and makes a mass tort amenable to common proof with only limited individual variation. Rather, each contaminated well involves different responsible parties, different volumes released into different types of soil, and different degrees of contamination requiring differing clean-up responses. Given these differences, an MTBE class action is a non-starter.

New Hampshire attempted to circumvent these problems by asserting *parens patriae* standing on behalf of private individuals who could not proceed on a classwide basis. New Hampshire hoped a *parens patriae* suit would allow it to do what *Dukes* forbids—hold Exxon accountable for MTBE contamination on a statewide level based on aggregate statistical evidence. But simply asserting *parens patriae* standing cannot eliminate either the numerous substantive individualized issues inherent in MTBE contamination cases or Exxon's constitutional right to present its defenses. Just as a court cannot resort to "Trial by Formula" to eliminate individual issues that preclude class treatment, a state court cannot reach the same result by allowing the State to sue on behalf of thousands of private well owners using statistical sampling and extrapolation to eliminate the defendant's ability to insist that others are responsible for the contamination of particular wells.

Indeed, apart from the precise mechanism used (Rule 23 versus *parens patriae*), the similarities between this case and *Dukes* are striking. In *Dukes*, plaintiffs alleged thousands of discrete instances of discrimination against female employees. 131 S. Ct. at 2547-48. But rather than prove each instance of discrimination, the plaintiffs proposed to select a sample set of alleged victims. *Id.* at 2561. The percentage of claims in the sample "determined to be valid" would then "be applied to the entire remaining class," with the product of that calculation representing the approximate number of victims. *Id.* This number would be multiplied by the sample set's average backpay award, allowing the entire class to recover "without further individualized proceedings."

Id. This Court disapproved this "novel" method of adjudication because it would deprive Wal-Mart of its right to defend against each individual claim. *Id.*

The New Hampshire Supreme Court approved the very same method of adjudication this Court rejected in *Dukes*, with the very same intolerable consequences for the defendant. As in *Dukes*, the plaintiff (the State as *parens patriae*) alleged thousands of discrete instances of contamination. But in an acknowledged "turning point" in the litigation, App.99, the trial court permitted the State to bring its claim without actual proof regarding any of the supposed thousands of impacted locations. Instead, the State was allowed "to prove injury-in-fact and damages on a state-wide," aggregate basis via "statistical" expert testimony, as opposed to an "individual" basis focusing on specific incidents of MTBE contamination at specific locations. *Id.*

Thus, the State's expert selected a sample set of 100 wells in RFG counties and a sample set of 177 wells in non-RFG counties. The percentage of wells in each sample exhibiting contamination (just 2% and 2.26%, respectively) was then multiplied by the total number of wells in the state, and *voilà*, the State was able to claim 5,543 contaminated wells. But the State did not stop there. Its expert then estimated that about 50,000 wells would be dug over the next twenty years, and that 287 of those hypothetical future wells would also be contaminated, leading to a grand total of 5,830 contaminated wells.

Because the State was permitted to prove its case using aggregate statistical estimates at the statewide level, it never identified which specific wells were

allegedly contaminated—much less by Exxon. And, needless to say, it never identified which hypothetical future wells were contaminated, as those wells *literally do not exist*. As a result, Exxon was deprived of any meaningful opportunity to mount a defense, which is an obvious violation of due process. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (due process protects the right "'to present every available defense'"); *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Exxon could not disprove the presence of contamination at a given well, because the State did not identify which wells were contaminated. Exxon could not identify third parties who were at fault for particular spills, because the State did not identify which spills caused contamination. Exxon could not even show that contamination at particular wells was caused by other refiners' gasoline, because the State did not provide any information about the nature of contamination at particular wells. As in *Dukes*—if not more so—Exxon was deprived of its right to defend against each individual instance of alleged injury. All individualized distinctions and nuances were buffed out by the statistical extrapolation.

Because this was not a federal class action, Exxon is not protected by the Rules Enabling Act. Exxon is, however, protected by the Due Process Clause—and those protections are most urgently needed where, as here, a state seeks to use its own courts to recover a massive judgment *for its own benefit*. Accordingly, this case squarely presents the question of whether the "Trial by Formula" rejected in *Dukes* exceeds constitutional bounds when it excuses a plaintiff from proving its injury and deprives a defendant of its right

to "present every available defense." *Lindsey*, 405 U.S. at 66.

2. This due process question, left unresolved in *Dukes*, divides the lower courts. The California Supreme Court, for example, has held that "Trial by Formula" violates federal due process. In *Duran v. U.S. Bank National Ass'n*, 325 P.3d 916 (Cal. 2014), that court reversed on due process grounds a judgment for plaintiffs in a state-law wage-and-hour class action. The trial court had permitted plaintiffs, a class of 260 employees, to prove class-wide injury based on a sample of just 21 employees. *Id.* at 920. Based on testimony from this "small sample group," the trial court "found that the *entire* class had been misclassified" as exempt from state overtime laws and then "extrapolated the average amount of overtime reported by the sample group to the class as a whole." *Id.* The California Supreme Court reversed, citing *Dukes* for the proposition that federal due process requires that defendants have an opportunity to present defenses to individual claims. *Id.* at 935 ("The court's decision to extrapolate classwide liability from a small sample … deprived [the bank] of the ability to litigate its exemption defense."); *see also Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 560-61 (Tex. App. 2002) ("[S]tatistical evidence will preclude any individual inquiry … when determining Wal-Mart's liability for any alleged breach of each contract.").[6]

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[6] Since *Dukes*, at least two federal courts of appeals have suggested that "Trial by Formula" violates due process. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 669 (7th Cir. 2015) ("[A] defendant has a due process right not to pay in excess of its

The Pennsylvania courts reached the opposite conclusion in *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875 (Pa. Super. Ct. 2011), *petition for cert. filed*, 83 U.S.L.W. 3747 (U.S. Mar. 13, 2015) (No. 14-1123). Plaintiffs, hourly employees, alleged that Wal-Mart "failed to compensate them for rest breaks and off-the-clock work as mandated in [Wal-Mart's] policies." *Id.* at 885. At trial, plaintiffs' experts relied on statistical extrapolation to "prove" the number of injured employees and amount of uncompensated work. Wal-Mart argued that these statistical extrapolations violated federal due process because Wal-Mart was unable to present individualized defenses to class members' claims. The Pennsylvania Superior Court rejected the argument, "discern[ing] no denial of due process." *Id.* at 883.[7]

The decision below deepens this split and calls out for this Court's review. The New Hampshire courts permitted the State to prove its case on a statewide basis via aggregate statistical extrapolation, placing Exxon in the impossible position of trying to prove it is not liable for contamination in wells the State never identified. And Exxon was prevented from showing that another party was, in fact, responsible for particular contamination, since the State could not

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liability and to present individualized defenses if those defenses affect its liability."); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims.").

[7] The Pennsylvania Supreme Court denied discretionary review of the federal question and affirmed the judgment. *See Braun v. Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. 2014), *petition for cert. filed*, 83 U.S.L.W. 3747 (U.S. Mar. 13, 2015) (No. 14-1124).

even identify which wells were contaminated. Thus, although MTBE almost always enters groundwater because a third party spilled, leaked, or otherwise mishandled MTBE gasoline, and although there were hundreds of different spills and leaks from locations throughout the state—which may or may not have affected a small minority of the private wells in the state in different ways depending on different circumstances—the New Hampshire courts' acquiescence to aggregate statistical evidence produced the improbable result that *not a single third party* bore *any* responsibility for *any* MTBE contamination in New Hampshire.

As if that were not enough, the State was also permitted to seek—and obtained—damages based on alleged contamination to wells that *do not yet even exist* and may never exist. *See* pp. 11, 20, *supra*. Again, this resulted from the State's ability to prove its case through aggregate statistics rather than individualized evidence of particular contamination of particular locations. If Exxon's right to present defenses was hamstrung by the State's reliance on aggregate statistical evidence as to existing wells, its right to present defenses as to *future* wells was as non-existent as those very wells.

The New Hampshire Supreme Court's holding permitting the State to prove its case using aggregate, statewide statistical evidence is irreconcilably at odds with *Duran*, *Lopez*, and the federal cases that have recognized a due process right to present individualized defenses to liability. *See* n.6, *supra*. The Court should grant certiorari to settle this indisputably important issue of federal law.

3. This case presents an ideal vehicle for the Court's review. First, the aggregate statistical evidence used here was not necessitated by the defendant's failure to keep records, as can occur in wage-and-hour class actions. For example, in *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 2806 (2015), plaintiffs relied on extrapolation to estimate the amount of time they spent donning, doffing, and walking because the defendant kept no such records. *Id.* at 799. Such cases present complicating intersections with spoliation doctrine and this Court's *Mt. Clemens* decision, which provides that employees can prove the "approximate" amount of time they worked "as a matter of just and reasonable inference" when an employer fails to keep time records. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946).[8]

In contrast, the State here used aggregate statistical evidence simply because doing so would be more *convenient* than proving its case on an individualized basis. *See, e.g.*, App.120 (stating that "'[i]ndividualized'" analysis of contaminated wells would not be "'cost effective'"). Nothing prevented the State from identifying contaminated wells before

[8] Nonetheless, should this Court reverse or vacate in *Tyson Foods*, it should, at absolute minimum, grant, vacate, and remand this case for further proceedings. In that case, petitioner argued, like Exxon here, that respondents' "use of statistics improperly disguised the presence of numerous individualized issues," "impermissibly lessened [respondents'] burden of proof," and "undermined [petitioner's] ability to defend itself" in violation of due process. Br. of Pet'r at 33-40, *Tyson Foods*, No. 14-1146 (U.S. Aug. 7, 2015).

filing suit. Indeed, at the State's request, the jury earmarked a portion of the damages award precisely to test all New Hampshire wells. That is, the State conceded that it can test—and represented that it would test—every well in New Hampshire. If the State can test those wells now, it could have tested them and identified contaminated wells before filing suit. "Trial by Formula" thus was used here solely for the State's convenience, making this due process challenge more straightforward than cases in which recordkeeping gaps, rather than litigation efficiency, justify the resort to extrapolation.

Second, the State used aggregate statistical evidence to prove both injury and damages, not just damages. The use of aggregate statistical evidence to prove liability raises far graver due process concerns than in the damages context. While this Court has recognized that damages models are often appropriate and their "[c]alculations need not be exact," *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013), there is no comparable principle that allows courts and juries to approximate liability. That said, the use of statistical evidence to show damages here underscores the due process violation. Damages in MTBE cases vary widely depending on site-specific local conditions, including how and when the MTBE was released, the spill volume, local hydrogeology, the presence of other contaminants, and any past remediation. *See, e.g.*, *In re MTBE Prods. Liab. Litig.*, 209 F.R.D. at 344. As other courts addressing MTBE contamination have recognized in denying class certification, *see id.*, there is no such thing as a "typical" contamination site, so there is no such thing as a "typical" damages award

that can form the basis of aggregate statistical evidence.

4. That this gross deviation from due process inures to the State's own benefit—to the tune of $236 million, the largest verdict in New Hampshire history—is all the more troubling. Although due process would be violated by this sort of aggregate statistical evidence no matter the plaintiff, the constitutional problem is particularly acute where, as here, a state approves an unprecedented method of tort adjudication to permit *itself* to obtain a judgment that augments the state treasury by hundreds of millions of dollars.[9] While a state court system has no obvious incentive to favor plaintiffs over defendants, a suit where the state stands to recover hundreds of millions of dollars from an out-of-state defendant raises distinct concerns.

This case is instructive, for the New Hampshire courts bent over backwards to make the State's recovery possible. Most dramatically, for the first time in New Hampshire history, and for the first time in any state in some twenty-five years, the court below adopted "market share liability." What is more, it embraced "market share liability" although the trial court had found that "a reasonable jury could conclude that Exxon was the proximate cause of the State's alleged injury under a traditional causation theory." App.143. No state has *ever* authorized a plaintiff to

[9] By reversing the trial court's trust ruling, the New Hampshire Supreme Court ensured that the entire damages award will go into the State's general revenue fund, allowing the legislature to appropriate the funds toward any purpose it wants. N.H. Rev. Stat. Ann. §§6:11, 6:12(b).

pursue market share liability when proving traditional causation remains possible, albeit cumbersome. *See, e.g.*, *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 286 (Fla. 1990) (market share liability requires plaintiff to "show[] that she has made a genuine attempt to locate and to identify the manufacturer responsible for her injury."). By allowing the State to rely on Exxon's market share, the courts below facilitated proof by aggregate statistical evidence, since market share evidence substituted for proof of responsibility for particular MTBE gasoline in particular wells.

It is not clear whether this adoption of market share liability represents a real shift in New Hampshire law or just a ruling limited to MTBE gasoline. But that is part and parcel of the problem. The only thing that is certain is that numerous state-law obstacles were eliminated in service of facilitating a "Trial by Formula" that deprived Exxon of its right to put on a meaningful defense. In addition to the novel market share ruling, the New Hampshire courts ignored core separation-of-powers principles; modified *parens patriae* standing from a jury question to a question for the court; crafted new exceptions to precedent requiring damages to be awarded based on proportionate fault; and broke from the overwhelming weight of authority by awarding prejudgment interest for costs the State has not yet incurred. All of this was done, furthermore, in a case where the State itself was seeking hundreds of millions of dollars from an out-of-state defendant. And then, having secured all these deviations in the name of ensuring that wells would be monitored and remediated for years, New Hampshire convinced its Supreme Court to free the State of the

trust obligation imposed by the trial court, allowing the award to be spent on any priority of the New Hampshire legislature.

There is no reason why other states will not follow New Hampshire's lead. Although the dubious state-law rulings below are not independently reviewable in this Court, they highlight why the protection against "Trial by Formula" cannot be limited to the Rules Enabling Act and defendants fortunate enough to be litigating in federal court. Nowhere is the need for the Due Process Clause's protections more acute than for an out-of-state defendant sued in state court by a state seeking to recover hundreds of millions of dollars for the state coffers purportedly on behalf of the citizens of the state. *Dukes* would prevent anything like this from happening in federal court. It is absolutely imperative that this Court make clear that defendants do not lack comparable protection where they need it most.

II. The No-MTBE Duty Imposed Below Is Preempted By Federal Law.

1. The retroactive no-MTBE duty imposed by the New Hampshire courts is preempted because MTBE was the only feasible means of complying with the federal oxygenate mandate. Congress, and subsequently the State of New Hampshire, required refiners like Exxon to use an oxygenate in their gasoline. In New Hampshire, the only oxygenate that could satisfy the federal mandate was MTBE, as the evidence and New Hampshire's own actions make clear. Yet the decision below imposes hundreds of millions of dollars of liability on Exxon simply for using MTBE. That retroactive state-law no-MTBE

duty is preempted just as plainly as it would be if Congress had expressly enacted an MTBE mandate, rather than an oxygenate mandate.

Proceeding on this straightforward preemption theory, Exxon introduced extensive evidence that there was no feasible alternative to MTBE in New Hampshire during the period the State participated in the RFG program. Exxon introduced evidence that the supply of ethanol was inadequate and risky;[10] ethanol-blended gasoline could not be shipped by pipeline, resulting in numerous distribution problems;[11] ethanol was incompatible with certain vehicles and storage systems;[12] the Northeast's distribution system precluded one refiner from using ethanol while others used MTBE;[13] and ethanol reduced air pollution less effectively than MTBE.[14]

Indeed, New Hampshire's own actions powerfully confirm that there was no feasible alternative to MTBE during the relevant time period. In 1999 and 2001, NHDES opposed bills that would have banned MTBE because doing so would "effectively create an ethanol mandate," N.H.App.850, and ethanol was "not commercially available," N.H.App.852. And when the State finally banned MTBE in 2004, it did not do so

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[10] Tr.1995-96, 5521-25, 7180-82, 7289-91, 7304-06; N.H.App.345, 348, 650, 674, 776-778, 788-89, 805-06.

[11] Tr.5518-20, 5600-01, 5651-54, 5866-68, 7185-88, 7195-99; N.H.App.650, 800, 805-06.

[12] Tr.6887, 7081-82, 7105-09; N.H.App.218-223, 261-63, 311-15, 347-48.

[13] Tr.5516-18, 5866-68.

[14] *E.g.*, N.H.App.804.

immediately. Rather, it adopted a nearly three-year phase-out period, in recognition that an immediate ban would have been disruptive and wholly impracticable. That phase-out confirms that there was no safer, feasible alternative available at that time and compliance with an immediate ban would have been impossible. That alone demonstrates that the State's claims are preempted.

It is one thing to allow a state to eliminate one option when it leaves private parties with other practical means of compliance. *Cf. Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 327 (2011). But when there is no real-world choice—when a private party has no feasible alternative for complying with a federal mandate—a state-law duty retroactively foreclosing that "choice" is effectively a state-law penalty for complying with federal law. *Cf. PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011).

That is plainly the case here. Although federal law provided Exxon with a theoretical choice between MTBE and ethanol, ethanol suffered from a host of practical, technical, and environmental obstacles rendering its use wholly infeasible in the Northeast. Consequently, MTBE was the only feasible option for complying with federal law, as the legislature recognized in phasing out MTBE over nearly three years. Indeed, if the legislature had not phased out MTBE but simply declared it unlawful retroactively, that action would plainly be preempted and raise takings and due process problems of the first order. *See, e.g.*, *E. Enters. v. Apfel*, 524 U.S. 498 (1998). The State does not avoid those problems by imposing a retroactive no-MTBE duty by judicial fiat.

At a bare minimum, the New Hampshire courts erred by rejecting this preemption theory without even allowing Exxon to put the issue of the feasibility of other alternatives to the jury. New Hampshire's own actions make clear that a retroactive no-MTBE duty is preempted as a matter of law. But if there were any room for debate, Exxon was entitled to have the jury determine the factual predicate for its argument that the federal oxygenate mandate was an MTBE mandate in New Hampshire.

2. Although the New Hampshire Supreme Court cited "several other courts that have addressed and rejected the issue of preemption and MTBE," App.26, those federal decisions are inapposite because they did not address liability imposed simply for supplying gasoline with MTBE, the basis for Exxon's liability here. For instance, in *In re MTBE Products Liability Litigation*, the Second Circuit explained that even if preemption would preclude tort liability for the mere marketing of MTBE gasoline, the verdict there was independently supported by jury findings of "tortious conduct beyond mere use of MTBE," such as "fail[ure] to exercise reasonable care when storing gasoline that contained MTBE." 725 F.3d at 103-04.

Here, New Hampshire did not argue, much less prove, that Exxon negligently handled MTBE gasoline. Rather, New Hampshire deliberately presented its case at a higher level of abstraction, precluding Exxon from presenting evidence regarding how it handled, stored, and dispensed gasoline and instead attacking only Exxon's decision to supply MTBE gasoline within New Hampshire. The resulting duty imposed below—a duty to have never

brought MTBE gasoline into the state—runs headlong into federal law in a way that a run-of-the-mill duty of due care does not. By abstracting away from individual spills and trying to prove its case on aggregate basis, New Hampshire created not only serious due process problems, *see* pp. 17-29, *supra*, but also an insoluble preemption problem.

The other cases cited by the decision below are equally inapposite. In *Oxygenated Fuels Ass'n, Inc. v. Pataki*, 293 F. Supp. 2d 170 (N.D.N.Y. 2003), the district court held that New York's MTBE law, which phased out MTBE over five years, was not preempted only after a bench trial to determine whether that law would interfere with federal objectives. Here, Exxon was denied the right to prove its preemption case to a factfinder and held liable under a retroactive no-MTBE duty providing no opportunity for Exxon to phase out MTBE to avoid liability. In *Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d 1246 (9th Cir. 2000), the Ninth Circuit addressed only whether Nevada could require higher minimum oxygen content in gasoline than what federal law required, not whether Nevada could retroactively ban MTBE. And in *Abundiz v. Explorer Pipeline Co.*, 2002 WL 1592604 (N.D. Tex. July 17, 2002), the court addressed only whether Texas law was preempted under this Court's decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), not whether it was preempted because state law eliminated the only feasible means for compliance with federal law.

3. The New Hampshire Supreme Court's reliance on *Abundiz* is telling, as it reflects its misunderstanding of how *Geier* and *Williamson*

interact with broader preemption doctrines. In tandem, *Geier* and *Williamson* teach that a tort duty eliminating one option for regulatory compliance is preempted where *choice itself* is a significant regulatory objective. Both courts below, however, incorrectly concluded that the converse is also true—if choice itself is not part of the federal objective, no preemption is possible. That is, they mistakenly believed *Geier* and *Williamson* constitute the entire universe of preemption doctrine when a case involves a federal mandate with options for compliance. But *Geier* and *Williamson* were not intended to create a *sui generis* set of rules for federal mandates with options for compliance. Rather, they clarified just one of many potential ways a state law may interfere with a federal scheme.

At trial, Exxon initially moved for summary judgment under *Geier* and *Williamson*, arguing that a "significant objective" of the RFG program was to provide refiners with a choice among oxygenates. After the trial court denied that motion, Exxon did not press that argument further. But Exxon continued to press the very different preemption argument that a state-law no-MTBE duty was preempted because MTBE was the only feasible way to comply with the oxygenate mandate in New Hampshire. The trial court's subsequent rulings, however, evinced its incorrect belief that preemption under *Geier* and *Williamson* is the *only* sort of preemption applicable in the context of a federal mandate with options. In denying Exxon's motion for directed verdict, the court stated that it would "not revisit" preemption because it had already rejected Exxon's earlier, distinct argument at summary judgment. App.147. Repeating

its error, the trial court refused even to put the question whether there was a feasible alternative to the jury. *See* Tr.10983-92 (requesting instruction). Finally, the trial court denied Exxon's motion for JNOV by stating that it would "not readdress" preemption and had already "rejected this legal argument." App.192.

The New Hampshire Supreme Court repeated the trial court's error with even less justification. Exxon never made a *Geier*/*Williamson* argument before that court, but rather argued that a state-law no-MTBE duty was preempted "'because Exxon had no safer, feasible alternative to MTBE at the time.'" App.19. The New Hampshire Supreme Court nonetheless treated Exxon's argument as if it were a *Geier*/*Williamson* argument, holding that "Exxon does not point to any part of the Clean Air Act or its legislative history that supports a conclusion that the choice among oxygenate options was a significant objective of the federal law." App.24. This explanation was entirely non-responsive to Exxon's argument, and it evinces a fundamental misunderstanding of federal preemption doctrine. There is simply no escaping what is legally relevant: New Hampshire opted in to a federal program requiring manufacturers to add an oxygenate; the only oxygenate feasible for use in New Hampshire at the time was MTBE; Exxon complied with federal and state law by supplying gasoline with MTBE; and Exxon is now liable for $236 million as a result. That outcome is not just plainly wrong but manifestly unjust.

4. The preemption issue here is extremely important. Precisely because of the real-world obstacles implicated by other oxygenates like ethanol (as the evidence and New Hampshire's actions demonstrated), MTBE was widely used to comply with the oxygenate mandate outside the Midwest. Accordingly, there are numerous suits pending around the country in courts that involve MTBE groundwater contamination. *See, e.g.*, *Pennsylvania v. Exxon Mobil Corp.*, No. 14-cv-06228 (Ct. Com. Pleas docketed June 19, 2014); *N.J. Dep't of Envtl. Prot. v. Atl. Richfield Co.*, No. 08-cv-00312 (N.J. Super. Ct. docketed June 28, 2007); *Orange Cty. Water Dist. v. Unocal Corp.*, No. 04-cv-4968 (Cal. Super. Ct. docketed May 6, 2003). If left undisturbed, the New Hampshire Supreme Court's decision will signal to these other courts that they, too, can ignore real-world obstacles that resulted in the use of MTBE in specific areas of the country. Yet it is these real-world obstacles that are key to determining whether state law "stands as an *obstacle* to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (emphasis added) (quotation marks omitted). To discount them entirely not only disregards preemption law, but also unjustly subjects parties like Exxon to extraordinary retroactive liability simply for complying with then-extant state and federal law.

CONCLUSION

This Court should grant the petition for certiorari or, in the alternative, hold the petition for *Tyson Foods* and grant, vacate, and remand should it vacate or reverse in that case.

Respectfully submitted,

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January 20, 2016

APPENDIX

TABLE OF APPENDICES

Appendix A

THE SUPREME COURT OF NEW HAMPSHIRE

Nos. 2013-0591, 2013-0668

THE STATE OF NEW HAMPSHIRE,

Appellant,

v.

EXXON MOBIL CORPORATION, *& a.*,

Appellees.

Argued: May 21, 2015
Opinion Issued: October 2, 2015

OPINION

DALIANIS, C.J. The defendants, Exxon Mobil Corporation and ExxonMobil Oil Corporation (collectively, either Exxon or ExxonMobil), appeal from a jury verdict awarding approximately $236 million in damages due to groundwater contamination to the plaintiff, the State of New Hampshire, after a trial in Superior Court (*Fauver*, J.). The State cross-appeals from the trial court's order imposing a trust upon approximately $195 million of the damages award. We affirm the trial court's rulings on the merits and reverse its imposition of a trust.

I. Background

In 1990, Congress amended the Federal Clean Air Act to require the use of an "oxygenate" in gasoline in

areas not meeting certain national air quality standards. *See* 42 U.S.C. § 7545(k) (Supp. 1991) (amended 2005, 2007). An oxygenate is a substance used to reduce gasoline emissions. *See Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 666 (9th Cir. 2003). The amendment did not mandate the use of any particular oxygenate; it simply required that "[t]he oxygen content of the gasoline shall equal or exceed 2.0 percent by weight." 42 U.S.C. § 7545(k)(2)(B). To implement the requirement, the Environmental Protection Agency (EPA) launched the Reformulated Gasoline Program (RFG Program), which required gasoline containing an oxygenate of the manufacturer's choice. *See* 40 C.F.R. § 80.46(g)(9)(i) (2000). Methyl tertiary butyl ether (MTBE) was one among several possible oxygenates. *Id.* MTBE is a gasoline additive that increases the octane levels of fuels. Metropolitan areas with significant concentrations of ambient ozone were required to use reformulated gasoline. *See* 42 U.S.C. § 7545(k). Other areas, like New Hampshire, could opt in to the program to receive credit toward mandatory emissions reduction requirements. *See* 42 U.S.C. § 7545(k)(6)(A).

New Hampshire joined the RFG Program in 1991, with respect to the State's four southern-most counties, effective January 1, 1995. Between 1995 and 2006, gasoline with MTBE was sold throughout the State. In 1997, employees at the New Hampshire Department of Environmental Services (DES) became aware that MTBE could pose increased risks to groundwater. In 1998, studies from Maine and California raised concerns about MTBE. In 1999, DES adopted regulations setting a maximum contaminant

level for MTBE in drinking water and groundwater at 13 parts per billion (ppb).

> In 2000, the EPA advised:
>
> > MTBE is capable of traveling through soil rapidly, is very soluble in water ... and is highly resistant to biodegradation .... MTBE that enters groundwater moves at nearly the same velocity as the groundwater itself. As a result, it often travels farther than other gasoline constituents, making it more likely to impact public and private drinking water wells. Due to its affinity for water and its tendency to form large contamination plumes in groundwater, and because MTBE is highly resistant to biodegradation and remediation, gasoline releases with MTBE can be substantially more difficult and costly to remediate than gasoline releases that do not contain MTBE.
>
> Advance Notice of Intent to Initiate Rulemaking under the Toxic Substance Control Act to Eliminate or Limit the Use of MTBE as a Fuel Additive in Gasoline, 65 Fed. Reg. 16094, 16097 (Mar. 24, 2000).

In 2001, the Governor petitioned the EPA to allow the State to opt out of the RFG Program, but did not receive a reply until 2004. *See* Removal of the Reformulated Gasoline Program From Four Counties in New Hampshire, 69 Fed. Reg. 4903 (Feb. 2, 2004). In 2004, the legislature enacted legislation banning MTBE gasoline effective in 2007. *See* RSA 146-G:12 (2005) (repealed 2015). In 2005, Congress eliminated the oxygenate requirement and enacted a renewable fuels mandate to increase ethanol usage. *See* Energy

Policy Act of 2005, Pub. L. No. 109-58, §§ 1501, 1504, 119 Stat. 594, 1067, 1076 (2005).

In 2003, New Hampshire sued several gasoline suppliers, refiners, and chemical manufacturers seeking damages for groundwater contamination allegedly caused by MTBE. Before trial, all defendants except Exxon settled with the State. After almost ten years of litigation, the case went to trial in 2013 on three causes of action: negligence; strict liability—design defect; and strict liability—failure to warn. After an approximately three-month trial, the jury found in favor of the State on all of its claims. The jury rejected Exxon's defenses that "in designing its MTBE gasoline, it complied with the state of the art"; that "the hazards posed by the use of MTBE in gasoline were obvious, or were known and recognized by the State"; and that Exxon "provided distributors with adequate warnings of the hazards of MTBE gasoline." The jury also found that Exxon failed to prove that "the actions of someone other than the State or ExxonMobil (which were not reasonably foreseeable to ExxonMobil) were the sole cause of the State's harm," that "the State committed misconduct that contributed to its harm," or that some or all of Exxon's fault should be allocated to certain nonparties.

The jury awarded total damages in the amount of $816,768,018. These damages included: (a) $142,120,005 for past cleanup costs; (b) $218,219,948 to assess and clean up 228 high-risk sites; (c) $305,821,030 for sampling drinking water wells; and (d) $150,607,035 for treating drinking water wells contaminated with MTBE at or above the maximum contaminant level. The jury found that

Exxon's market share for gasoline in New Hampshire during the applicable time period was 28.94%. Accordingly, the trial court entered an amended verdict of $236,372,644 against Exxon. The trial court subsequently awarded the State prejudgment interest in accordance with RSA 524:1-b (2007).

On appeal, Exxon contends that: (1) the State's suit should have been dismissed on the grounds of separation of powers and due process; (2) the suit should have been dismissed due to waiver; (3) the State's claims are preempted by the 1990 amendments to the Federal Clean Air Act; (4) the State failed to establish that Exxon departed from the applicable standard of care; (5) Exxon did not have a duty to warn the State; (6) market share liability is not an acceptable theory of recovery; (7) the State should not have been permitted to rely upon aggregate statistical evidence; (8) Exxon was unfairly prejudiced in its ability to present evidence of fault on the part of other nonparties; (9) the trial court erred in deciding the State had *parens patriae* standing; (10) the State's damages claims for future well impacts are not ripe; and (11) the trial court erred in awarding prejudgment interest on future costs.

II. Separation of Powers and Due Process

Exxon argues that the State's suit should have been dismissed on the grounds of separation of powers and due process. Exxon asserts that based upon the State's decision to participate in the RFG Program beginning in 1991, and the legislature's failure to ban MTBE before 2007, "[t]he retroactive no-MTBE duty" imposed upon it "conflicts with bedrock principles of the separation of powers" and "due process." Exxon

also argues that the suit conflicts with the Oil Discharge and Disposal Cleanup Fund (ODD Fund), RSA ch. 146-D (Supp. 2014); *see* Laws 2014, 177:1 (repealing RSA chapter 146-D, eff. July 1 2025), and the Gasoline Remediation and Elimination of Ethers Fund (GREE Fund), RSA ch. 146-G (Supp. 2014); *see* Laws 2014, 177:3, I (repealing RSA chapter 146-G, excluding RSA 146-G:9, eff. July 1, 2025), Laws 2014, 177:3, II (repealing RSA 146-G:9, eff. October 1, 2025). The State asserts that Exxon failed to preserve its separation of powers argument because the arguments it raises on appeal were not made to the trial court, and that Exxon fails to identify where it preserved its due process argument.

The appealing party bears the burden of demonstrating that it "specifically raised the arguments articulated in [its appellate] brief before the trial court." *Dukette v. Brazas*, 166 N.H. 252, 255 (2014). Generally, the failure to do so bars a party from raising such claims on appeal. *N. Country Envtl. Servs. v. Town of Bethlehem*, 150 N.H. 606, 619 (2004). *But see Sup. Ct. R.* 16-A (plain error rule). We have reviewed the record and agree with the State that Exxon failed to preserve its separation of powers argument concerning the State's purported public policy decisions, as well as its due process argument. However, we address, as properly preserved, Exxon's separation of powers argument based upon the ODD and GREE Funds.

Before trial, Exxon moved for summary judgment on separation of powers grounds, arguing that the State's suit threatened to usurp the legislature's appropriations power because the ODD and GREE

Funds "embody the legislative choice regarding how testing and remediation should be funded" and "this suit would allow the Attorney General to fund remediation in a very different way and create an appropriation outside of the General Court's purview." Exxon asserted that, because "there is no existing statutory mechanism through which any damages awarded to the State in this litigation could be specifically appropriated to the investigation, testing, and remediation the State requests," it would violate separation of powers for the court or the attorney general "to order such an appropriation." Thus, Exxon argued, "[i]n light of the existing funds and their structure, this suit implicates appropriations-related separation of powers problems."

The trial court denied the motion, concluding that Exxon had failed to establish that the legislature intended the ODD or GREE Funds to be the State's exclusive remedy. As to the ODD Fund, the court found that pursuant to the plain language of RSA 146-D:6, I, and I-a, the Fund "is only authorized to disburse funds to owners of underground storage facilities, bulk storage facilities, or the land on which such facilities are stored" and, thus, the statute did not demonstrate legislative intent "to provide a remedy for the damages sought by the State in this litigation." As to the GREE Fund, although noting that it does not contain an explicit limitation upon who may seek payment, because the potential damages at issue in this suit far exceed the $2,500,000 capped balance of the fund, the trial court stated that

> [i]t is reasonable to infer, then, that in creating the GREE Fund the legislature did

> not intend it to serve as the sole source of cleanup funds for any and all contamination event[s]. Its relatively small size indicates that it was intended to address a small number of isolated incidents at any given time, not a statewide contamination of the type alleged here by the State. Finally, the Court notes that neither fund claims to be an exclusive remedy.

Accordingly, the court found that "the existence of these funds does not evince the intent of the legislature to preclude suits such as this one" and that "the State's suit does not threaten to usurp the legislature's appropriations power."

On appeal, Exxon argues that the legislature "created two detailed statutory schemes—the ODD Fund and the GREE Fund—to enable direct spillers to pay the often substantial costs of remediation," and that "[i]t is precisely when the legislature has established a tailored regulatory framework to address a particular problem that this Court has declined to make judicial 'improvements' to the democratically-enacted scheme." The State argues that its suit "is consistent with the ODD and GREE funds" in that the "caps on those funds, their purposes, and their structures confirm that neither was intended to replace recovery actions for tortious activity against manufacturers of dangerous products or to free manufacturers that withhold knowledge of a dangerous condition from liability."

Whether the State's lawsuit violates the Separation of Powers Clause of the State Constitution, N.H. CONST. pt. I, art. 37, because it conflicts with

the ODD and GREE Funds, is a question of law, which we review *de novo*. *See Cloutier v. State*, 163 N.H. 445, 451 (2012). "The separation of powers among the legislative, executive and judicial branches of government is an important part of its constitutional fabric." *Duquette v. Warden, N.H. State Prison*, 154 N.H. 737, 746 (2007). "Separation of the three co-equal branches of government is essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people." *Id.* Thus, under the Separation of Powers Clause, "each branch is prohibited ... from encroaching upon the powers and functions of another branch." *Id.* at 746-47. Nevertheless, Part I, Article 37 does "not provide for impenetrable barriers between the branches ... and the doctrine is violated only when one branch usurps an essential power of another." *Id.* at 747 (citation omitted).

Statutory interpretation is a question of law, which we review *de novo*. *Appeal of Local Gov't Ctr.*, 165 N.H. 790, 804 (2014). In matters of statutory interpretation, we are the final arbiter of the intent of the legislature, as expressed in the words of the statute considered as a whole. *Id.* We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. *Id.* We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* Statutory "provisions barring [a] common law right to recover are to be strictly construed." *Estate of Gordon-Couture v. Brown*, 152 N.H. 265, 267 (2005). "If such a right is

to be taken away, it must be expressed clearly by the legislature." *Id.* at 266.

The purpose of the ODD Fund is "to establish financial responsibility for the cleanup of oil discharge and disposal, and to establish a fund to be used in addressing the costs incurred *by the owners* of underground storage facilities and bulk storage facilities for the cleanup of oil discharge and disposal." RSA 146-D:1 (emphasis added). The ODD Fund allows owners of eligible facilities to apply for reimbursement of court-ordered damages to third parties for injury or property damage and costs of cleanup of oil discharges up to $1,500,000. RSA 146-D:6, III. The ODD Fund is financed by a fee on imported oil that is paid on a per gallon basis by distributors who import oil into New Hampshire. RSA 146-D:2-:3. As the trial court found, "the end goal of the ODD Fund is not to offset tort liability for Defendants but rather to provide an excess insurance mechanism for [underground storage tank] owners who are otherwise in compliance with all relevant laws and rules."

The purpose of the GREE Fund, a fund in addition to both the Oil Pollution Control Fund established pursuant to RSA 146-A:11-a (Supp. 2014) and the ODD Fund, "is to provide procedures that will expedite the cleanup of gasoline ether spillage, mitigate the adverse [e]ffects of gasoline ether discharges, encourage preventive measures, impose a fee upon importers of neat gasoline ethers into the state and establish a fund for the remediation of groundwater and surface water contaminated by gasoline ethers." RSA 146-G:1, II. "Th[e GREE] nonlapsing, revolving fund shall be used .... to mitigate

the adverse [e]ffects of gasoline ether discharges including, but not limited to, provision of emergency water supplies to persons affected by such pollution, and ... the establishment of an acceptable source of potable water to injured parties." RSA 146-G:4, I. "Not more than $150,000 shall be allocated annually for research programs dedicated to the development and improvement of preventive and cleanup measures concerning such gasoline ether discharges." *Id*. The fund's balance is capped at $2,500,000. RSA 146-G:4, II. The fund is financed in part by the ODD Fund. RSA 146-D:3, VI(b); RSA 146-G:1.

We agree with the trial court that there is no language in either of the statutory provisions establishing the ODD and GREE Funds indicating a legislative intent to preclude the damages sought by the State in this case. *See also State v. Hess Corp.*, 161 N.H. 426, 431 (2011) (MTBE defendants conceded that the State may recover damages to test and treat statutorily defined public water systems). Accordingly, we reject Exxon's separation of powers argument based upon the ODD and GREE Funds.

III. Waiver

Exxon argues that the State's suit should have been dismissed due to waiver. Before trial, Exxon moved for summary judgment, arguing, in part, that "by requiring that RFG ... gasoline be sold in New Hampshire, with full knowledge that such gasoline would contain MTBE and with full knowledge of all of MTBE's alleged defective properties, the State cannot now be allowed to sue Defendants who thereafter complied with the State's demands and supplied MTBE gasoline to the State." (Quotation omitted.) In

denying the motion, the trial court noted that, because Exxon did not assert that the State expressly waived its right to sue for harm from MTBE, Exxon could only proceed under an implied waiver theory. The court found that there were "genuine issues of disputed fact regarding the State's knowledge, [Exxon's] knowledge, and timing of this awareness."

Following the jury verdict, Exxon moved to set aside the verdict and for a new trial. Exxon argued, in part, that it was "unfairly prejudiced" when the trial court instructed the jury on waiver in its preliminary instructions "but then refused to include that instruction in its final instructions or in the verdict form." In its order denying Exxon's motion, the trial court explained:

> In its motion for summary judgment on waiver, Exxon argued that the State knew MTBE's characteristics but still opted in to the RFG program, thereby waiving any claims it had or would develop regarding MTBE contamination. However, the State disputed its level of knowledge. During trial, Exxon attempted to prove the State's knowledge by presenting witnesses that testified that MTBE's characteristics were widely known and understood thereby suggesting the State should have known about MTBE.
>
> The State countered this testimony with its own witnesses explaining that the first time State employees found MTBE in a contamination site, those employees were unable to identify the compound and asked

> the U.S. EPA for assistance. The State also presented testimony that it did not become aware of MTBE's full nature until the State of Maine published a study.
>
> This testimony goes to the issue of waiver but it is also relevant to the issue of [the State's] misconduct, and the Court gave an instruction on [the State's] misconduct. In fact, the Court instruction on [the State's] misconduct encompassed the same elements embodied in a waiver claim.

(Citations omitted.)

On appeal, Exxon argues that, "with knowledge of MTBE groundwater risks, the State opted-in to the RFG program, participated in that program for years, repeatedly opposed banning MTBE, and ultimately decided in 2004 that continuing MTBE's use for nearly three more years was better for the State than an outright ban." Thus, there was "ample evidence to support a jury verdict finding waiver," and the trial court's "failure to instruct the jury is clear error." Exxon also argues that the trial court's reasoning that a waiver instruction was unnecessary is erroneous, "as misconduct and waiver are distinct defenses that are appropriately charged separately." The State argues that, at trial, Exxon adduced no evidence of express or implied waiver, that the special verdict form reflects that the jury rejected Exxon's defense "that the hazards posed by the use of MTBE in gasoline were obvious, or were known and recognized by the State," and that, in any event, the trial court "correctly concluded that its misconduct instruction adequately encompassed Exxon's waiver defense."

Whether a particular jury instruction is necessary and the exact scope and wording of jury instructions are within the sound discretion of the trial court. *See State v. Littlefield*, 152 N.H. 331, 334 (2005). We review the trial court's decisions on these matters for an unsustainable exercise of discretion. *Id.*

Exxon's "plaintiff's misconduct defense" jury instruction as given by the trial court provided in pertinent part:

> If you find that ExxonMobil's product was unreasonably dangerous, ExxonMobil failed to provide a warning, or behaved negligently and that ExxonMobil is liable, you should then go on to determine if the State committed misconduct that contributed to cause its injuries. With respect to the State's alleged misconduct, ExxonMobil bears the burden to prove that it is more likely than not that the State committed misconduct in its use of the product.
>
> Misconduct includes, but is not limited to, abnormal use of the product, misuse of the product, *failing to discover or foresee dangers that the ordinary person or entity would have discovered or foreseen, voluntarily proceeding to encounter a known danger, and failing to mitigate damages*.

(Emphasis added.)

We note that in its motion for judgment notwithstanding the verdict (JNOV) following the jury verdict, Exxon made the same argument regarding its misconduct defense that it makes on appeal regarding waiver. Asserting in its motion for JNOV that the

evidence "overwhelmingly proved ExxonMobil's affirmative defenses," Exxon argued that "[t]he evidence at trial overwhelmingly proves that the State's misconduct contributed to its injuries. First, the evidence established that the State voluntarily encountered a known danger by opting-in to the RFG program with knowledge of MTBE's characteristics. Moreover, the evidence demonstrates that the State knew that MTBE would be used in New Hampshire to comply with the RFG program." (Citation omitted.) In support of its waiver argument on appeal, Exxon asserts that "with knowledge of MTBE groundwater risks, the State opted-in to the RFG program [and] participated in that program for years."

Concluding that the waiver and misconduct instructions are similar because they both address the State's knowledge and subsequent actions based upon that knowledge, the trial court reasoned:

> Depending on the State's knowledge, the jury could have found that the State knew or should have known the characteristics of MTBE gasoline and thereby either waived any challenge it is now raising or should have been held partially responsible for its own injury. In other words, because the jury was instructed on and considered the issue of the State's knowledge—that the State knew of MTBE and used it anyway—the jury also considered whether the State waived any claims about MTBE contamination risks by knowingly using MTBE. The jury nonetheless rejected this theory. Thus, Exxon was not entitled to an independent waiver instruction

> because the plaintiff's misconduct instruction encompassed this affirmative defense.

Assuming, without deciding, that there was enough evidence for Exxon's implied waiver defense to go to the jury, we hold that any error was harmless given the jury's finding that the State did not commit misconduct that contributed to its harm.

IV. Federal Preemption

Exxon argues that the State's claims are preempted by the Federal Clean Air Act. Before trial, Exxon moved for summary judgment, arguing that Congress and the EPA "took actions providing that federal requirements were to be met by allowing refiners to choose MTBE as an additive to gasoline," and that "State law is preempted where it seeks to ban an action that federal law affirmatively chooses to make available to state actors." The trial court rejected Exxon's argument that the State's tort claims present an obstacle to the federal purpose of the Clean Air Act.

Noting that "[o]n numerous occasions, courts throughout the United States have considered whether the [Clean Air Act] preempts state tort law claims regarding the use of MTBE," the trial court applied the reasoning of the United States District Court for the Southern District of New York. The trial court explained that Exxon's arguments

> are essentially identical to those made by the defendants during *In re MTBE Products Liability Litigation*. Here, the Defendants claim that the federal regulation deliberately provided manufacturers with a range of oxygenate choices and the choice was

> designed to further the regulation's objectives. The Defendants further argue that Congress and the EPA stressed the importance of MTBE as a choice and encouraged its use. Finally, they point to the lengthy legislative history of the [Clean Air Act] to support their arguments.

See In re Methyl Tertiary Butyl Ether (MTBE) Products, 457 F. Supp. 2d 324, 336-42 (S.D.N.Y. 2006), *aff'd*, 725 F.3d 65 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1877 (2014). The trial court concluded that "[l]ike the defendants [in *MTBE Products*], the Defendants here have failed to prove that the State's tort law claims are preempted by the [Clean Air Act], and their use of the legislative history is irrelevant due to the unambiguous language of the [Act]."

Exxon moved for a directed verdict at the close of the State's case-in-chief, based in part upon its assertion that the evidence presented "demonstrates that the State's claims are preempted based on the Clean Air Act's requirement that gasoline contain an oxygenate and the factual evidence demonstrating that no feasible alternative oxygenate existed sufficient to meet the requirements of RFG in New Hampshire." Noting that Exxon's argument "is presented in a highly summary fashion," the trial court declined to revisit the preemption claim and relied upon its earlier decision denying Exxon's motion for summary judgment.

After the jury verdict, Exxon moved to set aside the verdict and for a new trial arguing, in part, that the trial court "failed to instruct the jury on ExxonMobil's affirmative defense of preemption or

include it in the verdict form." According to Exxon, the trial court erred because "there were sufficient facts" to support its argument "that MTBE was the only feasible oxygenate for use in New Hampshire" and, therefore, "the State's claim would be preempted because ExxonMobil was required to use an oxygenate under the Clean Air Act Amendments." Exxon asserted also that "as a matter of law, the State's claims were preempted ... because Congress specifically intended for refiners to be able to choose among oxygenates, including MTBE, to comply with the RFG program and eliminating MTBE would have interfered with the goals of the [Act]."

Noting that "[t]he preemption argument Exxon raises directly alleges the argument it raised pretrial and in its directed verdict motion," the trial court denied the motion. The court reasoned that

> [t]o the extent Exxon argues the jury should have been instructed on preemption in order to find facts from which the Court could further evaluate preemption, the Court considered and rejected this argument in its [order denying Exxon's motion for a directed verdict]. Even assuming New Hampshire courts would adopt this view of preemption, there are no facts to support Exxon's theory. Exxon alleges the State's claims are preempted by the federal Clean Air Act and its RFG program. The Court rejected this legal argument. There are no facts that a jury could find that would alter the legal analysis this Court already undertook.

(Citation omitted.)

On appeal, Exxon argues that a state tort duty holding it liable for supplying MTBE is preempted by the Clean Air Act, "particularly because Exxon had no safer, feasible alternative to MTBE at the time." According to Exxon, "[p]reemption here follows *a fortiori* from" *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), and *Williamson v. Mazda Motor of America, Inc.*, 562 U.S. 323 (2011), "which establish that when federal law imposes a mandate but leaves private parties with a choice of how to comply, a state-law tort duty that would take one option off the table obstructs federal objectives when maintaining the choice is a '*significant objective*' of the federal program." Exxon asserts that despite "ample evidence that there was no safer, feasible alternative to MTBE," the trial court erroneously refused to instruct the jury on this issue. The State argues that "[p]reemption arguments like the one Exxon raises here have been rejected by every federal court of appeals to consider them." The State contends that "enabling suppliers to choose MTBE (as opposed to ethanol) was not a significant regulatory objective of Congress or EPA," and that the trial evidence demonstrated that "safer, feasible alternatives to MTBE existed." (Quotations omitted.)

Because the trial court's determination of federal preemption is a matter of law, our review is *de novo*. *N.H. Attorney Gen. v. Bass Victory Comm.*, 166 N.H. 796, 801 (2014). The federal preemption doctrine is based upon the Supremacy Clause of the United States Constitution. *See Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012); *see also Appeal of Sinclair Machine Prod's, Inc.*, 126 N.H. 822, 826 (1985). Article VI provides that federal law "shall be the supreme law

of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI. "Accordingly, it has long been settled that state laws that conflict with federal law are without effect." *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) (quotation omitted).

Congress may preempt state law under the Supremacy Clause in several ways. *Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 713 (1985). First, within constitutional limits, "Congress is empowered to pre-empt state law by so stating in express terms." *Id.* "In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." *Id.* (quotation omitted).

"Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law." *Id.* This "conflict preemption" arises when "compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quotations and citation omitted).

Exxon relies upon the so-called "obstacle branch" of conflict preemption—that state law "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 132

S. Ct. at 2501 (quotation omitted). "The burden of establishing obstacle preemption ... is heavy: the mere fact of tension between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power." *MTBE Products Liability Litigation*, 725 F.3d 65, 101-02 (2d Cir. 2013) (quotations and brackets omitted), *cert. denied*, 134 S. Ct. 1877 (2014). "Indeed, federal law does not preempt state law under obstacle preemption analysis unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." *Id.* at 102 (quotation omitted).

"The control and elimination of water pollution is a subject clearly within the scope of the police power" of the State. *Shirley v. Commission*, 100 N.H. 294, 299 (1956). "Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quotation, brackets, and ellipses omitted). "Accordingly, the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Id.* (quotations and brackets omitted). "Since preemption of any type fundamentally is a question of congressional intent, our preemption analysis begins with the source of the alleged preemption." *Bass Victory Comm.*, 166 N.H. at 803 (quotation, brackets, and citation omitted).

As discussed above, in 1990, Congress enacted amendments to the Clean Air Act that, among other

things, created the RFG Program. *See* 42 U.S.C. § 7545(k). The RFG Program required gasoline used in specific geographic areas to have a minimum oxygen content, achieved by the addition of an oxygenate of the manufacturer's choice. *See* 42 U.S.C. §§ 7545(k)(2)(B), (m)(2); *see also* 40 C.F.R. § 80.46(g)(9)(i). After the passage of the amendments, the EPA certified various blends of gasoline for use in the RFG Program, including gasoline containing MTBE, but did not mandate the use of any one oxygenate. As the United States Court of Appeals for the Second Circuit explained,

> the 1990 Amendments did not require, either expressly or implicitly, that Exxon use MTBE. Although the 1990 Amendments required that gasoline in certain geographic areas contain a minimum level of oxygen, they did not prescribe a means by which manufacturers were to comply with this requirement. The EPA identified MTBE as one additive that could be used to "certify" gasoline, but certification of a fuel meant only that it satisfied certain conditions in reducing air pollution. Neither the statute nor the regulations required Exxon to use MTBE, rather than other oxygenates, such as ethanol, in its gasoline.

MTBE Products Liability Litigation, 725 F.3d at 98 (citations omitted).

We disagree with Exxon that preemption here "follows *a fortiori*" from *Geier* and *Williamson*. Those cases both considered portions of Federal Motor Vehicle Safety Standard 208 (FMVSS 208),

promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966. In *Geier*, a 1984 version of FMVSS 208 required manufacturers to equip their vehicles with passive restraint systems, but gave manufacturers a choice among several different passive restraint systems, including airbags and automatic seatbelts. *Geier*, 529 U.S. at 864-65, 875. The question before the United States Supreme Court was whether the Act, together with the regulation, preempted a state tort suit that would have held a manufacturer liable for not installing *airbags*. *See id*. at 865. In determining whether, in fact, the state tort action conflicted with federal law, the Court considered whether the state law stood as an "obstacle" to the objectives of the federal law. *Id*. at 886. After examining the regulation, including its history, the promulgating agency's contemporaneous explanation of its objectives, and the agency's current views of the regulation's preemptive effect, the Court concluded that giving auto manufacturers a choice among different kinds of passive restraint devices was a significant objective of the federal regulation. *Id*. at 874-83. Because the tort suit stood as an obstacle to the accomplishment of that objective in that the suit would have deprived the manufacturers of the choice among passive restraint systems that the federal regulation gave them, the Court found the state tort suit preempted. *Id*. at 886.

In *Williamson*, the Supreme Court considered a 1989 version of FMVSS 208 requiring that auto manufacturers install seatbelts on the rear seats of passenger vehicles. *Williamson*, 562 U.S. at 326. The law required manufacturers to install lap-and-shoulder belts on seats next to a vehicle's doors or

frames but gave them a choice of installing either simple lap belts or lap-and-shoulder belts on rear inner seats. *Id*. The Court noted that like the regulation in *Geier*, the regulation at issue before it left the manufacturer with a choice and, like the tort suit in *Geier*, the tort suit at issue would restrict that choice. *Id*. at 332. However, after reviewing the history of the regulation before it, including the agency's explanation of the reasons for not requiring lap-and-shoulder belts for rear inner seats and the Solicitor General's representations of the agency's views, the Court concluded that providing manufacturers with this seatbelt choice was not a significant objective of the federal regulation. *Id*. at 334-36. Thus, the Court concluded that because the choice of the type of restraint was not a significant regulatory objective, the state tort suit was not preempted. *Id*.

Exxon does not point to any part of the Clean Air Act or its legislative history that supports a conclusion that the choice among oxygenate options was a significant objective of the federal law. Indeed, "[t]he [Clean Air Act] itself contains no language mandating that [Exxon] have a choice among oxygenates." *In re Methyl Tertiary Butyl Ether (MTBE) Products*, 457 F. Supp. 2d at 336-37. Unlike *Geier*, in which the federal regulation deliberately provided the manufacturer with a range of choices among different passive restraint devices, "[h]ere, the choice of oxygenate options is a means towards improving air quality, and the existence of the choice itself is not critical to furthering that goal." *MTBE Products Liability Litigation*, 725 F.3d at 98 n.15. "*Geier* does not stand ... for the proposition that any time an agency gives manufacturers a choice between two or more options,

a tort suit that imposes liability on the basis of one of the options is an obstacle to the achievement of a federal regulatory objective and may be pre-empted." *Williamson*, 562 U.S. at 337 (*Sotomayor*, J., concurring). Rather, "a conflict results only when [the regulation] ... does not just set out options for compliance, but also provides that the regulated parties must remain free to choose among those options." *Id.* at 338 (quotation omitted).

We reject Exxon's argument that "[d]espite ample evidence that there was no safer, feasible alternative to MTBE," the trial court's refusal to instruct the jury on this issue was error because "preemption questions can be informed by questions of fact." Exxon asserts that "[a]t the summary judgment stage, the [trial court] rejected the purely legal argument that the State's claims would be preempted even if there were safer, feasible alternatives, but later ... refused to consider the different and fact-dependent question whether preemption would apply if Exxon had no safer, feasible alternative." (Citation omitted.)

The record shows, however, that Exxon's proposed jury instruction did not ask the jury to find whether there was *no safer feasible alternative* to MTBE. Rather, the proposed instruction asked "whether prohibiting the use of MTBE in gasoline during the period at issue here *would have resulted in delays and increased costs* to the expansion of the federal RFG program," thus establishing preemption. (Emphasis added.) This position has been rejected as a matter of law. *See MTBE Products Liability Litigation*, 725 F.3d at 103 (although legislative materials demonstrate that Congress was sensitive to the magnitude of the

economic burdens it might be imposing by virtue of the RFG Program, "they hardly establish that Congress had a 'clear and manifest intent' to preempt state tort judgments that might be premised on the use of one approved oxygenate over a slightly more expensive one"); *Oxygenated Fuels Ass'n Inc.*, 331 F.3d at 673 (plaintiff "offered virtually no support for its assertion that the Clean Air Act's goals—for purposes of preemption analysis—are a smoothly functioning market and cheap gasoline").

We agree with several other courts that have addressed and rejected the issue of preemption and MTBE. *See*, *e.g.*, *MTBE Products Liability Litigation*, 725 F.3d at 100-03 (rejecting Exxon's obstacle branch preemption arguments); *In re Methyl Tertiary Butyl Ether (MTBE) Products*, 739 F. Supp. 2d at 601-02 (allowing plaintiffs to recover damages for inordinate environmental effects caused by the use of MTBE does not conflict with federal policy, and rejecting Exxon's arguments that because there was no safer, feasible alternative to MTBE, it was impossible for Exxon to comply with federal requirements without using MTBE); *In re Methyl Tertiary Butyl Ether (MTBE) Products*, 457 F. Supp. 2d at 343 ("Just as the many other courts that have addressed the issue of preemption and MTBE, this Court finds that plaintiffs' tort law claims are not preempted."); *Oxygenated Fuels Ass'n, Inc. v. Pataki*, 293 F. Supp. 2d 170, 172, 182-83 (N.D.N.Y. 2003) (concluding after bench trial that New York MTBE ban does not conflict with any aspect of Clean Air Act); *Exxon Mobil Corp. v. U.S. E.P.A.*, 217 F.3d 1246, 1256 (9th Cir. 2000) (Nevada regulation requiring that all gasoline sold in wintertime have an oxygen content of at least 3.5

percent does not conflict with, and is not preempted by, any provision of the Clean Air Act); *Abundiz v. Explorer Pipeline Co.*, No. CIV. 3:00-CV-H, 00-2029, 2002 WL 1592604, at *3-5 (N.D. Tex. July 17, 2002) (*Geier* does not compel a finding that state MTBE regulations are preempted).

We hold as a matter of law that the State's claims are not preempted by federal law, and that the trial court did not err in refusing Exxon's proposed jury instruction.

V. Standard of Care

Exxon argues that the State failed to establish that it departed from the applicable standard of care "simply by marketing MTBE." In its motion for a directed verdict at the close of the State's case-in-chief, Exxon argued that "[i]n order to establish that ExxonMobil breached its duty of care, the State was obligated to present evidence that ExxonMobil failed to act pursuant to what reasonable prudence would require under similar circumstances." (Quotation omitted.) Exxon asserted that, because the evidence presented at trial "demonstrated that the entire industry acted in the same manner in using gasoline containing MTBE in New Hampshire," there was "no evidence to establish the standard of care or what a reasonable manufacturer or supplier would have done, let alone that ExxonMobil deviated from any applicable standard of care."

The trial court denied Exxon's motion, rejecting its argument that because the State did not present evidence regarding the care exercised by other manufacturers and refiners in the industry, the State failed to show that Exxon's actions were unreasonable.

The court stated:

> In fact, the State presented testimony from Duane Bordvick regarding the risk-benefit analysis his company, Tosco—another manufacturer during the relevant time period of this case—conducted. Bordvick testified that Tosco decided not to use MTBE because of the unique and increased risks Tosco perceived MTBE to have. This testimony not only directly contradicts Exxon's argument that the State failed to show the care exercised by other members of the refining industry, it also serves as some evidence from which a jury could conclude that Exxon's behavior in selecting MTBE as its RFG formula oxygenate and doing so without providing a warning was unreasonable.

(Citations omitted.) The trial court also rejected, as unsupported by the record, Exxon's argument that it could not have foreseen all manners in which the State's alleged harm occurred. The court stated:

> The State admitted Barbara Mickelson's memorandum to Exxon that demonstrates Exxon received warnings against the use of MTBE—that MTBE would take longer and cost more to remediate than traditional gasoline spills. Other witnesses corroborated Exxon's possession of information regarding the expense associated with MTBE remediation as early as the 1980s. In this way, a reasonable jury could conclude that Exxon should have foreseen the harm the State now alleges—increased remediation

> costs of a different nature than those associated with traditional gasoline.

(Citations omitted.)

Following the jury verdict, Exxon moved for JNOV, arguing, in part, that "there is no evidence in the record regarding the standard of care for a reasonably prudent refiner or manufacturer or what actions ExxonMobil took that breached a standard of care" when the decision to use MTBE was made. Exxon asserted that it presented testimony showing that it "carefully considered the use of MTBE," including consulting with "[a]t least nine different groups within Exxon" to gain information, and that "[o]ther gasoline refiners and manufacturers agreed with Exxon's assessment that the RFG program's requirements could not have been met without the use of MTBE in addition to ethanol." Noting that it had previously rejected Exxon's arguments in its directed verdict ruling, the trial court relied upon that ruling in declining to consider these arguments again "[b]ecause Exxon raises no new facts or law."

On appeal, Exxon argues that the State "offered no evidence to support the notion that a reasonable supplier in New Hampshire would never have used MTBE at any time" and that "[w]ithout a relevant standard against which to compare Exxon's conduct, the State's negligence claim ... fails as a matter of state law." According to Exxon, the State failed to establish that it departed from the applicable standard of care simply by marketing MTBE, asserting that "the evidence presented at trial showed that manufacturers overwhelmingly complied with the RFG program in the Northeast by using MTBE

because there was no safer, feasible alternative." The State argues that "[t]he record contains ample evidence that Exxon breached the standard of care," the trial court properly instructed the jury regarding the duty of care, and the jury found Exxon negligent.

Weighing the evidence is a proper function of the factfinder. *93 Clearing House, Inc. v. Khoury*, 120 N.H. 346, 350 (1980). The trier of fact is in the best position to measure the persuasiveness of evidence and the credibility of witnesses. *Id*. Factual findings "will not be disturbed unless ... erroneous as a matter of law or unsupported by the evidence." *Great Lakes Aircraft Co. v. City of Claremont*, 135 N.H. 270, 287 (1992) (quotations omitted); *see Sutton v. Town of Gilford*, 160 N.H. 43, 55 (2010). "A fact finder has the discretion to evaluate the credibility of the evidence and may choose to reject that evidence in whole or in part." *Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack*, 139 N.H. 253, 256 (1994). Our task is to determine whether a reasonable person could reach the same conclusion as the jury on the basis of the evidence before it. *See Shaka v. Shaka*, 120 N.H. 780, 782 (1980). We review sufficiency of the evidence claims as a matter of law. *Tosta v. Bullis*, 156 N.H. 763, 767 (2008).

The test of due care is what reasonable prudence would require under similar circumstances. *Carignan v. N.H. Int'l Speedway*, 151 N.H. 409, 414 (2004). Whether the defendant breached that duty of care is a question for the trier of fact. *Id*. "[N]ot every risk that might be foreseen gives rise to a duty to avoid a course of conduct; a duty arises because the likelihood and magnitude of the risk perceived is such that the

conduct is unreasonably dangerous." *Millis v. Fouts*, 144 N.H. 446, 449 (1999) (quotation omitted). "[C]onformity with industry practice is not an absolute defense to liability under New Hampshire law, because entire industries may lag behind the standard of care. But it is nonetheless a factor that the jury may consider in evaluating negligence claims." *Bartlett v. Mutual Pharmaceutical Co., Inc.*, 742 F. Supp. 2d 182, 189 (D.N.H. 2010) (quotation and citation omitted); *see Bouley v. Company*, 90 N.H. 402, 403 (1939) (the test of due care is not custom or usage, but what reasonable prudence would require under the circumstances).

The record supports that in April 1984, an Exxon employee stated in an internal memo that "we have ... ethical and environmental concerns [about MTBE] that are not too well defined at this point." The memo explained that as there were "strong economic incentives to use MTBE, a study should be started [to] thoroughly review the issues with management." In August 1984, Exxon asked an in-house environmental engineer, Barbara Mickelson, for "information on additional potential ground water contamination problems that are associated with the use of MTBE in gasoline." Mickelson stated that "MTBE when dissolved in ground water, will migrate farther than [another gasoline additive] before soil attenuation processes stop the MTBE migration." She explained that the "[s]mall household carbon filtration units ... used by Exxon to treat private drinking supplies contaminated by [another gasoline additive] ... would not provide adequate treatment for water supplies additionally contaminated by MTBE." Mickelson concluded that "the number of well contamination

incidents is estimated to increase three times following the widespread introduction of MTBE into Exxon gasoline" and that "the closing-out of these incidents would take longer and treatment costs would be higher by a factor of 5." In 1985, Mickelson recommended that "from an environmental risk point of view MTBE not be considered as an additive to Exxon gasolines on a blanket basis throughout the United States" because of its unique contaminating properties.

In the 1980s, Exxon joined the MTBE Committee, an industry group that was formed to address "environmental issues" and "federal and state regulatory issues" relating to MTBE. In a December 1986 meeting with MTBE Committee members, including Exxon, the EPA expressed concern about MTBE leaking into groundwater because MTBE, "which is very soluble in water, can find its way to drinking supplies (i.e. acqu[i]fers)." Nonetheless, in February 1987, the MTBE Committee represented to the EPA that

> there is no evidence that MTBE poses any significant risk of harm to health or the environment, that human exposure to MTBE and release of MTBE to the environment is negligible, that sufficient data exists to reasonably determine or predict that manufacture, processing, distribution, use and disposal of MTBE will not have an adverse effect on health or the environment, and that testing is therefore not needed to develop such data.

After Congress amended the Clean Air Act in 1990 to require use of an oxygenate in gasoline, members of the American Petroleum Institute, an industry lobbying group that included Exxon, met with New Hampshire officials and encouraged them to opt in to the RFG Program. During those meetings, it was not disclosed that oil companies would use MTBE in RFG Program gasoline. Robert Varney, who was the commissioner of DES during the relevant time, testified that, although Exxon knew as early as 1984 about MTBE groundwater contamination issues, Exxon did not warn the State or provide it with any information about those issues before Varney recommended that the State opt in to the RFG Program in 1991 or before he recommended that it remain in the Program in 1997. He also testified that the State would not have opted in to the RFG Program if DES had known the information contained in Mickelson's 1984 memo.

In 1999, Exxon had identified more than 100 known contamination sites in New England, many polluted solely with MTBE. That same year, a study by Exxon on the costs of cleaning up MTBE noted that spills containing MTBE could be more difficult and costly to clean up because MTBE "is more soluble [in water] and less biodegradable than other gasoline components." The study found that "[c]ost increases related to MTBE are significant for ... New England" due in part to "hydrogeologic site conditions which maximize the potential for MTBE to 'travel' and impact receptors (e.g., shallow groundwater, fractured bedrock, a high density of private potable wells)." In 2000, Exxon employees observed in an internal communication that "industry has not demonstrated

the ability to stop leaks and spills to the level required to avoid MTBE concentrations that effect [*sic*] the taste and odor in drinking water," that "non MTBE fuel leaks are more managable [*sic*]," and that "[b]ased on experience in [the] US, it is fair to assume that other places using MTBE will eventually find groundwater contamination."

Duane Bordvick, a former senior vice-president for safety, health and environment at Tosco Corporation, a gasoline refinery in California, testified that in 1997 he made a statement on behalf of Tosco that the company had decided "that long-term use of MTBE was not in the best interest of" the company or its shareholders due to the "potential threat to California's drinking water resources and the associated liability ... for restoring water resources." He testified that that conclusion was drawn based upon several factors including: "the growing evidence on the threat of MTBE contamination and evidence related to the difficulty of cleaning up MTBE"; "the cost associated [with] potentially having to participate in replacement of drinking water to cities"; "the potential liability for the use of MTBE, associated legal costs, [and] potential lawsuits that may result"; and the "likelihood" that those costs "would exceed ... whatever costs may be associated with no longer relying on MTBE in [Tosco's] gasoline," including refinery changes and other equipment changes.

As the trial court instructed the jury:

> Negligence is the failure to use reasonable care. Reasonable care is the degree of care that an ordinary, prudent manufacturer or

> supplier would use under the same or similar circumstances.
>
> The failure to use reasonable care may take the form of action or inaction. That is, negligence may consist of either: doing something that an ordinary, prudent manufacturer or supplier would not do under the same or similar circumstances; or, failing to do something that an ordinary, prudent manufacturer or supplier would do under the same or similar circumstances.
>
> A manufacturer or supplier has a duty to make inspections or tests that are reasonably necessary to see that its product is safe for its intended use and for any other reasonably foreseeable purpose.

Viewed in the light most favorable to the State, we hold that the record contains sufficient evidence to support a finding that Exxon breached the standard of care by acting unreasonably under the circumstances. Accordingly, we uphold the trial court's rulings.

VI. Duty to Warn

Exxon argues that it did not have a duty to warn the government as sovereign, rather than as end user or consumer, of the characteristics of MTBE gasoline. In 2008, Exxon moved to dismiss the State's failure-to-warn claim, alleging that when the State claims that, as a bystander, it is a consumer of MTBE, and is therefore entitled to bring a products liability claim, it improperly expands the definition of "consumer," and that the State should be classified as a third party bystander. Because New Hampshire does not recognize bystander liability claims, Exxon argued

that the State's strict liability claims should be dismissed.

The trial court denied the motion, finding that the State's claim regarding Exxon's alleged failure to warn of its defective product had been properly pleaded. Based upon RSA 481:1 (2013), the court concluded that because the State "holds the waters of New Hampshire in trust for the public," the State had properly alleged that "the defendants may be sought to be held liable for damage to the State's waters." The trial court rejected the argument that "the State's interests in its water are akin to those of a bystander." Several years later, Exxon moved for summary judgment on the State's failure-to-warn claim, arguing that because the State was not a "user" or "consumer" of MTBE it "cannot premise a failure-to-warn claim on [Exxon's] alleged failure to warn the State itself." The trial court agreed with the State that the issue had already been addressed in the prior order on the motion to dismiss.

In its motion for a directed verdict at the close of the State's case-in-chief, Exxon argued, in part, that the State "failed to introduce evidence that ExxonMobil failed to warn 'users' of gasoline containing MTBE, instead focusing exclusively on ExxonMobil's alleged failure to warn the State as a regulatory entity, not as a user." The trial court rejected Exxon's arguments, stating that "the State is the party who—if a jury determined a warning was required—would have been owed the warning." The court explained that "[t]he State, as the consumer and in its *parens patriae* capacity, was an end user of MTBE gasoline. This Court has previously ruled the

State has standing to assert claims brought on behalf of the people of New Hampshire. Additionally, the State is a consumer itself."

On appeal, Exxon argues that "[t]he theory that there is a duty to warn the sovereign *qua* sovereign" is "wholly unprecedented, oversteps longstanding limitations of New Hampshire tort law, and raises serious First Amendment difficulties." The State argues that "although Exxon contends that the verdict hinges on the State's status as sovereign, the trial evidence clearly demonstrated that Exxon provided no warning about MTBE to anyone" and that Exxon, thus, "failed to warn the State as regulator, the State as an end user, or the citizenry represented by the State as *parens patriae*." We agree with the State.

The General Court has declared that the State is the trustee over all of the State's water. Pursuant to RSA 481:1,

> an adequate supply of water is indispensable to the health, welfare and safety of the people of the state and is essential to the balance of the natural environment of the state. Further, the water resources of the state are subject to an ever-increasing demand for new and competing uses. The general court declares and determines that the water of New Hampshire whether located above or below ground constitutes a limited and, therefore, precious and invaluable public resource which should be protected, conserved and managed in the interest of present and future generations. The state as trustee of this resource for the public benefit

> declares that it has the authority and responsibility to provide careful stewardship over all the waters lying within its boundaries.

RSA 481:1. As trustee, the State can bring suit to protect from contamination the waters over which it is trustee. *Hess*, 161 N.H. at 432.

In *State v. City of Dover*, 153 N.H. 181 (2006), we determined that the State was the proper party to bring suit against the MTBE defendants, because it "has a quasi-sovereign interest in protecting the health and well-being, both physical and economic, of its residents with respect to the statewide water supply." *City of Dover*, 153 N.H. at 186. In addition, we concluded that the State satisfied the requirements of *parens patriae* standing because it asserted an injury to a quasi-sovereign interest, and alleged injury to a substantial segment of its population. *Id*. at 187-88. "[A] state may act as the representative of its citizens where the injury alleged affects the general population of a State in a substantial way." *Hess*, 161 N.H. at 433 (quotation omitted). Accordingly, we held that the State has *parens patriae* standing to bring suit against the MTBE defendants on behalf of the residents of New Hampshire. *City of Dover*, 153 N.H. at 187-88.

The jury was not instructed that Exxon owed a duty to the State as sovereign. Rather, the trial court instructed:

> In deciding whether there was a design defect in the product, you may consider whether there was a warning, and, if so, whether the warning was adequate. The warning is inadequate unless it makes the potential

> harmful consequences apparent and contains specific language directed at the significant risks or dangers caused by a failure to use the product in the prescribed manner. The manner of the warning is inadequate unless it is of such intensity to cause a reasonable person to exercise caution equal to the potential danger.
>
> ....
>
> The State has the burden to prove that if ExxonMobil had provided an adequate warning, MTBE gasoline would not have been used or would have been used differently.
>
> A failure to warn amounts to a legal cause of harm when the failure to warn is a substantial factor in bringing about the harm, and if the harm would not have occurred without the failure to warn. The failure to warn need not be the only cause of the injury, but it must be a substantial factor in bringing about the injury.

We reject Exxon's argument that the State's failure-to-warn claim was improper because it was premised upon a duty to warn the "sovereign *qua* sovereign." Accordingly, we find no error.

VII. Market Share Liability

Exxon argues that market share liability is not an acceptable theory of recovery and, that, even if it is, the trial court erred in applying market share liability in this case. Several years before trial, Exxon sought an order requiring the State to specify "which Defendants it seeks to hold liable for the damages,"

"what damages it seeks to recover from those Defendants and when and how the damages occurred," and "the legal theory for holding those Defendants liable for the damages." (Quotations omitted.) The trial court denied the motion, finding that

> requiring the State to allege specifically which defendant caused each injury would create an impossible burden given the allegations of commingling of MTBE and the asserted indivisible injury to the State of New Hampshire's water supplies. To mandate the State to establish more particularized causation would essentially allow the defendants to seek to avoid liability because of lack of individualized proofs where the gravamen of the claim is ... that all defendants placed gasoline containing MTBE into the stream of commerce, thereby causing [the State's] injury.
>
> To allow such a state of events would be to allow claims for tortious conduct for discrete, identifiable, and perhaps lesser tortious acts, but to deny claims for tortious conduct where the conduct alleged may be part of group activity which is alleged [to] have led to a common, and more deleterious, result.

(Quotation omitted.)

In a subsequent order, the trial court, recognizing that "situations exist where a plaintiff may not necessarily be able to identify, specifically, which members of a group, who are engaged in the same activity, caused his or her damages," noted that courts

"allow plaintiffs to prove causation through alternative theories of liability," including market share liability and "seemingly specific to the MTBE cases, ... commingled product theory." The court found that the "commingled product theory" does not apply here because that theory "only relieves the Plaintiff of its burden to prove the percentage of a particular Defendant's gasoline found at a particular site," and the court "has already found that a specific site-by-site approach is unfeasible and unnecessary in this case." Accordingly, the trial court concluded that market share liability "is a more reasoned approach to this case."

As the trial court explained, the purpose behind market share liability is that

> [i]n our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. In an era of mass production and complex marketing methods the traditional standard of negligence is insufficient to govern the obligations of manufacturer to consumer, courts should acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances.

(Quotation, ellipsis, and brackets omitted.) The court noted that in determining whether market share

liability applies in certain circumstances, the *Restatement (Third) of Torts: Products Liability* sets forth six factors that provide a general framework for analysis:

> (1) The generic nature of the product; (2) the long latency period of the harm; (3) the inability of plaintiffs to discover which defendant's product caused plaintiff's harm; (4) the clarity of the causal connection between the defective product and the harm suffered by plaintiffs; (5) the absence of other medical or environmental factors that could have caused or materially contributed to the harm; and (6) the availability of sufficient "market share" data to support a reasonable apportionment of liability.

(Quotation and ellipsis omitted.) *See Restatement (Third) of Torts: Products Liability* § 15 comment *c* at 233 (1998). The court found that in this case "these factors weigh heavily in favor of utilizing market share liability."

Exxon subsequently moved for summary judgment on the issue of causation, asserting that New Hampshire has not adopted the market share liability theory, and that "the theory is contrary to New Hampshire law." The trial court concluded, however, that New Hampshire recognizes market share liability. Citing *Buttrick v. Lessard*, 110 N.H. 36 (1969), and *Trull v. Volkswagen of America*, 145 N.H. 259 (2000), the court reasoned that "[t]he New Hampshire Supreme Court has repeatedly expressed its willingness to provide plaintiffs with a less stringent burden of proof where they face a 'practically

impossible burden,'" and that "[g]iven this willingness, the court is confident that existing New Hampshire law supports the application of Market-Share Liability." Dismissing as unfounded Exxon's suggestion that market share liability "is synonymous with absolute liability," the trial court explained that

> [e]ven where a plaintiff proceeds under a Market-Share Liability theory, he must prove that the defendants breached a duty to avoid an unreasonable risk of harm from their products .... The requirement to prove that a defendant breached his duty to avoid harm is a separate and distinct burden. Only after a plaintiff makes such a showing is he entitled to a relaxed standard for proving causation.

(Quotation and citation omitted.)

Applying the six *Restatement* factors, the trial court determined that market share liability should be applied in this case. As to the first factor, the generic nature of the product, the court found that the State had alleged sufficient facts for the court to conclude that MTBE is fungible, *i.e.*, that it is interchangeable with other brands of the same product. As to the second factor, whether the harm caused by the product has a long latency period, the trial court found that the harm caused by MTBE was not latent because it travels faster and further than other chemicals. Thus, the court concluded that this factor weighs in favor of Exxon. As to the third factor, the plaintiff's inability to identify which defendant caused the harm, the trial court concluded this factor weighs in the State's favor because "retailers commingled gasoline in storage tanks at stations, so it would be impossible to

determine which of the defendant[s'] MTBE gasoline was discharged into the environment."

The trial court found that the fourth factor, the clarity of the causal connection between the defective product and harm suffered by the State, favors the State. The court agreed with Exxon's general proposition that the gasoline market does not alone reflect the risk created and, thus, the court required the State "to introduce market share data as targeted as possible (e.g. market share data specific to RFG and non-RFG counties)." (Quotation omitted.) Noting that it is impossible to determine market share with mathematical exactitude, the court concluded that the experts' market data was sufficient.

The trial court found the fifth and sixth factors favor the State. As to the fifth factor, whether other medical or environmental factors could have contributed to the harm, the court noted that Exxon had not asserted that other factors contributed. As to the sixth factor, the sufficiency of the market data, the court found that the State's experts had presented "enough market data to allow the State to proceed" on a market share liability theory.

Following the jury verdict, Exxon moved for JNOV, arguing, in part, that, for five reasons, the market share liability evidence the jury considered was insufficient for the jury to find it liable: (1) there was no evidence that Exxon's market share for MTBE gasoline was 28.94% because that figure measured all gasoline supplied in New Hampshire; (2) there was no evidence to support the jury's finding that all gasoline containing MTBE was fungible; (3) no rational trier of fact could have found that the State could not trace

MTBE gasoline back to the company that supplied it because, from 1996 to 2005, the State could identify the suppliers that caused its alleged harm; (4) the State failed to identify a substantial segment of the relevant market for gasoline containing MTBE because it only presented evidence as to "a snapshot of" the wholesale market; and (5) the State failed to establish the relevant market at the time of its alleged injuries. Noting that Exxon had raised, and the court had rejected, all of these arguments before, and because Exxon raised no new law or facts to support its motion, the court addressed Exxon's arguments "only for the purpose of further explanation and clarification."

Considering Exxon's first and fifth arguments together, the court determined that "the State presented sufficient evidence for a reasonable juror to conclude that all gasoline imported into New Hampshire was commingled with MTBE gasoline. From there, the jury could reasonably have assigned Exxon the share of the gasoline market that its supply represented." With respect to Exxon's second argument, the court concluded that there was "sufficient evidence from which a reasonable jury could find that MTBE gasoline was fungible." As to Exxon's third and fourth arguments, the court noted that the State "presented evidence through various witnesses from which a juror could reasonably conclude that all gasoline in New Hampshire was statistically likely to be commingled with MTBE to some concentration. Thus, it was for the jury to decide whether it would rely upon the 100 percent figure [the State's expert] provided, or a lower figure." The court also observed that it had previously found the State's

expert qualified, and that her testimony "was based upon sufficient facts and data; her testimony was the product of reliable principles and methods; and she applied the principles and methods reliably to the facts of the case." Finally, the trial court addressed Exxon's additional argument that, because MTBE gasoline could be traced to a supplier from the refinery, the State failed to prove its market share case. The court stated:

> The State's theory of the case, as addressed in pretrial, trial, and directed verdict rulings, was that MTBE gasoline is untraceable once spilled or leaked; once it causes harm to the State. It is wholly irrelevant that gasoline might be traceable to a particular supplier from a wholesale distributor or even the refinery because, as the State alleged, once the gasoline causes harm, it cannot be traced to a supplier, distributor, or refiner. The jury heard evidence to this extent, and could thereby have found that the State met the requisites of relying on market share liability for causation purposes.

Exxon also moved to set aside the verdict and for a new trial arguing, in part, that the trial court erred as a matter of law by allowing the State to use market share liability. Exxon argued that the State "should have been compelled ... to proceed on a site-specific basis and rely on traditional causation to prove its claims," and that it was error "to permit the State to use a wholesale supplier market share when it was undisputed that ... the MTBE gasoline that allegedly caused the State's harm could be traced back to the

wholesale suppliers, thus negating the need for or applicability of [market share liability] theories." The trial court rejected Exxon's arguments. As to Exxon's argument that the jury needed to find first that the State could not prove traditional causation in order to find the State entitled to rely upon market share liability, the trial court stated that market share liability "did not require the State to prove that it could not establish traditional causation; it required the State to show that it could not identify the tortfeasor responsible for its injury. The 'last resort' requirement focuses on the inability of the plaintiff to identify the manufacturer of a product, not the absence of alternative causes of action or theories of recovery." The court concluded:

> During trial, the State presented several witnesses who testified that MTBE gasoline is fungible and commingled at nearly every step in the distribution network, thereby making it virtually impossible if not impossible to trace from a spill or leak back from a contamination site to a retailer or supplier. This testimony tended to fulfill the State's burden of proving that it was unable to identify the specific tortfeasor responsible for its injury. The jury's verdict—finding that the State was unable to identify the specific tortfeasor responsible for its injury—was not conclusively against the weight of the evidence.

(Citations omitted.)

On appeal, Exxon argues that the trial court erred in adopting market share liability in New Hampshire

because it "departs from centuries of New Hampshire law." Exxon also argues that "[e]ven if market share liability would ever be appropriate under New Hampshire law, this would be a poor case to make that first jump" and that the trial court "applied the wrong market share." The State argues that traditional principles of tort law support the use of market share evidence, that Exxon has failed to show that market share liability was not warranted on the facts of this case, and that the trial court properly ruled that the jury was entitled to determine that Exxon should be held liable for its percentage of the supply, rather than the refining, market.

We review challenges to a trial court's evidentiary rulings under our unsustainable exercise of discretion standard and reverse only if the rulings are clearly untenable or unreasonable to the prejudice of a party's case. *In the Matter of McArdle & McArdle*, 162 N.H. 482, 485 (2011). We review questions of law *de novo*. *Sanderson v. Town of Candia*, 146 N.H. 598, 600 (2001).

Market share liability has its roots in a 1980 decision of the California Supreme Court, *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980). In *Sindell*, the plaintiffs alleged injuries resulting from their *in utero* exposure to the drug diethylstilbesterol (DES), a synthetic hormone that was marketed to women as a miscarriage preventative from 1947 to 1971. *Sindell*, 607 P.2d at 925. In 1971, a link was discovered between fetal exposure to DES and the development many years later of adenocarcinoma. *Id.* Over 200 manufacturers made DES and, because of the long latency period and generic nature of the drug,

many plaintiffs were unable to identify the precise manufacturer of the DES ingested by their mothers during pregnancy. *Id.* at 931. Plaintiff Sindell brought a class action against 11 drug manufacturers, alleging that the defendants were jointly and severally liable because they had acted in concert to make, market, and promote DES as a safe and effective drug for preventing miscarriages. *Id.* at 925-26. The trial court had dismissed the claims due to Sindell's inability to identify which defendants had manufactured the DES responsible for her injuries. *Id.* at 926.

In reversing that decision, the California Supreme Court expanded alternative liability to encompass what is now known as market share liability. Under market share liability, the burden of identification shifts to the defendants if the plaintiff establishes a *prima facie* case on every element of the claim except for identification of the actual tortfeasors, and the plaintiff has joined the manufacturers of a "substantial share" of the DES market. *Id.* at 936-37. Once these elements are established, each defendant is severally liable for the portion of the judgment that represents its share of the market at the time of the injury, unless it proves that it could not have made the DES that caused the plaintiff's injuries. *Id.* at 937.

The court based its decision upon two considerations: (1) "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury"; and (2) "[f]rom a broader policy standpoint," because the manufacturer "is in the best position to discover and guard against defects in its products and to warn of harmful effects ... , holding it liable ... will provide an incentive to product safety."

Id. at 936. The court held it to be reasonable, in the context of the case, "to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them ... bears to the entire production of the drug sold by all for that purpose." *Id*. at 937. By holding each defendant liable for the proportion of the judgment represented by its share of the market, "each manufacturer's liability would approximate its responsibility for the injuries caused by its own products." *Id*.

Several states have adopted some form of market share liability. *See*, *e.g.*, *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 49-51 (Wis. 1984) (adopting a form of market share liability in DES case); *Martin v. Abbott Laboratories*, 689 P.2d 368, 380-82 (Wash. 1984) (rejecting *Sindell* market-share theory of liability in favor of market-share alternative liability in DES case); *Hymowitz v. Eli Lilly and Co.*, 539 N.E.2d 1069, 1075-78 (N.Y. 1989) (adopting market share liability theory for a national market in DES case); *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 285-86 (Fla. 1990) (adopting market share alternate liability theory in DES case); *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 727-29 (Haw. 1991) (adopting market share liability theory in action against manufacturers of blood product). In other jurisdictions, courts have left open the possibility of adopting market share liability in the future. *See*, *e.g.*, *Skipworth v. Lead Industries Ass'n, Inc.*, 690 A.2d 169, 172 (Pa. 1997) (deciding not to adopt market share liability in lead paint case, but recognizing that the need to adopt that theory might arise in the future); *Shackil v. Lederle Laboratories*, 561 A.2d 511, 529 (N.J. 1989) (decision "should not be

read as forecasting an inhospitable response to the theory of market-share liability in an appropriate context"); *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1066-67 (Okla. 1987) (rejecting market share liability in asbestos case but recognizing that market share considerations were sufficient in DES context to achieve a balance between the rights of the defendants and the rights of the plaintiffs); *Payton v. Abbott Labs*, 437 N.E.2d 171, 190 (Mass. 1982) (court might recognize "some relaxation of the traditional identification requirement in appropriate circumstances so as to allow recovery against a negligent defendant of that portion of a plaintiff's damages which is represented by that defendant's contribution of DES to the market in the relevant period of time"); *see Abel v. Eli Lilly and Co.*, 343 N.W.2d 164, 173-74 (Mich. 1984) (a "new DES-unique version of alternative liability" will be applied in cases in which all defendants have acted tortiously, but only one unidentifiable defendant caused plaintiff's injury).

We disagree with Exxon that the trial court erred in concluding that New Hampshire would recognize market share liability as an alternative liability theory and that the theory is proper on the facts of this case. In *Buttrick v. Lessard* we adopted strict liability for design defect claims because requiring the plaintiff to prove negligence would impose "an impossible burden" on the plaintiff due to the difficulty of proving breach of a duty by a distant manufacturer using mass production techniques. *Buttrick*, 110 N.H. at 39. We explained:

> The rule requiring a person injured by a defective product to prove the manufacturer

> or seller negligent was evolved when products were simple and the manufacturer and seller generally the same person. Knowledge of the then purchaser ... was sufficient to enable him to not only locate the defect but to determine whether negligence caused the defect and if so whose. The purchaser of the present day is not in this position. How the defect in manufacture occurred is generally beyond the knowledge of either the injured person or the marketer or manufacturer.

Id. As we later noted, what was crucial to our policy analysis in *Buttrick* "was the recognition that the need to establish traditional legal fault in certain products liability cases had proven to be, and would continue to be, a practically impossible burden. This was the compelling reason of policy without which *Buttrick* would have gone the other way." *Bagley v. Controlled Environment Corp.*, 127 N.H. 556, 560 (1986) (citations and quotation omitted).

Based upon this rationale, we subsequently placed the burden of proving apportionment upon defendants in crashworthiness or enhanced injury cases involving indivisible injuries. *Trull*, 145 N.H. at 260. In *Trull*, we held that plaintiffs were required to prove that a design defect was a substantial factor in producing damages over and above those caused by the original impact to their car, and, once they had made that showing, the burden would shift to the defendants to show which injuries were attributable to the initial collision and which to the design defect. *Id*. at 265. That burden was placed upon the defendants because the plaintiffs would otherwise

have been "relegated to an almost hopeless state of never being able to succeed against a defective designer." *Id.* (quotation omitted). We were persuaded by policy reasons not to place a "practically impossible burden" upon injured plaintiffs. *Id.*

By contrast, we have declined to expand products liability law in cases in which plaintiffs have not faced a practically impossible burden of proving negligence. *See*, *e.g.*, *Royer v. Catholic Med. Ctr.*, 144 N.H. 330, 335 (1999) (strict liability did not apply to tort action against non-manufacturer hospital for selling defective prosthetic knee to plaintiff); *Bruzga v. PMR Architects*, 141 N.H. 756, 761 (1997) (unlike a consumer who purchases a mass-produced good, strict liability does not apply to architect and contractor because the owner or user of a building does not face "extraordinary difficulties in proving liability under traditional negligence principles"); *Bagley*, 127 N.H. at 560 (declining to impose strict liability in action by landowner against adjoining landowner for damages resulting from soil and groundwater contamination because "there [was] no apparent impossibility of proving negligence"); *Siciliano v. Capitol City Shows, Inc.*, 124 N.H. 719, 730 (1984) (refusing to extend strict liability to owner and operator of amusement park ride when there was no indication that the plaintiffs suffered an "unfair burden" from not doing so because they possess adequate protection through an action for negligence); *Wood v. Public Serv. Co.*, 114 N.H. 182, 189 (1974) (no "compelling reason of policy or logic" advanced to apply strict liability to electric companies in wrongful death action).

We have also declined to expand products liability law when the defendants could not have been at fault. *Simoneau v. South Bend Lathe, Inc.*, 130 N.H. 466 (1988). In *Simoneau*, we rejected the product line theory of successor liability, reasoning that "liability without negligence is not liability without fault." *Id.* at 469. Under the product line theory, a party that acquires a manufacturing business and continues the output of its line of products, assumes strict liability for defects in units of the same product line manufactured and sold by the predecessor company. *Id.* at 468. We refused to "impose what amounts to absolute liability on a manufacturer," *id.* at 470, reaffirming "[t]he common-law principle that *fault and responsibility* are elements of our legal system applicable to corporations and individuals alike" and that such principle ought "not be undermined or abolished by spreading of risk and cost in this State." *Id.* at 469 (quotation omitted).

Based upon the reasoning expressed in our cases developing products liability law in New Hampshire, the trial court concluded that it would "not rigidly apply theories of tort law where doing so would either be impractical or unfairly 'tilt the scales' in favor of one party or another." We agree with the trial court that, based upon our willingness to construct judicial remedies for plaintiffs who would be left without recourse due to impossible burdens of proof, applying market share liability was justified in the circumstances presented by this case. In addition to finding that the State had proven all of the elements of its claims, the jury found: "MTBE gasoline is fungible"; the State "cannot trace MTBE gasoline found in groundwater and in drinking water back to

the company that manufactured or supplied that MTBE gasoline"; and the State "has identified a substantial segment of the relevant market for gasoline containing MTBE." We have reviewed the record and conclude that it contains sufficient evidence to support the jury's findings. Given the evidence presented, the State faced an impossible burden of proving which of several MTBE gasoline producers caused New Hampshire's groundwater contamination. We hold that the trial court did not unsustainably exercise its discretion in allowing the State to use the theory of market share liability to determine the portion of the State's damages caused by Exxon's conduct.

Exxon argues that because the trial court found that there was sufficient evidence for the State to prove traditional causation, it erred by instructing the jury on market share liability. We disagree. To the contrary, the trial court merely found that the State could prove "but for" causation as required under the market share liability theory. "Under market share liability, the burden of identification shifts to the defendants if the plaintiff establishes a *prima facie* case on every element of the claim except for identification of the actual tortfeasor or tortfeasors ...." *In re Methyl Tertiary Butyl Ether Products Liab.*, 379 F. Supp. 2d 348, 375 (S.D.N.Y. 2005). Exxon argued in its motion for a directed verdict at the close of the State's case-in-chief that, "[f]or each of the State's claims, the State was required to provide evidence specific to ExxonMobil that gasoline containing MTBE from ExxonMobil was the but for cause of the State's alleged injuries and that ExxonMobil's conduct or product were a substantial factor in bringing about the

State's alleged injuries." Exxon asserted that such proof "was utterly lacking ... and the State has not identified any evidence that gasoline containing MTBE from ExxonMobil caused any of the alleged contamination in this case under traditional theories of causation."

The trial court denied Exxon's motion, reasoning that, from testimony presented by the State, "a reasonable jury could conclude that Exxon was the proximate cause of the State's alleged injury under a traditional causation theory." Thus, the trial court rejected Exxon's argument that the State had not established a *prima facie* case on each of its claims. Further, the evidence established that MTBE gasoline is a fungible product, that the fungibility of MTBE gasoline allows it to be commingled at nearly every step of the gasoline distribution system, and that commingling prevents the State from tracing a molecule of MTBE gasoline from the refinery to New Hampshire so that the State cannot identify the refiner of the MTBE gasoline that caused the harm. Thus, because the State could not identify the tortfeasor responsible for its injury, under market share liability the burden of identification shifted to Exxon. Accordingly, the jury was instructed:

> If the State has been harmed by a product that was manufactured and sold by any number of manufacturers and suppliers, and the State has no reasonable means to prove which manufacturer or supplier supplied the product that caused the injury, then the State may use market share liability to satisfy its burden of proof. Under market share liability,

> ExxonMobil is responsible for the State's harm in proportion to ExxonMobil's share of the market for the defective product during the time that the State's harm occurred.
>
> Market share liability requires that the State ... prove all the elements for negligence, or strict liability defect in design, or strict liability based on a failure to warn and that the State suffered harm. In addition, the State must prove the following: (1) it has identified enough MTBE gasoline manufacturers or suppliers in this case so that a substantial share of the relevant market is accounted for; and (2) MTBE gasoline is fungible, meaning that one manufacturer's or supplier's MTBE gasoline is interchangeable with another's; and (3) the State cannot identify the manufacturer or supplier of the MTBE gasoline that caused the harm.

Finally, we find no error with the trial court's ruling that the jury was entitled to determine that Exxon could be held liable for its percentage of the supply market. As the trial court reasoned, because Exxon "had or should have had knowledge of the characteristics of MTBE gasoline from [its] refining role[ ]," a jury could find Exxon liable for MTBE gasoline it supplied but did not refine. The trial court explained that the jury was entitled to estimates of supplier and refiner market share and that both reflected Exxon's "creation of the risk within the State," and that "[a]ny figure within this spectrum

would be an appropriate measure of the State's damages."

VIII. Aggregate Statistical Evidence

Exxon argues that the State should not have been permitted to rely upon aggregate statistical evidence rather than individualized evidence of particular water supplies and sites. Before trial, Exxon moved to exclude the opinions of three of the State's experts estimating the probability of MTBE occurrence in New Hampshire, the past costs of MTBE remediation, and the future costs of investigating and remediating MTBE sites. Exxon argued that these experts, Dr. Graham Fogg, Gary Beckett, and Dr. Ian Hutchison, "attempt to draw statewide conclusions about MTBE detections and costs from small 'sample' datasets, extrapolating to the State at large," but "fail ... to follow basic, well-accepted statistical and scientific principles."

Following a hearing, the trial court issued a written order "accept[ing] the [State's] argument that using statistical methods is appropriate and, as a result, the state-wide proof model is acceptable and relevant." The court reasoned that "the use of statistical methods, assuming their reliability, makes the existence of the [State's] injury more probable than it would be without such evidence; likewise, it will assist the trier of fact to understand and determine both the existence and extent of the [State's] injury." Thus, the trial court concluded that the State's experts' opinions "are relevant to prove injury-in-fact and damages" and that it would accept proof of injury "through the use of statistical evidence and extrapolation, i.e. the 'state-wide approach.'"

The trial court set forth several reasons in support of its conclusion. First, the court noted that the majority of the cases cited by Exxon are class-action cases, "which disallow the use of aggregate damages across a class of plaintiffs." The court found those cases distinguishable because, here, the State "does not seek to establish injury among several class plaintiffs through the use of an aggregate model, but instead seeks to prove *its own* injury through the use of statistics." Second, the court reasoned that New Hampshire's "'declaration of policy' confirms that an injury to both public and private waters within the [s]tate is an indivisible injury, allowing for the State to prove its claim upon state-wide proof." The court stated that under RSA 481:1, "[t]he state as trustee of the waters for the public benefit declares that it has the authority and responsibility to provide careful stewardship over all the waters lying within its boundaries," and that this statute provides the State "with more than just a vehicle to demonstrate standing: the statute allows the [State] to prove injury to a single resource." (Quotation and brackets omitted.) Finally, the trial court reasoned that "general policy considerations support allowing the [State] to establish injury and damages using statistical methods." The court stated:

> American manufacturers now mass produce goods for consumption by millions using new chemical compounds and processes, creating the potential for mass injury. As a result, modern adjudicatory tools must be adopted to allow the fair, efficient, effective and responsive resolution of claims of these injured masses. In a perfect setting, the

> [State] would have the resources to test each individual well over a long period of time and precisely determine its damages. However, if such a process were undertaken here, it would have to continue beyond all lives in being. The Court simply cannot support such a process.
>
> Moreover, requiring the [State] to test each individual well undoubtedly and unfairly "tilts the scales" in [Exxon's] favor .... Here, ... the necessary additional litigation costs the [State] would have to bear would consume much of any recovery, making continued pursuit of the litigation fruitless. Because of these public policy interests, the Court finds that allowing the [State] to use statistical methods of proof is relevant to prove injury and damages in this case.
>
> The fact is that for decades, judges, lawyers, jurors, and litigants have shown themselves competent to sift through statistical evidence in a variety of contexts, from mass toxic torts to single-car collisions. Not only have they shown themselves competent, but also such evidence has become a generally accepted method for a plaintiff to prove his case. This Court is simply not persuaded by [Exxon's] attempt to frame this case as a class action. As a result, the Court rejects the notion that New Hampshire law forbids the use of a statistical approach to prove injury-in-fact.

(Quotations, citations, brackets, and ellipsis omitted.)

Exxon subsequently attempted to exclude the opinions of the same three experts on grounds of reliability, arguing that the State's experts used improper methodologies and, even when they used proper methodologies, they applied the methodologies incorrectly to the facts and data provided. After conducting a thorough analysis of each of the statistical methods employed by the State's experts, the trial court concluded that their opinions and methodologies were reliable and denied Exxon's motion.

Following the trial court's ruling that the statewide approach was acceptable, Exxon sought an interlocutory transfer to this court. The trial court denied the request, finding that Exxon failed to satisfy the requirements of New Hampshire Supreme Court Rule 8(1). *See Sup. Ct. R.* 8 (interlocutory appeal from ruling). In its order, the trial court noted that, despite its rulings otherwise, Exxon continued to assert that it is feasible to try this case on a well-by-well approach. As the court explained, under Exxon's approach,

> the State would identify a contaminated drinking-water well and then trace the source of contamination to a particular physical location that leached gasoline into the ground. These locations will usually be businesses associated with gasoline, like retail gas stations and junkyards. From here, these entities can then trace the gasoline back through the product chain to the wholesaler and eventually the refiner. In this way, either the State or the retailers can

> spread the liability throughout the product chain. [Exxon] explain[s] that because all entities in a product chain would be liable for the State's harm, the State should be required to proceed on a well-by-well approach.

The trial court found this method to be "technically and scientifically infeasible." The court reasoned:

> The State's case attempts to impose liability on manufacturers and refiners. Without decision makers selecting, marketing, and reformulating MTBE, it would never have been included in the RFG program and would never have been imported into New Hampshire to spill, leak, and evaporate. Gasoline imported into New Hampshire would not have been capable of contaminating the State's water resources in the vast, seemingly uncontainable way it has if it did not contain MTBE. The State has chosen to pursue the named Defendants because they created the initial risk that led to widespread contamination. Based on this selected class of defendants, product tracing is virtually impossible.
>
> Defendants themselves admit that tracing MTBE found in a contaminated well all the way back to the refiner is virtually impossible because MTBE lacks a chemical signature, linking it to a particular refiner. Additionally, a contaminated well, many times, cannot be traced to a particular retailer, making it

> practically impossible to trace MTBE to a specific wholesaler.

Following the jury verdict, Exxon argued in its motion to set aside the verdict that the statewide approach allowed the State "to prove its private well and 'future injury' case using statistical extrapolations from experts about potential hypothetical impacts rather than particularized evidence of an actual injury" and that this "resulted in the State being able to avoid its burden to prove individualized causation with respect to particular private well impacts." The trial court denied the motion, stating that its prior rulings on this issue were rulings of law and that because "Exxon does not raise any new facts regarding these rulings and it does not contend that the jury's verdict was conclusively against the weight of the evidence," the argument "did not properly fall within the purview" of a motion to set aside.

On appeal, Exxon argues that the trial court erred in allowing the State to prove its case on a statewide basis. Exxon asserts that "[e]very other court to address the issue has recognized that MTBE tort cases depend overwhelmingly on individualized questions of law and fact, and thus are not amenable to proof on a mass basis." According to Exxon, the trial court "broke from these precedents" in allowing statewide aggregate evidence. The State argues that the "immense scope of Exxon's pollution" has "directly affected a substantial portion of the State's population" and that "[t]he statewide nature of Exxon's tortious conduct, therefore, required adjudication on a statewide basis." (Quotation

omitted.) The State asserts that Exxon has "mischaracterize[d] both the trial record and the relevant standards of review."

We review challenges to a trial court's evidentiary rulings under our unsustainable exercise of discretion standard and reverse only if the rulings are clearly untenable or unreasonable to the prejudice of a party's case. *In the Matter of McArdle*, 162 N.H. at 485.

Exxon cites *In re Methyl Tertiary Butyl Ether Products Litigation*, 209 F.R.D. 323 (S.D.N.Y. 2002), as an example of why "MTBE tort cases depend overwhelmingly on individualized questions of law and fact." The trial court, however, found this and other MTBE cases involving a determination as to "injury in fact" to be unhelpful, as "the facts of this case are very different." In contrast to the New York MTBE case in which the court dismissed full categories of class plaintiffs who had actually tested and detected no MTBE in their wells, the trial court noted that here, "the [State] has tested many wells where it has discovered the existence of MTBE. It merely seeks to extrapolate that information in order to establish further injury." The trial court agreed that "if the [State] had not tested any wells or had tested wells and found no MTBE, the [State's] pursuit of a statistical approach would be fruitless." As further distinguishing the New York MTBE case, the trial court noted that, whereas in the New York case, the plaintiffs' allegations neither contained any statistics pertaining to MTBE detection rates for private wells nor established that the private wells were located in proximity to possible release sites, here the State "provided the Court with adequate statistical evidence

through their experts," and, the State seeks recovery "on the basis of 'high-risk' areas only."

At trial, the State offered proof based upon expert testimony regarding 1,584 specific sites where MTBE has been known to leak and has contaminated the subsurface. The State also introduced scientific evidence through expert testimony that 5,590 drinking water wells serving 16,276 people are contaminated with MTBE at levels over 13 ppb, and that many more are expected to become contaminated in the future. Dr. Fogg used substantial data on MTBE contamination in the state to calculate statistically the number of drinking wells currently contaminated by MTBE. The State's experts expressly accounted for the fact that "every site is different." Exxon does not contend on appeal that the expert evidence was irrelevant or unreliable.

Based upon the record, we conclude that the trial court's determination that the use of statistical evidence and extrapolation to prove injury-in-fact was not an unsustainable exercise of discretion. *See Bodwell v. Brooks*, 141 N.H. 508, 510-11 (1996) (statistical probability evidence may be used to rebut the presumption of legitimacy); *Rancourt v. Town of Barnstead*, 129 N.H. 45, 50-51 (1986) (validity of a town's growth control ordinance rests upon a relationship between the town's growth restrictions and a projection of "normal growth" based upon scientific and statistical evidence); *In re Neurontin Marketing and Sales Practices*, 712 F.3d 21, 42 (1st Cir. 2013) ("courts have long permitted parties to use statistical data to establish causal relationships").

IX. RSA 507:7-e and *DeBenedetto*

Exxon argues that it was "unfairly prejudiced in its ability to present its defense" under RSA 507:7-e (2010) and *DeBenedetto v. CLD Consulting Engineers, Inc.*, 153 N.H. 793 (2006). Before trial, Exxon filed disclosures containing lists of several thousand non-litigants, including the names of gasoline suppliers, gasoline importers, foreign refiners, domestic refiners, distributors, trucking companies, and persons with leaking underground storage tanks. After reviewing these initial disclosures, the trial court found that they did not sufficiently allege fault against the non-litigants and, as a result, did not provide either the court or the State with adequate notice under *DeBenedetto*. The trial court ordered Exxon to "set forth, with specificity, a good faith basis for why each party listed within their disclosures is responsible for the claims made by the State."

The State subsequently moved to strike Exxon's supplemental disclosures, maintaining that Exxon failed to comply with the trial court's order because the disclosures did not provide sufficient evidence specific to each *DeBenedetto* party. In its order, the trial court stated:

> Despite the fact that the New Hampshire Supreme Court has never directly addressed the present *DeBenedetto* issues, it has, nonetheless, supplied a framework to guide this court's analysis. This framework is made up of four principles: first, that RSA 507:7-e applies to all parties contributing to the occurrence giving rise to the action, including those immune from liability or otherwise not

> before the court; second, that a civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an affirmative defense; third, the defendant carries the burdens of production and persuasion; and fourth, that a defendant may not easily shift fault under RSA 507:7-e; allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes.

(Quotations and citations omitted.)

The trial court found "the most notable portion of the framework, and the most helpful in the present analysis, is that portion identifying non-litigant liability as akin to an 'affirmative defense.'" Because in New Hampshire defendants are required to plead affirmative defenses to provide the plaintiff with adequate notice of the defense and a fair opportunity to rebut it, the trial court determined that "when a defendant raises a defense under *DeBenedetto*, its disclosure must provide the plaintiff with adequate notice of the defense and the plaintiff must be given fair opportunity to rebut it." Looking at the requirements of other jurisdictions, the court reasoned that the Colorado standard "for evaluating a defendant's notice of non-litigant fault [is] persuasive in molding a standard for 'adequate notice' under *DeBenedetto*." Thus, the court concluded that

> proper notice in the *DeBenedetto* context requires [Exxon] to provide to the State identifying information for the nonparty in

> addition to a brief statement of the basis for believing such nonparty to be at fault. Furthermore, the notice must allege sufficient facts to satisfy all the elements of at least one of the State's claims.

(Quotations, citations, and brackets omitted.) The trial court rejected Exxon's assertion that it need demonstrate only "how a *DeBenedetto* party contributed to the harm alleged by the State, not correspond each *DeBenedetto* party to individual claims," reasoning that Exxon cannot assert that it has "any less of a burden than to link [its] own allegations of non-litigant fault to at least one of the claims asserted by the State." (Quotation omitted.)

Thereafter, the trial court determined that with respect to negligence, Exxon "must assert that a nonparty owed a duty with respect to MTBE gasoline and breached that duty. This will require demonstrating that a nonparty had some knowledge of MTBE or its characteristics, or should have had some knowledge." With respect to products liability, the trial court determined that Exxon "must assert that a nonparty knew or reasonably should have known of the nature of MTBE upon which the State's claims are based in order to show that an entity below [Exxon] in the product chain is similarly culpable and/or owed a similar duty to warn." The trial court explained that Exxon "need not show that a nonparty was aware of the unique nature of MTBE ... However, a nonparty cannot possibly [have] foreseen the type of harm alleged by the State absent some knowledge that MTBE was generally present in gasoline or could have

been present. Alternatively, [Exxon] may demonstrate that a nonparty should have known of MTBE."

After the jury verdict, Exxon moved to set aside the verdict and for a new trial. Exxon argued that the trial court erred by: (1) "improperly requiring ExxonMobil to prove that the non-parties were liable for the State's claims, rather than proving only that they contributed to the State's injury"; (2) "preventing ExxonMobil from relying on RSA 146-A to establish the non-parties' fault"; (3) "requiring proof that the non-parties had actual or constructive knowledge of MTBE's presence in gasoline before contributing to the State's injury"; and (4) requiring it to present "categories of evidence rather than evidence about the actions of particular individuals in connection with particular injuries."

The trial court rejected Exxon's first three challenges because they raised pure questions of law that the court addressed pretrial and "Exxon has raised no new fact or law to convince the Court to readdress these arguments." Regarding the statewide proof claim, the trial court agreed with the State that allowing categories was a convenience, not a requirement, and "Exxon could have presented evidence regarding every individual *DeBenedetto* party, as opposed to categorical evidence." As to the categories, the trial court found that "Exxon presented very little evidence establishing nonparty liability" and that its primary witness who testified regarding the various categories of nonparties "did not indicate that nonparties were aware of MTBE's presence in gasoline during the relevant time period, and he never stated that nonparties were aware their actions

caused spills and leaks that caused MTBE contamination." Accordingly, the trial court concluded that it "cannot say that a jury verdict rejecting Exxon's *DeBenedetto* defense was conclusively against the weight of the evidence."

On appeal, Exxon argues that the trial court's *DeBenedetto* rulings "deviate from clear precedent and denied Exxon a meaningful opportunity to prove that third parties contributed to at least part of the alleged harm." Exxon asserts that the trial court's ruling that Exxon had to link each *DeBenedetto* party to a claim made by the State "eviscerated Exxon's statutory right to allocate fault to third parties." The State argues that Exxon's *DeBenedetto* argument is "unavailing because Exxon did not show at trial that non-parties were at *fault* for MTBE pollution."

We review challenges to a trial court's evidentiary rulings under our unsustainable exercise of discretion standard and reverse only if the rulings are clearly untenable or unreasonable to the prejudice of a party's case. *In the Matter of McArdle*, 162 N.H. at 485. We review questions of law *de novo*. *Sanderson*, 146 N.H. at 600.

Pursuant to RSA 507:7-e and *DeBenedetto*, defendants may ask a jury to shift or apportion fault from themselves to other nonparties in a case. RSA 507:7-e, I, provides:

> I. In all actions, the court shall:
>
> > (a) Instruct the jury to determine ... the amount of damages to be awarded to each claimant and against each defendant in

> accordance with the proportionate fault of each of the parties; and
>
> (b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.

"[F]or apportionment purposes under RSA 507:7-e, the word 'party' refers not only to 'parties to an action, including settling parties,' but to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court." *DeBenedetto*, 153 N.H. at 804 (quotation, ellipsis, and citation omitted). "[A] defendant may not easily shift fault under RSA 507:7-e; allegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes." *Id*. "[A] civil defendant who seeks to deflect fault by apportionment to non-litigants is raising something in the nature of an *affirmative defense*." *Goudreault v. Kleeman*, 158 N.H. 236, 256 (2009). Accordingly, "the defendant carries the burdens of production and persuasion." *Id*. Furthermore, "a defendant who raises a non-litigant apportionment defense essentially becomes another plaintiff who must seek to impose liability on a non-litigant just as a plaintiff seeks to impose it on him." *Id*. (quotation and brackets omitted); *see Wyle v. Lees*, 162 N.H. 406, 413 (2011) (trial court implicitly concluded that the defendants failed to prove their allegations of

comparative negligence for purposes of apportionment of damages).

As the trial court correctly concluded, apportionment under RSA 507:7-e requires proof of fault. *DeBenedetto*, 153 N.H. at 800 (apportionment must include all tortfeasors who are causally negligent by either causing or contributing to the occurrence in question). At trial, Exxon's expert witness, Jeffrey A. Klaiber, an environmental consultant, testified for several days, including providing extensive testimony regarding typical spill and leak scenarios for the various categories of alleged faulty nonparties. He acknowledged, however, that he did not interview anyone at any of the sites that Exxon contends are responsible for MTBE contamination, that he did not know whether anyone who owned or operated any of those sites knew that MTBE gasoline behaves differently from other gasolines when released into the environment, and that he did not know if any of the owners or operators of those sites even knew that MTBE was in the gasoline that they were receiving. Nonetheless, the trial court allowed the jury to consider apportioning liability to those nonparties. The trial court instructed the jury:

> In this state, courts and juries may apportion fault to all persons or entities who contributed to causing an injury, even if they are not parties to the lawsuit. What that means in this case is that if you find that the State has proven any of its three claims against ExxonMobil, then ExxonMobil shall have the burden of proving that some or all of

> its fault should be allocated to the nonparties identified in Defense Exhibit 1047.

The jury answered "No" to each portion of this question on the special verdict form: "Has ExxonMobil proven, by a preponderance of the evidence, that some or all of its fault should be allocated to nonparties in the following categories? ... a. Tanks With Holes ... b. Aboveground Releases ... c. Tanks With Releases ... d. Junkyards." Based upon the record, we are not persuaded by Exxon's argument that it was denied "a meaningful opportunity" to apportion fault to third parties or that it suffered any prejudice from the trial court's rulings. Accordingly, we find no error.

X. Parens Patriae

Exxon argues that the trial court erroneously decided that the State had *parens patriae* standing, rather than submitting this question to the jury. Exxon asserts that whether there is an injury to a "substantial segment" of the population is a question of fact for the jury, not a question of law for the judge, and that a rational jury could have found the State's proof insufficient. The State argues that Exxon waived this argument because Exxon failed to raise it before the trial court, including failing to raise it in its motion for summary judgment on *parens patriae* issues or in its motion for a directed verdict, and failed to argue it in either its motion for JNOV or motion to set aside the verdict.

We have reviewed the record and agree with the State that Exxon has failed to demonstrate that it specifically raised this argument before the trial court. *See Dukette*, 166 N.H. at 255. Accordingly, because the argument is not preserved for our review, we decline

to address it substantively. *See N. Country Envtl. Servs.*, 150 N.H. at 619.

XI. Future Well Impacts

Exxon argues that the State's "future, speculative, and unknown well and site impacts" are not ripe for review. Before trial, Exxon raised this argument in a summary judgment motion. The trial court denied the motion, stating:

> It is well settled in New Hampshire that an injured party may seek recovery for future harm that will arise from a current injury. In order to recover for future damages, a party need only show that there is evidence from which it can be found to be more probable than not that the future damages will occur. Thus, contrary to [Exxon's] argument, New Hampshire has no absolute prohibition on awarding future damages.
>
> The court finds that the State's damages for future and unknown well impacts are fit for ... judicial determination. Importantly, the injury causing the future harm has already occurred. The injury occurred when MTBE entered State waters. The State's claim for future damages merely seeks to measure the extent of the harm caused, which New Hampshire allows. Furthermore, the court has already determined that the methods undertaken by the State's experts for determining the future harm ... are relevant and reliable. Therefore, the State's future damages claims are ripe for review under the first prong of the ripeness test.

(Quotation, citations, and brackets omitted.)

Exxon moved for a directed verdict following the State's conclusion of its case-in-chief arguing, in part, that the State failed to present its damages figure with sufficient certainty. Exxon argued that the State failed to prove that it has "sustained a cognizable injury" and that the State's damages evidence was insufficient. The trial court rejected the motion, stating:

> The State need only show an approximation of its harm. As this Court's prior orders on this issue explain, the State does not need to have identified every contaminated well in New Hampshire to show it is injured. Nonetheless, the State presented testimony in its case-in-chief through Gary Beckett, Dr. Ian Hutchison, Dr. Graham Fogg, Steve Guercia, and Brandon Kernen. These witnesses estimated the number of wells that are currently suffering contamination based on statistical sampling, the location of spill sites, and the number and proximity of drinking wells in New Hampshire. The mere fact that the State's damages figure is based on an approximation does not make it speculative or legally insufficient. Further, the evidence presented during the State's case-in-chief regarding the estimated costs of remediation efforts based on estimated contamination is sufficient for a reasonable juror to conclude the State has suffered a cognizable injury.

(Citation omitted.)

Following the jury verdict Exxon moved for JNOV, arguing that "several aspects of the jury's damages award for future well testing and treatment ... are unsupported by the evidence." Denying the motion, the trial court stated:

> Exxon explains that even if it is liable, the damages figure the jury awarded is speculative because it is based on expert estimations and not supported by evidence; it is not sufficiently definite. The Court considered and rejected this argument in its directed verdict order: "The mere fact that the State's damages figure is based on an approximation does not make it speculative or legally insufficient." Because Exxon raises no new facts or law, the Court will not reconsider its prior ruling. As such, the record is not so clearly in Exxon's favor that the Court can find the jury's verdict is unsustainable.

(Citation omitted.)

In addition, Exxon moved to set aside the verdict and for a new trial, arguing that "[j]ust because MTBE is in groundwater now does not mean that it will injure private wells in the future," and, therefore, "these projected injuries are speculative and were not ripe." The trial court rejected Exxon's argument, stating:

> This Court has ruled that the State's injury already occurred; MTBE has already been brought into New Hampshire. Exxon sought a jury instruction on imminent and immediate harm, which the Court denied.

> Whether the State has been injured is a question for the jury, but prospective damages are proper where there was evidence from which the jury could find it more probable than otherwise that such damage would occur. Because Exxon's motion raises no new issues of law or fact, the Court declines to reconsider its prior rulings.

(Quotation and citations omitted.)

On appeal, Exxon argues that the trial court erred "in allowing the State to claim more than $300 million in damages for the costs of testing private wells for possible MTBE contamination, $150 million to treat whatever contamination is found in the wells in the future, and another $218 million for anticipated generalized costs to characterize ... and clean up release sites," because these claims are unripe and should be dismissed. Exxon asserts that the State "did not present proof of actual or imminent contamination to particular private wells," and that the State's claims for treatment of future private-well impacts "are even more uncertain, remote, and contingent." According to Exxon, the trial court's ruling "dramatically increased the scope of this suit and took the [court] into territory where no common law court has gone before."

The State argues that its harm "exists today, and recompense for this type of harm is certainly no less recoverable than future medical expenses or damages for loss of income, both of which are regularly awarded in tort actions without raising ripeness concerns." The State also asserts that its testing and future-treatment claims are ripe because the State

"presented concrete evidence of damage that already has occurred."

"[R]ipeness relates to the degree to which the defined issues in a case are based on actual facts and are capable of being adjudicated on an adequately developed record." *Appeal of City of Concord*, 161 N.H. 344, 354 (2011). Although we have not adopted a formal test for ripeness, we have found "persuasive the two-pronged analysis used by other jurisdictions that evaluates the fitness of the issue for judicial determination and the hardship to the parties if the court declines to consider the issue." *Appeal of State Employees' Assoc.*, 142 N.H. 874, 878 (1998).

We find no error in the trial court's rulings on this issue. The State's claims for future testing and treatment are fit for judicial determination as the harm from MTBE has already occurred. *Cf. In re Methyl Tertiary Butyl Ether ("MTBE") Prod.*, 175 F. Supp. 2d 593, 607-11 (S.D.N.Y. 2001) (individual plaintiffs could not show a present threat of imminent harm because either they had not tested their private wells or tests did not detect MTBE in their wells). The record establishes that, as of the time of trial, over 1,000 drinking wells in the state had tested positive for MTBE, and, of those, 358 wells were contaminated at levels over the maximum contaminant level of 13 ppb. The record also establishes that more than 5,000 wells, which have not yet been tested, were likely already contaminated with MTBE above 13 ppb at the time of trial. The record also contains evidence that the damage from MTBE contamination is not limited to drinking wells. According to the State's experts, MTBE has a "residence time" of up to 50 years, during

which time it gradually seeps through subsurface zones toward wells, lakes, and wetlands. The State's experts testified that, although leaks from some underground storage tanks might not yet have been detected, those leaks "will continue to pose a hazard to groundwater quality." As the jury was instructed:

> The State is entitled to be fully compensated for the harm resulting from ExxonMobil's legal fault.
>
> ....
>
> In determining the amount of damages to allow the State, you may ... consider whether it is more probable than otherwise that its damages will continue into the future as a direct, natural and probable consequence of ExxonMobil's legal fault and, if so, award it full, fair, and adequate compensation for those future damages.

Exxon does not present any argument on the hardship prong of the ripeness test, and we therefore consider any argument regarding that prong to be waived. *See State v. Roy*, 167 N.H. 276, 286 (2015).

XII. Prejudgment Interest

Exxon argues that the trial court should not have awarded prejudgment interest on future costs. Following the jury verdict, the State moved for taxation of costs, including prejudgment interest pursuant to RSA 524:1-b (2007). Exxon moved to preclude the addition of prejudgment interest on the future costs portion of the State's damage award, arguing that such an award would not serve the statute's purpose and "would amount to an illegal

punitive award." Exxon asserted that because money has time value, interest is added to damages for past harms to take into account the time during which the plaintiff was deprived of its use, but "[t]hat rationale is inapposite to an award for future costs associated with establishing investigation, testing and treatment programs and with MTBE impacts that have not yet occurred." The State objected, arguing that because the injury has already occurred when MTBE entered New Hampshire's waters, Exxon's "motion fails in its basic premise; there are no future injuries here." The State also argued that even assuming future injuries were at issue, the statute "does not distinguish between past and future costs or harm."

The trial court rejected Exxon's arguments, noting that, although during trial, "the State categorized its damages as past, current, and future for purposes of breaking the figure into parts for evidentiary presentation, ... this presentation was not intended to and did not define the State's injury." The court reasoned:

> The State presented substantial evidence that the damage to its waters had already been done, MTBE had already been imported into the State, and this is the presentation of evidence that the jury accepted by its verdict. The mere fact that the State characterized part of its damages figure as that for future testing and remediation does not mean that it did not suffer the loss of use of these monies prior to the jury's verdict in this case. Further, had these monies been available during the last decade when litigation was

> pending, arguably, the cost to test and remediate would be lesser now.

On appeal, Exxon argues that the trial court erred "by awarding prejudgment interest on the total judgment amount, or $236,372,664, when $195,243,134 of those damages ... were for the State's claims for investigating, testing, characterizing, and treating alleged MTBE contamination in New Hampshire's private wells and future costs for site investigation and remediation." According to Exxon, "[p]rejudgment interest on those future costs fails to serve the compensatory purpose of RSA 524:1-b and thus should not have been awarded." The State argues that Exxon "makes no effort to square its argument with [the statute's] text," and that "RSA 524:1-b has dual purposes: to accelerate settlement and provide compensation for the loss of use of money damages." (Quotation and emphasis omitted.) The State asserts that "[a]warding prejudgment interest to all of the State's damages satisfies the objective of accelerating settlement, regardless of when the money underlying the damages is spent," and that "because the contamination occurred in the past, ongoing treatment and testing does not, as Exxon claims, represent 'future harms' or damages the State has yet to incur." (Quotation, brackets, and citation omitted.)

"Ordinarily, upon a verdict for damages and upon motion of a party, interest is to be awarded as part of all judgments." *State v. Peter Salvucci Inc.*, 111 N.H. 259, 262 (1971). Pursuant to RSA 524:1-b, in all civil proceedings, other than an action on a debt,

> in which a verdict is rendered or a finding is made for pecuniary damages to any party,

> whether for personal injuries, for wrongful death, for consequential damages, for damage to property, business or reputation, for any other type of loss for which damages are recognized, there shall be added ... to the amount of damages interest thereon from the date of the writ or the filing of the petition to the date of judgment.

RSA 524:1-b; *see* RSA 524:1-a (2007).

The interpretation of a statute is a question of law, which we review *de novo*. *In the Matter of Liquidation of Home Ins. Co.*, 166 N.H. 84, 88 (2014). We are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. *Id*. We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used. *Id*. Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme. *Id*.

The purpose of the legislature in enacting RSA 524:1-b was "to clarify and simplify the existing law and to make plain that in all cases where the trial court awarded money to the party entitled to be compensated, interest at the legal rate is to be added to the award." *Id*. at 89 (quotation omitted). Even assuming, without deciding, that the damages award included some amount for "future" costs, the plain language of the statute does not distinguish between past and future damages. Rather, the statute mandates the award of prejudgment interest "to the amount of damages." Thus, the plain language of the statute provides no support for Exxon's argument

differentiating past and future damages for purposes of calculating and awarding prejudgment interest. *See Starr v. Governor*, 151 N.H. 608, 610 (2004) (we will not add words to a statute that the legislature did not see fit to include). Accordingly, we hold that the trial court did not err in awarding prejudgment interest as to all of the State's damages.

XIII. State's Cross-Appeal

The State cross-appeals from the trial court's order imposing a trust upon approximately $195 million of the damages award. Before trial, Exxon moved "to establish a court supervised trust fund for any monies the State recovers in this litigation" and for "an accounting for all settlement proceeds the State has received to date." Exxon argued that the need for a trust fund was necessary "given the speculative nature of the State's future damages," and that a "'pay-as-you-go' fund ... would effectively limit the State's recovery to those future testing, monitoring, treatment, and remediation costs the State actually incurs." The State objected, and the trial court deferred ruling until after trial.

Following the verdict, Exxon renewed its motion, asserting that "[t]he need for a court-supervised trust is proven by the recent press coverage indicating that the New Hampshire Legislature intends to divert funds awarded in this litigation away from MTBE remediation," and that, in two recent Maryland cases, the court had required court-supervised trust funds in medical monitoring cases involving alleged MTBE exposures. The State objected, arguing, among other contentions, that, because the trial court had already determined that "the underlying causes of action do

not require the State to prove how it will spend damages, there is no basis for imposing a court-supervised trust requiring the State to establish how the money will be spent as a prerequisite to obtaining the damages for which Exxon was found liable." In addition, the State argued that Exxon "has not cited a single case, statute, or other authority that would allow [the trial court] to establish a trust fund for monies received by the State pursuant to a jury award in a products liability case," and that Exxon's reliance upon the Maryland cases was misplaced.

The trial court granted Exxon's motion in part, agreeing that "a trust is necessary to protect the *res* of the jury damage award." The trial court reasoned that "because the State brought this case in its *parens patriae*/trustee capacity," the "State's obligation to remediate contaminated water exists independent of Exxon's interest in the damages figure the jury awarded the State," and the State "must ensure it has adequate resources to test and treat New Hampshire's waters in the future." The court declined to impose a trust upon the amount of damages designated for past cleanup costs, reasoning that "those monies must be available upon final judgment" for the State to reimburse itself. However, the court imposed a trust upon the amount of damages designated for 228 high-risk sites, sampling private drinking water wells, and treating drinking water wells contaminated with MTBE at or above the maximum contaminant level. The court rejected Exxon's request for an order compelling the State to disclose how it would proceed with testing and remediation, but noted that "to the extent Exxon has a legal interest in a trust as a beneficiary at the termination of the trust, it may file

a proposed procedure for how the trust should function." The trial court deferred deciding whether the trust would be court-supervised, and a hearing date was set for the court "to consider each party's proposal for the administrative details of a trust."

Before the scheduled hearing date, the State moved for reconsideration of the trial court's order, Exxon filed this appeal, and the State filed its cross-appeal. We subsequently issued an order staying the appellate proceedings to allow the trial court to issue a final decision on the State's motion for reconsideration. The trial court thereafter denied the motion. The court noted at the outset that "it would be inefficient for the Court to decide all the relevant details of a trust now, if the Supreme Court is being asked to decide whether the existence of a trust is permissible. As such, this Court interprets the Supreme Court order to require a ruling on imposition of a trust but not the details." The trial court rejected the State's arguments that, among other things, the court conflated *parens patriae* and the public trust doctrine, failed to comply with RSA 6:11, III (Supp. 2014), and violated separation of powers. The trial court also rejected the State's argument that Exxon lacked standing, stating that "the Court specifically left open the question of whether Exxon has standing" and that "Exxon's standing was irrelevant to the Court's determination to impose the trust."

On appeal, the State argues that the trial court's imposition of a trust was erroneous for several reasons, including that no common law precedent or statute provides for the imposition of a trust over the State's damages award. Exxon argues that trial courts

have "broad and flexible equitable powers," which include the power to establish a trust over the damages awarded in this case. (Quotation omitted.)

Although we recognize that "[t]he propriety of affording equitable relief in a particular case rests in the sound discretion of the trial court," *Libertarian Party of N.H. v. Sec'y of State*, 158 N.H. 194, 196 (2008), this principle does not apply to the remedy in this case. The common law remedy for a tort law cause of action is lump-sum damages. *See Reilly v. United States*, 863 F.2d 149, 169 (1st Cir. 1988) (under the common law rule, "a court's authority to award damages for personal injuries is limited to making lump-sum judgments"); *see also In re Methyl Tertiary Butyl Ether ("MTBE")*, 56 F. Supp. 3d 272, 273, 275 (S.D.N.Y. 2014) (declining to impose a reversionary trust on damages awarded for Exxon's liability on claims of public nuisance, negligence, trespass, and products liability for failure to warn, because the remedy for a traditional tort law cause of action is lump-sum damages). Thus, in the absence of a statute or an agreement between the parties, when a tortfeasor loses at trial it must pay the judgment in one lump sum. *See Reilly*, 863 F.2d at 170; *see also Vanhoy v. United States*, 514 F.3d 447, 454-55 (5th Cir. 2008) (court refused to deviate from a conventional lump-sum award and create a reversionary trust over damages in the absence of any applicable statutory or precedential requirement); *Frankel v. Heym*, 466 F.2d 1226, 1228-29 (3d Cir. 1972) ("courts of law had no power at common law to enter judgments in terms other than a simple award of money damages"; thus, "court should not make other than lump-sum money judgments" in case

brought under Federal Tort Claims Act "unless and until Congress shall authorize a different type of award").

The trial court reasoned that a trust was required because the State brought this action in its *parens patriae* capacity. *Parens patriae*, however, is simply a standing doctrine. *See Hess*, 161 N.H. at 431-32. As we explained in *Hess*, "[t]he public trust doctrine, from which the State's authority as trustee stems, and the *parens patriae* doctrine are both available to states seeking to remedy environmental harm." *Id.* at 431. "While the public trust doctrine is its own cause of action, *parens patriae* is a concept of standing, which allows the state to protect certain quasi-sovereign interests." *Id.* at 431-32 (quotations omitted). "*Parens patriae* does not provide a cause of action, but may provide a state with standing to bring suit to protect a broader range of natural resources than the public trust doctrine because it does not require state ownership of such resources." *Id.* at 432. Accordingly, we are not persuaded that the fact that the State was allowed to proceed under *parens patriae* standing authorizes the imposition of a trust over the money damages awarded for Exxon's torts. In the absence of statutory or precedential support, we decline to deviate from the conventional lump-sum damages award and, accordingly, reverse the trial court's imposition of a trust as erroneous as a matter of law.

Affirmed in part; and
reversed in part.

HICKS, J., and VAUGHAN, J., retired superior court justice, specially assigned under RSA 490:3, concurred.

Appendix B

THE SUPREME COURT
OF NEW HAMPSHIRE

Nos. 2013-0591, 2013-0668

THE STATE OF NEW HAMPSHIRE,
Appellant,
v.
EXXON MOBIL CORPORATION, *& a.*,
Appellees.

Filed: October 22, 2015

ORDER

On October 9, 2015, the defendants filed a motion for rehearing or reconsideration regarding our decision dated October 2, 2015. The State did not file an objection.

New Hampshire Supreme Court Rule 22(2) provides that a party filing a motion for rehearing or reconsideration shall state with particularity the points of law or fact that in the professional judgment of the movant the court has overlooked or misapprehended.

We have reviewed the claims raised by the defendants in their motion for reconsideration and conclude that no points of law or fact were overlooked or misapprehended in our decision. Accordingly, upon

reconsideration, we affirm the October 2, 2015 decision and deny the relief requested in the motion.

On October 9, 2015, the defendants also filed a motion to stay the mandate while they seek review in the Supreme Court of the United States. The State having filed no objection, the motion is granted.

Relief requested in the motion for rehearing and reconsideration denied; relief requested in the motion to stay granted.

Dalianis, C.J., Hicks, J., and Vaughan, J., retired superior court justice, specially assigned under RSA 490:3, concurred.

Eileen Fox,
Clerk

Appendix C

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

No. 03-C-0550
Merrimack, SS.

STATE OF NEW HAMPSHIRE,
Plaintiff,
v.
HESS CORPORATION, *et al.*,
Defendants.

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON CLAIMS PREEMPTED BY FEDERAL LAW [1082, 1083, 1216, 1217, 1260]

The Plaintiff, State of New Hampshire ("State"), brought suit against several gasoline manufacturers and refiners (collectively "Defendants") in order to protect its citizens and remedy alleged past and future contamination of State waters containing methyl tertiary-butyl ether ("MTBE"), a chemical additive previously used in gasoline. The Defendants[1] move for

[1] The Defendants joining this motion are as follows: CIT GO Petroleum Corporation: CIT GO Refining and Chemicals Company L.P.; ConocoPhilips Company; Exxon Mobil Corporation; Exxon Mobil Oil Corporation; Highlands Fuel Delivery, LLC (f/k/a Irving Oil Corporation); Irving Oil Limited; Motiva Enterprises LLC: North Atlantic Refining Limited; Shell Oil Company; Sunoco, Inc. (R&M); TMR Company; Ultramar

summary judgment on the State's claims that are, according to the Defendants, preempted by federal law. The State objects. After reviewing the parties' arguments and the applicable law, the Court finds and rules as follows.

The parties have previously engaged in extensive motion writing, and familiarity with the Court's previous decisions is assumed. The facts underlying this case are set forth in those opinions.

In order to prevail on summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. A fact is "material" if it affects the outcome of the litigation. *Horse Pond Fish and Game Club, Inc. v. Cormier*, 133 N.H. 648, 653 (1990). In considering a party's motion for summary judgment, the Court examines the evidence submitted and draws all necessary inferences from that evidence in the light most favorable to the non-moving party. *Gould v. George Brox, Inc.*, 137 N.H. 85, 87 (1993). "The non-moving party may not rest on mere allegations or denials in his pleadings, ... [and the non-moving party's] response ... must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV. "'To the extent that the nonmoving party either ignores or does not dispute facts set forth in the moving party's affidavits, they are deemed to be admitted for the purposes of the motion." *N.H. Div. of Human Servs. v. Allard*, 141 N.H. 672, 674 (1997).

Energy Inc.; Valero Energy Corporation: Valero Marketing and Supply Company: and Vital S.A. Inc. (hereinafter "Defendants").

The Defendants argue that the State's tort claims frustrate and conflict with the objective and purpose of federal regulations, specifically the Clean Air Act ("CAA"). In other words, they argue that such tort claims present an obstacle to the federal purpose of the CAA. Defs' Reply Mem. at 9. The Court rejects the Defendants' argument because the State's tort law claims are not preempted by the Clean Air Act's minimum oxygenate standard.

Under Article VI, Clause 2 of the United States Constitution, the Supremacy Clause invalidates state laws that "interfere with, or are contrary to" federal law. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824). "The United States Supreme Court has defined three circumstances in which state law is preempted under the supremacy clause." *Wenners v. Great State Beverages. Inc.*, 140 N.H. 100, 103 (1995). "First, Congress can define explicitly the extent to which its enactments pre-empt state law." *English v. General Electric Co.*, 496 U.S. 72, 78 (1990). "Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.*, at 79. "Finally, state law is pre-empted to the extent that it actually conflicts with federal law." *Id.*, Here, the Defendants concede that they are not arguing express preemption. Instead, they argue that there is "a conflict between the State's suit and the federal goals." Defs' Reply Mem. at 9.

Where Congress has not expressly or impliedly preempted a field, a state law is invalid to the extent that it actually conflicts with federal law. *Oxygenated Fuels Ass'n v. Pataki*, 158 F. Supp. 2d 248, 252

(N.D.N.Y. 2001). "Conflict preemption" can occur in one of two ways. First, such a conflict arises when "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). The doctrine of impossibility focuses on whether the federal requirement, on its face, precludes the possibility of the state requirement. As the Court explained in *Florida Lime & Avocado Growers Inc.*, an example of impossible dual compliance would be if a federal law "forbade the picking and marketing of any avocado testing more than 7% oil" while a state law "excluded from the State any avocado measuring less than 8% oil content." *Id.*

Additionally, conflict preemption arises when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Accordingly, the state law must interfere directly with the federal purpose. *Free v. Bland*, 369 U.S. 663, 664 (1962). In other jurisdictions, clear evidence of interference is important in finding preemption. *See Clean Air Mkts. Group v. Pataki,* 338 F. 3d. 82, 88-89 (2d. Cir. 2003) (finding that the CAA provisions evidenced a clear goal to set up a nationwide allocation and transfer system for reducing emissions of sulfur dioxide, and a New York Statute clearly interfered with those goals). Evidence may include proof that the agency authorized to implement the federal statute has found that the state law would interfere with the federal purpose. *Geier v. Am. Honda Co.*, 529 U.S. 861, 882 (2000). In the absence of such evidence, a finding of preemption is less likely.

When a tort law claim is the basis for preemption, the question of whether a successful claim would necessarily cause the defendants behavior to change may be relevant. If defendants would rather pay tort damages than change their behavior, then the tort claim presents no obstacle to the federal purpose. Even where plaintiffs assert a tort duty that creates a substantial obstacle, preemption should not "ordinarily be implied absent an 'actual conflict.'"

English, 496 U.S. at 90. "Thus, while the Court in *Geier* ultimately declined to decide whether compliance with an alleged tort duty could be assumed for purposes of preemption, it found that the alleged tort duty conflicted with federal law." *In re Methyl Tertiarv Butyl Ether ("MTBE") Products Liability Litigation*, 457 F. Supp. 2d 324, 334-43 (S.D.N.Y. 2006) (citing *Geier*, 529 U.S. at 861). The Court in *Geier* reasoned that "because there was strong evidence of clear interference with a Congressional purpose, as well as evidence that the Department of Transportation believed the claims to be preempted." 529 U.S. at 861.

On numerous occasions, courts throughout the United States have considered whether the CAA preempts state tort law claims regarding the use of *MTBE. See, e.g., In re Methyl Tertiary Butyl Ether* ("MTBE") Products Liability Litigation, 457 F. Supp. 2d at 334-43. In *In re MBTE Products Liability Litigation*, the defendants pointed to alleged features of the CAA and its legislative history to support their argument that the plaintiff's tort claims presented an obstacle to a federal purpose and were therefore preempted. *See id.* These included the following:

> (1) Congress intended that defendants could choose which oxygenate to use to meet the requirements of the CAA; (2) Congress wanted to increase the amount of oxygenates available and thus maximize the improvement in air quality achievable under the RFG program; (3) the EPA expected MTBE to be the most heavily used oxygenate; and (4) plaintiffs' theories would impose strict tort liability for compliance with federal law.

Id. at 336. Judge Schendlin of the United States District Court for the Southern District of New York ruled that none of the features listed by the defendants proved that a duty not to use MTBE would present an obstacle to compliance with the CAA. *Id.*

First, the court determined that the defendants' use of legislative history of the CAA to prove that Congress wanted to give the defendants a choice among oxygenates was irrelevant. *Id*. The language of the CAA is clear and unambiguous, making the use of legislative history inappropriate. *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 457 F. Supp. 2d at 336. The court noted that the "CAA itself contains no language mandating that defendants have a choice among oxygenates. Congress intended the states to have flexibility in setting emissions standards as long as the state met the minimum threshold set by the RFG program." *Id.* at 337.

Further, even upon review of the legislative history, the court, citing the Ninth Circuit, determined that "the legislative history of the CAA 'does not support a conclusion that Congress meant to give

gasoline producers an unconstrained choice of oxygenates.'" *Id.* at 339 (citing *Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 672 (9th Cir. 2003)). While Congress and the EPA wanted to give gasoline producers a choice of oxygenates, they did not to intend to give "unfettered discretion to defendants to use any oxygenate, regardless of safety." *Id.* As a result, the court determined that the defendants failed to show adequate evidence of their first contention. *Id.*

Next, the court analyzed the defendants' contention that a duty not to use MTBE would be an obstacle to Congress' goal of maximizing the RFG program. *Id.* The court determined that genuine issues of material fact existed as to whether eliminating MTBE would prevent the growth of the RFG program. *Id.* at 340.

Third, the court reviewed the defendants' argument that the EPA "expected MTBE to be the most heavily used oxygenate and thus any restriction on MTBE would frustrate EPA's expectations." *Id.* at 341. The court noted that the EPA did not intend to preempt the field of fuel content regulation for all purposes, nor did the EPA have such authority. *Id.* The fact that the EPA expected MTBE to be used does not amount to "a means-related objective or a mandate that defendants use MTBE." *Id.* at 342.

Finally, the defendants argued that a finding of liability "would be tantamount to punishing compliance with a federal program." *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 457 F. Supp. 2d at 343. The court ruled that speculation about future tort suits "is no basis for finding the current claims preempted by federal law."

Id. As a result, the court rejected all of the defendants' preemption arguments.

In the instant case, the Defendants make arguments that are essentially identical to those made by the defendants during *In re MBTE Products Liability Litigation*. Here, the Defendants claim that the federal regulation deliberately provided manufacturers with a range of oxygenate choices and the choice was designed to further the regulation's objectives. The Defendants further argue that Congress and the EPA stressed the importance of MTBE as a choice and encouraged its use. Finally, they point to the lengthy legislative history of the CAA to support their arguments. Like the defendants of *In re MBTE Products Liability Lit*igation, the Defendants here have failed to prove that the State's tort law claims are preempted by the CAA, and their use of the legislative history is irrelevant due to the unambiguous language of the CAA.

Based on the above analysis, the Court finds that the State's common law tort claims are not preempted by federal regulation. Because the Defendants cannot show the CAA preempts the State claims under a conflict analysis, this order also subsumes any possible relief under express and implied preemption. As a result, the Defendants' motion for summary judgment is DENIED.

So ordered.

8-22-12	s/
Date	Peter H. Fauver Presiding Justice

Appendix D

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

No. 03-C-0550
Merrimack, SS.

STATE OF NEW HAMPSHIRE,
Plaintiff,
v.
HESS CORPORATION, *et al.*,
Defendants.

ORDER ON CERTAIN DEFENDANTS' MOTION TO EXCLUDE PLAINTIFF'S EXPERTS AS IRRELEVANT

The Plaintiff, State of New Hampshire, brought suit against several gasoline manufacturers and refiners (collectively "Defendants") in order to protect its citizens and remedy alleged contamination and future contamination of State waters containing methyl tertiary butyl ether ("MTBE"), a chemical additive previously used in gasoline. Given the extensive history of this case, familiarity with the Court's previous orders and with the factual background is assumed. The Defendants move to exclude as irrelevant three of the Plaintiff's experts: (1) Graham Fogg ("Fogg"); (2) Gerry Beckett

("Beckett"); and (3) Ian Hutchison ("Hutchison").[1] The Plaintiff objects. On May 24, 2011, the Court heard oral argument on the Defendants' motion during a status conference.[2] Following the oral argument, the parties submitted supplemental memoranda. Upon review of the parties' oral and written submissions, the Court finds and rules as follows.

The Court's decision on the Defendants' Motion to Exclude the Plaintiff's Experts as Irrelevant (hereinafter "state-wide proof motion") is a turning point in this litigation. The Court's decision will directly impact how this case is tried moving forward. On the one hand, granting the Defendants' motion means trying this case on an individual, focus-site basis; a process which would take many years and require several trials. On the other hand, denying the Defendants' motion will allow the Plaintiff to prove injury-in-fact and damages on a state-wide or statistical basis, which would allow the Plaintiff the opportunity to prove its case in a single trial.

In other words, the Court's determination will affect more than the inclusion or exclusion of three of the Plaintiff's witnesses. As the parties' recognize, the Court's decision will affect issues such as the scope of discovery, the level of proof necessary to decide

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[1] The defendants also move to exclude the experts as "unreliable"; however, the Court has postponed ruling on that motion until it has decided the present motion.

[2] Although both parties requested an evidentiary hearing on the Defendants' motion to exclude, the Court found that "an evidentiary hearing w[ould] not further assist it in making a determination ...." *State v. Hess*, Merrimack County, No. 03-C-0550, *2 (May 6, 2011) (Order, Fauver, J.).

causation, the necessity of *DeBenedetto* disclosures, and many more. As a result, the Court has structured this Order not only to address the merits of the Defendants' motion, but also to address other issues intertwined with the Court's decision.

This Order is divided into multiple parts. First, the Court will address the Defendants' "state-wide proof" arguments. That analysis will focus on the relevance of the Plaintiff's experts' opinions in light of the case law cited by both parties and other considerations. Second, the Court will address *DeBenedetto*. Finally, the Court will address alternative theories of liability for proving causation.[3]

The State-Wide Proof Motion

The Defendants' primary contention is that a "generalized approach" cannot be used to establish injury-in-fact in New Hampshire. They assert that the opinions of Dr. Fogg, Mr. Beckett, and Dr. Hutchison improperly attempt to predict contamination of several wells using extrapolation methods, which do not suffice to prove specific injury and are, therefore, irrelevant under New Hampshire Rules of Evidence 702 and 401. In support, the Defendants cite several cases where courts have refused to permit "aggregate approaches" to prove injury and damages among class-plaintiffs. They also cite to opinions issued by the MTBE Multi-District Litigation ("MDL") court dismissing several plaintiffs based on lack of standing

[3] The Court has not selected these issues randomly. All of the issues addressed in this Order were raised by the parties within the context of this state-wide proof motion and are, therefore, ripe for review.

and lack of typicality under Fed. R. Civ. P. 23. Finally, the Defendants maintain that allowing the Plaintiff to proceed on a state-wide approach will prevent them from presenting certain defenses and will also violate their rights to Due Process and a Fair Trial under the United States Constitution.

The Plaintiff objects and argues that a state-wide or statistical approach to proving injury-in-fact is nothing new and is consistent with the Defendants' constitutional rights. It further provides that the New Hampshire Supreme Court in *State v. Hess*, 161 N.H. 426 (2011), approved the use of a state-wide approach to prove injury. Finally, the Plaintiff argues that given its *parens patriae* standing, injury to any portion of state waters is "indivisible" and suffices to establish injury-in-fact. Thus, the State's use of statistical evidence is used solely to demonstrate the extent of the injury or, in other words, damages. The Court addresses the parties' arguments in turn.

Generalized Approach to Proving Injury

Under N.H. R. Evid. 402, "Evidence which is not relevant is not admissible." "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.H. R. Evid. 401 (quotation omitted). "To be admissible, expert testimony must be relevant not only in the sense that all evidence must be relevant, ... but also in the incremental sense that the expert's proposed opinion, if admitted, likely would assist the trier of fact to understand or determine a fact in issue." *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77,

81 (1st Cir. 1998) (citation omitted); *see also* N.H. R. Evid. 702. "The starting point for discussing relevant evidence is what the testimony actually is." *State v. Giddens*, 155 N.H. 175, 183 (2007) (Broderick, J., dissenting).

This Court need not address the reliability of the Plaintiffs experts' opinions at this time. By its very nature, a relevancy determination assumes the reliability of the evidence sought to be excluded. *See* Defs.' Mem. at 2. The determination asks whether, assuming its truth, the evidence is nonetheless irrelevant. *See generally* N.H. R. Evid. 401. In this light, the Court will now summarize the Plaintiffs experts' opinions, not with eye toward whether their methods are reliable, but instead toward what each actually seeks to prove.

Dr. Fogg is a hydrogeologist and Professor of hydrogeology at the University of California-Davis. Dr. Fogg has "made fundamental contributions to the statistical characterization of subsurface complexity as well as to methods of modeling subsurface transport." Fogg's Report at 2. The Plaintiff offers his testimony in order to prove two of its damages categories: (1) the costs of investigating (testing) and monitoring non-public drinking water wells in order to determine the actual, full extent of the MTBE problem; and (2) the current and future costs of treating MTBE at private and public wells where MTBE is detected in order to remove MTBE from drinking water supplies and minimize further human exposure.

Dr. Fogg has concluded the following:

1. There are 31,500 private drinking water wells currently contaminated with MTBE statewide, with a 95% confidence interval ranging from 20,000 to 43,000 drinking water wells. These wells are distributed between Reformulated-Gasoline ("RFG") and non-RFG counties as provided: RFG = 24,750 greater than or equal to .2 ppb; Non-RFG = 6,750. These results are based upon a United States Geological Survey study.

2. New MTBE impacts to drinking water wells will continue to accrue over a period of many decades. This is based upon the general principles of hydrogeology, knowledge of the persistence and transport of MTBE in groundwater (specifically in fractured bedrock, as found in New Hampshire), the large number of known and reasonably suspected unknown widespread presence in wells throughout the State, and numerous scientific studies that have all arrived at the same conclusion: travel times to most private wells from MTBE release sites are on the order of decades, therefore most wells in New Hampshire have yet to witness the effects of widespread MTBE releases.

3. Generally accepted hydrogeological methods have been used to estimate the numbers of wells likely to suffer MTBE impacts in the future and have not been impacted to date. Travel times to bedrock

drinking water wells are commonly on the order of decades. More than 70% of private bedrock wells are characterized by travel times greater than 16 years. Given that it has only been approximately 16 years since the widespread use of MTBE, most of the MTBE impacts to bedrock wells and private bedrock wells in New Hampshire will occur in the coming decades.

4. Future Impacts-Between 435 and 1,425 drinking water wells will be impacted by MTBE in the future from known and potential sources of MTBE contamination inventoried and tabulated by New Hampshire Department of Environmental Services ("DES"), and likely many times more wells will be impacted from releases from unregulated tanks not tabulated by DES and not included in the analysis.

5. I am confident that the results predicted by my model significantly underestimate the numbers of wells that will be impacted by MTBE in the future. In sum, I have deliberately and consistently, for scientific reasons, biased my opinions so as to underestimate MTBE impacts. I am confident, therefore, that real world future impacts will meet or exceed those that I have presented here and in my previous reports.

6. The complex and variable nature of the hydrogeology, the inherent uncertainty regarding the number, timing, and mass of MTBE releases, combined with the spare

monitoring typical of MTBE sites in New Hampshire, generally preclude the site-specific analysis of contaminant transport, which requires large sets of data from a densely monitored site. Historically, these limitations have been overcome in hydrogeology by applying a common and accepted methodology that combines data from diverse MTBE sites for characterization and modeling analyses, often including "Monte Carlo" analyses of plumes, to study historical and current impacts, and to project the future fate and transport of MTBE and other chemicals in groundwater.

7. Monte Carlo Approach- The advantage of pooling data from multiple sites is that general trends may be identified despite effects of site-specific features that can complicate data interpretation at individual sites. In other words, interpretation of the data takes the form of statistical trends across groups of sites to detailed, deterministic predictions of plume behavior in selected case examples.

8. Rather than aiming to predict the fate of MTBE from all sites in New Hampshire, an analysis unquestionably fraught with difficulty, I instead omitted the vast majority of potential MTBE sites in New Hampshire, those not inventoried by NHDES and lacking data, in an effort to construct a conservative analysis. Moreover, my calculations show that the approach that I implemented

> conservatively underestimates well impacts by a factor 2 to 3 when compared to computing well impacts based strictly on absolute plume growth as suggested by Drs. Zeeb and Rouhani.

See Dr. Fogg's Report. Thus, Dr. Fogg's report stands for the proposition that levels of MTBE in known and unknown private and public wells may be accurately determined by using a statistical approach to extrapolate known MTBE levels to the unknown wells.

Mr. Beckett provides specialized hydrogeologic and environmental consulting services to major petroleum companies, the United States Department of Defense, and others. Mr. Beckett's objectives in the present case were to (1) determine how much the State of New Hampshire has already spent to mitigate known MTBE impacts; and (2) determine the work scope and attendant costs associated with mitigating known MTBE contaminated sites in the future. The Plaintiff seeks to use Mr. Beckett's testimony to prove the following categories: (1) past costs expended by the State in remediating MTBE soil and groundwater contamination at known MTBE release sites; (2)' the costs of screening for the presence of MTBE at potential release sites where there is a high likelihood of MTBE; and (3) the future costs of characterizing and remediating MTBE contamination at known, high-priority, high risk MTBE release sites.

Mr. Beckett's conclusions are as follows:

> 1. With regard to future costs associated with cleaning up MTBE impacts to groundwater I have reached two opinions: (1) screening

investigations are needed to determine the presence or absence of MTBE at potential release sites; and (2) site characterization activities are needed at known high priority MTBE sites. High priority sites are those with both high risk as determined by the State DES, and MTBE levels greater than the Ambient Groundwater Quality Standards ("AGQS") of 13ug/l since 2008.

2. The State has decided to manage MTBE releases that have likely occurred, but are presently unknown, through groundwater treatment strategies. This eliminates the need to estimate the number of future MTBE sites requ1nng future mitigation actions where releases could have occurred but are as yet not identified or investigated. This leaves only the sites with known MTBE releases at high priority sites as the subject of the future cost evaluations in this category.

3. Gasoline releases have likely occurred that have not yet been investigated. For this reason, I recommend that one-time groundwater screening investigations be done as a cost-effective data collection technique at three types of facilities where MTBE releases are most likely to have occurred, but are presently uninvestigated: (1) junkyards; (2) ether sites where a spill is known to have occurred, but the cause and location of the spill are unknown; and (3) above and below ground tank sites that have not had documented releases.

> 4. It will cost the State $393,851,243 to properly characterize known "high priority" release sites contaminated with MTBE. This estimate is derived from existing DES data regarding individual release sites, which show that there are currently 335 sites with documented MTBE releases that are also classified by DES as high risk. Using basis statistics, 238 of the 335 sites require future site characterization work.

See Mr. Beckett's Report.

Dr. Hutchison is a civil engineer and Ph.D. hydrologist with decades of experience in pollution investigation, soil and groundwater cleanup, capital and operating cost estimating, and statistically-based cost estimating. The purpose of Dr. Hutchison's testimony is to corroborate Mr. Beckett's testimony. Dr. Hutchison reaches the conclusion that Mr. Beckett's estimates are reasonable.

Now that the Court has summarized the Plaintiff's experts' opinions, it is necessary to point out which of the experts' opinions the Defendants do not challenge in the present motion. The sites not challenged by the Defendants are: past costs for release site cleanup; future site costs (characterization), 238 identifiable sites; future site costs (site remediation), 238 identifiable sites; non-community transient well treatment, 16 identifiable wells; and community and non-transient well treatment, 189 identifiable wells. *See* Defs.' State-Wide Proof Motion PowerPoint. The sites challenged by the Defendants are: future site costs (screening), 4038 "unknown" sites; future site costs

(characterization), 430 unknown or identified sites; future site costs (site remediation), 430 unknown or identified sites; advertising campaign to reach private well owners; private well sampling; private well treatment at unknown and unidentifiable wells; and private transient well treatment. *See* Defs.' Rule 702 Motion PowerPoint. With the challenged categories now identified the Court proceeds with its analysis.

The Defendants' motion relies on the premise that to prove injury-in-fact, a plaintiff cannot use statistical or aggregate methods. They maintain that their argument rests in the sound basis of tort law, which "prohibits recovery where it cannot be shown with reasonable certainty that any damage resulted from the act complained of." *Witte v. Desmarais*, 136 N.H. 178, 188 (1992). In further support, the Defendants cite several class action cases.

For instance, the Defendants cite *In re Fibreboard Corp. v. Acands, Inc.*, 893 F.2d 706 (5th Cir. 1990) and *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998), which were both class certified asbestos-related cases, Substantively, both cases involved the same general issue: whether a court's determination of injury and damages on an aggregate basis among a large number of class plaintiffs satisfied the State of Texas's mandate that specific causation and damages be determined as to individuals, not groups. *Fibreboard*, 893 F.2d at 712; *see also Cimino*, 151 F.3d at 314. In each case, the lower court heard evidence in relation to a small percentage of class plaintiffs and then attempted to extrapolate the information to the rest of the class. See *Fibreboard*, 893 F .2d at 709; *see also Cimino*, 151 F.3d at 300. Ultimately, in each case,

the Fifth Circuit held that such methods violated Texas law. *Fibreboard*, 893 F.2d at 712; *Cimino*, 151 F.3d at 315. Additionally, the court in *Cimino* added, "[the class certification] rule cannot abridge, enlarge, or modify any substantive right .... Nor is deviation from these settled principles authorized because these are asbestos cases whose vast numbers swamp the courts." 151 F.3d at 312.

The Defendants also cite *In re Zyprexa Prod. Liab. Litig.*, 671 F.Supp.2d 397 (E.D.N.Y. 2009), which involved a claim by the State of Mississippi seeking compensation "for its payments for the drug Zyprexa." 671 F.Supp.2d at 400. Mississippi asserted several theories of fraud. *Id.* at 401. "Crucial to Mississippi's claims [wa]s statistical evidence relating to the population of patients who received Zyprexa in Mississippi." *Id.* at 433. The court, therefore, addressed the issue of whether or not Mississippi could rely on statistical methods to support its claims. *Id.* In doing so, it characterized Mississippi's claim as a "structural class action" because it was bringing "claims for reimbursements it provided, structured on and founded upon large numbers of individual patients' medical costs for Zyprexa prescriptions and treatment of subsequent conditions." *Id.*

Ultimately, the court determined that, "particularly in the products liability or fraud context, statistical proof is in most instances insufficient to show reliance, loss-causation, or injury on the part of individual members or claimants." *Id.* at 434. The court then cited several class-action cases supporting its view. *See id.* at 434-42. After doing so, the court stated, "These decisions ... suggest that the Court of

Appeals for the Second Circuit's skepticism about the utility of aggregate proof, and in particular statistical evidence, in obtaining justice for large numbers of mulcted individuals applies across-the-board to all types of cases...." *Id.* at 445. As a result, the court found that Mississippi could not rely on aggregate proof in order to establish its claims. *Id.* at 449.

In its objection to the Defendants' state-wide proof motion, the Plaintiff cites several cases of its own. The Court briefly summarizes some of them below. *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 160 (1st Cir. 2009), arose out of a nationwide, multidistrict class action involving the pricing of physician-administered drugs that were reimbursed by Medicare, private insurers, and patients' coinsurance payments. The issue to be decided by the First Circuit was whether the district court's award of aggregate damages without individualized determinations of damages violated the defendants' fundamental right to defend against each class member's claim of injury and damages. *Id.* at 195. The court found that the award did not violate the defendants' rights because the plaintiffs' expert's analysis on damages took into account sufficient individualized data to support a finding that the aggregate damages award was accurate. *Id.* at 197.

In re Mid-Atlantic Toyota Antitrust Litig., 525 F.Supp. 1265, 1269 (D. Md. 1981), represented five of the seven lawsuits consolidated in the Mid-Atlantic Antitrust Litigation. The cases were filed in the plaintiffs' *parens patriae* capacities. *Id.* The complaints alleged certain violations the Hart-Scott-Rodino Antitrust Improvements Act of 1976 title III,

12 U.S.C. § 15(c)-(h), which provided, "damages may be proved and assessed in the aggregate by statistical or sampling methods, without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought." *Id.* 1284, n.19.

The issue before the court was whether the damages provisions violated Due Process and the Right to a Fair Trial because of their reliance on statistical methods. 525 F.Supp. at 1284. The court ultimately decided that the defendants' rights were not violated because, as the Court reasoned, "It has long been established that once the fact of injury in an antitrust case has been proved, the amount of damages may be established by a just and reasonable estimate based on relevant data." *Id.* The Court did not decide whether a specific method was reasonable but instead provided that so long as the "plaintiffs' method is a reasonable estimate based on relevant data, defendants still retain the opportunity of rebutting the method of proving damages, the facts or assumptions upon which the methods rest, or the uniformity of application of price increase." *Id.* Therefore, the statute itself did not violate the constitution.

The Plaintiff also cites *Blue Cross and Blue Shield of N.J. v. Philip Morris, Inc.,* 113 F.Supp.2d 345 (E.D.N.Y. 2000) (abrogated on other grounds by *Empire Healthchoice, Inc. v. Philip Morris USA Inc.*, 393 F.3d 312, 315 (2d Cir. 2004)). In *Blue Cross*, various Blue Cross and Blue Shield Plans sought to recover against the major tobacco manufacturers for deceptive conduct regarding the deleterious effects of

tobacco use on their clients' health that resulted in increased costs for plaintiffs. *Id.* at 352. The plaintiffs sought to use statistical analysis to prove what proportion of their expenses for the period between 1954-2009 were or would be attributable to Tobacco's alleged improper conduct. *Id.* at 372.

The issue in *Blue Cross* was whether the use of statistical evidence violated either the Due Process clause or the Right to a Jury Trial. The court held that the use of statistical evidence did not violate the defendants' constitutional rights. *See id.* at 373-76 (relying on *In re Chevron USA. Inc.*, 109 F.3d 1016 (5th Cir. 1997)). In making that determination, the court recognized that "[t]he use of statistical evidence and methods in the American Justice system to establish liability and damages is appropriate, particularly in mass injury cases …." *Id.* at 372. Further, the court provided, "Reliance on statistical methods has been required by the profound evolution that our economic system has experienced in recent decades." *Id.* "American manufacturers now mass produce goods for consumption by millions using new chemical compounds and processes, creating the potential for mass injury. Modem adjudicatory tools must be adopted to allow the fair, efficient, effective and responsive resolution of the claims of these injured masses." *Id.* at 373. The court then cited to cases which supported, among other things, the use of "market share liability theory." *Id.*

In terms of Due Process, the court identified the interests to consider: (1) private interest that will be affected; (2) risk of erroneous deprivation; and (3) principal attention to the interest of the party

seeking the procedure with due regard for any ancillary interest. *Id.* First, the court concluded that "the private interests at issue counsel[ed] in favor of utilizing statistical methods." *Id.* It stated further that although Tobacco "admittedly ha[d] an interest in not paying for damages in excess of what its alleged misconduct may have caused," practical considerations tempered the weight of that interest. *Id.* at 373-74. If such a process were undertaken, it would have "to continue beyond all lives in being." *Id.* at 374. Further, individualized information should be used where it is practical. *Id.* If individual information is not practical to obtain, however, sampling should be used so that a judgment can be reached efficiently and expeditiously. *Id.*

With regard to the Seventh Amendment right to a jury trial issue, the Tobacco defendants, like the Defendants here, relied on both *Cimino* and *In re Fibreboard* for the proposition that statistical methods could not be used. *Id.* at 375. However, the court provided, "Neither decision cited by the defendants stands for the proposition that defendants cite them for, i.e. that the use of statistical proof *by* a *plaintiff* to establish *its own* multiple injuries violates the Seventh Amendment." *Id.* Those cases dealt strictly with class actions and Texas law. *Id.* The Court also noted,

> To accept the defendants' contention that the aggregation of subrogation claims violates the Seventh Amendment would require concluding that the Amendment establishes fixed limitations on the methods of proof a *particular party* may offer in support of *its*

> *own claims*. Neither *Cimino* nor *Fibreboard* stand for this untenable proposition. Such a ruling would run contrary to decades of federal law in areas such as employment, copyright, and patent law where the use of statistical evidence is common.

Id. at 376. The court then went on to cite certain examples. *See id.*

This decision was clarified in another opinion by that court in *Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris. Inc*., 133 F.Supp.2d 162 (E.D.N.Y. 2001) (*abrogated on other grounds by Empire Healthchoice. Inc. v. Philip Morris USA Inc*., 393 F.3d 312, 315 (2d Cir. 2004)). That court stated,

> Computation of damages through statistical methods is admissible and sufficient as a matter of federal and state practice. Absolute precision as to damages is not required. They may be proven by reference to a class as a whole, rather than by reference to each individual class member. Statistics may [also] be used to prove causation as to a proportion of the entire · class as well as the probability, through satisfaction of burdens of proof, that the proportions are in accord with those in the real world .... Using sampling to determine liability related issues in cases with large numbers of claims reduces expenses for the parties and the court system, saves information costs, and promotes the general goals of compensation and deterrence tort law. More efficient fact-finding through statistical analysis also makes for a more

> equitable and effective administration of substantive law because it improves accuracy, thus reducing warping of a state substantive law's effects.

Blue Cross, 133 F.Supp.2d at 169-71 (citations and quotations omitted). The *Blue Cross* decision was also affirmed on appeal to the Second Circuit. *See Blue Cross and Blue Shield of N.J., Inc. v. Philip Morris USA. Inc.*, 344 F.3d 211, 225-27 (2d Cir. 2003).

Finally, the Plaintiff points to the New Hampshire Supreme Court's recent decision on interlocutory appeal in this case. The plaintiff contends that the holding in *Hess*, that the · State "has a quasi-sovereign interest in protecting the health and well-being ... of its residents with respect to the statewide water supply," supports the notion that the Supreme Court specifically contemplated the Plaintiff's use of state-wide proof and statistical evidence to demonstrate injury. 161 N.H. at 433.

After reviewing the parties' cases and their arguments, the Court finds that, assuming the reliability of the State's expert witnesses, their testimony is relevant to demonstrate injury-in-fact and damages in this case. The Court accepts the Plaintiff's argument that using statistical methods is appropriate and, a result, the state-wide proof model is acceptable and relevant. In other words, the use of statistical methods, assuming their reliability, makes the existence of the Plaintiff's injury more probable than it would be without such evidence; likewise, it will assist the trier of fact to understand and determine both the existence and extent of the

Plaintiff's injury. Several reasons support the Court's conclusion.

First, the majority of the cases the Defendants cite are class-action cases, which disallow the use of aggregate damages across a class of plaintiffs. *See, e.g. Cimino*, 151 F.3d at 315. Those cases are distinguishable from the present case because the Plaintiff here does not seek to establish injury among several class plaintiffs through the use of an aggregate model, but instead seeks to prove *its own* injury through the use of statistics. The distinction is important. As the court in *Blue Cross* explained in the context of that case:

> To accept defendants' contention that the aggregation of Empire's subrogation claims violates the Seventh Amendment would require concluding that the Amendment establishes fixed limitations on the methods of proof a *particular party* may offer in support of *its own claims*. Neither *Cimino* nor *Fibreboard* stand for this untenable proposition. Such a ruling would run contrary to decades of federal law in areas such as employment, copyright and patent law where the use of statistical evidence is common.

113 F .Supp.2d at 376.[4] In fact, this Court need not go far to see such a method utilized in this State. Under

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[4] The Defendants assert that this portion of the *Blue Cross* opinion was abrogated, even though the Second Circuit never addressed the issue when it eventually dismissed the case. The Defendants' contention is without merit, especially in light of the fact that the narrow legal issue decided—whether statistical methods may be used by an *individual* plaintiff to establish *his*

RSA 556:12, an administrator of a deceased person's estate may seek damages in a wrongful death action for "the probable duration of life but for the injury and the capacity to earn money during the deceased party's probable working life." Such damages are calculated based upon actuarial tables, *see Bouthiette v. Wiggin*, 122 N.H. 774, 775 (1982), which are statistical tools for proving harm. *See Matsuyama v. Birnbaum*, 890 N.E.2d 819, 841 (Mass. 2008); *see also Piper v. Boston & M.R.R.*, 75 N.H. 228, 233-34 (1909). Therefore, the Court finds the class action cases unpersuasive.[5]

Second, New Hampshire's "declaration of policy" confirms that an injury to both public and private waters within the State is an indivisible injury, allowing for the State to prove its claim upon state-wide proof. Under RSA 481:1, the legislature has provided that "[t]he state as trustee of [the waters] for the public benefit declares that it has the authority and responsibility to provide careful stewardship over all the waters lying within its boundaries." This

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own injury—has not since been analyzed by the Second Circuit. Moreover, even assuming it was over-ruled, countless courts still recognize an individual Plaintiff's ability to demonstrate injury through the use of statistical methods. *See* Pl.'s Response to Defs.' Documents, at 13-14.

[5] The Court anticipates that the Defendants will attempt to argue that the recently decided *Wal-Mart Stores. Inc. v. Dukes*, __ U.S. __, Slip Op., (June 20, 2011), supports their argument. However, the Court has fully reviewed the opinion and finds that it suffers from the same deficiencies as *Cimino* and *In re Fibreboard*: namely, that the Supreme Court did not address whether an individual may use a statistical approach to establish his own injury. Thus, *Wal-Mart* is not persuasive.

statute provides the Plaintiff with more than just a vehicle to demonstrate standing: the statute allows the Plaintiff to prove injury to a single resource. In this way, the case is unlike *Zyprexa*, wherein a federal district court found that the State of Mississippi was pursuing a "structural class action" based on "many thousands of conceptually separate claims associated with individual patients, coordinated and aggregated by the State for purposes of recovering a portion of its overall … Medicaid costs." 671 F.Supp.2d at 402. Here, the Plaintiffs claims are not based upon many thousands of separate individual actions, but instead are attempts to protect one indivisible resource.

Finally, general policy considerations support allowing the Plaintiff to establish injury and damages using statistical methods. "American manufacturers now mass produce goods for consumption by millions using new chemical compounds and processes, creating the potential for mass injury." *Blue Cross*, 113 F.Supp.2d at 374. As a result, "[m]odern adjudicatory tools must be adopted to allow the fair, efficient, effective and responsive resolution of claims of these injured masses." *Id.* In a perfect setting, the Plaintiff would have the resources to test each individual well over a long period of time and precisely determine its damages. However, if such a process were undertaken here, "it would have to continue beyond all lives in being." *Id.* The Court simply cannot support such a process.

Moreover, requiring the Plaintiff to test each individual well undoubtedly and unfairly "tilts the scales" in the Defendants' favor. Academics frame the issue in the following manner:

> With or without statute, we propose as a model for determining liability in complex cases that the method of proof be determined by the cost of collecting information. Individualized information should be used where it is practical-i.e., cost effective-to obtain. If individual information is not practical to obtain, however, sampling should be used so that a judgment can be reached efficiently and expeditiously. The fundamental justification for this model is found in its capacity to avoid outcomes determined by the cost of gathering information. In a situation where critical information about liability is costly to obtain, one side can prevail simply because the relevant information costs too much for the other side to gather and not because of the merits as established by law.

Laurens Walker and John Monahan, *Sampling Liability*, 85 Va. L. Rev. 329, 343 (1999). Here, as in *Blue Cross*, "[t]he necessary additional litigation costs [the Plaintiff] would have to bear would consume much of any recovery ..., making continued pursuit of the litigation fruitless." 113 F.Supp.2d at 374. Because of these public policy interests, the Court finds that allowing the Plaintiff to use statistical methods of proof is relevant to prove injury and damages in this case.

The fact is that "[f]or decades, judges, lawyers, jurors, and litigants have shown themselves competent to sift through [statistical] evidence in a variety of contexts, from mass toxic · torts to single-car

collisions." *Matsuyama*, 890 N.E.2d at 841. Not only have they shown themselves competent, but also such evidence has become a generally accepted method for a plaintiff to prove his case. This Court is simply not persuaded by the Defendants' attempt to frame this case as a class action. As a result, the Court rejects the notion that New Hampshire law forbids the use of a statistical approach to prove injury-in-fact.

Parens Patriae

The Defendants argue that the Plaintiff is attempting to rely strictly upon its standing in *parens patriae* to justify its use of the state-wide approach. The Defendants maintain that such an argument fails because *parens patriae* is a standing doctrine only and does not relieve the Plaintiff of its burden to demonstrate injury on a site-specific basis. Although the Court has already determined that the Plaintiff's state-wide approach using statistical methods is relevant to demonstrate injury, the Court agrees with the Defendants that the Plaintiff's ability to do so does not stem from its *parens patriae* standing.

This Court stresses that its decision that the Plaintiffs state-wide proof model is relevant does not rest on the Plaintiffs *parens patriae* standing. Further, the Court disagrees with the Plaintiff that the Supreme Court's opinion in *Hess* specifically allows for a state-wide approach. In *Hess*, the primary issue was whether "all costs of investigating, monitoring, treating, remediating, replacing[,] or otherwise restoring state water contaminated by MTBE, regardless of whether the MTBE is detected in a privately or publicly owned well, constitute damages the State is entitled to recover on its own behalf."

161 N.H. at 430. It held "that the State is not precluded from recovering damages related to MTBE contamination in a privately owned well." *Id.* at 431. Neither the Court's holding nor its subsequent analysis addressed whether the Plaintiff could proceed on a state-wide approach.

Indeed, the Court in *Hess* did provide that the State was required to demonstrate that it sustained "a statewide injury affecting the health and well-being of a substantial portion of its citizens." 161 N.H. at 435. However, such a standard only explains *what* the State must prove in Court to show *standing*. It does not address *how* the State must prove its *injury*. As a result, the Court is not persuaded that the Supreme Court's decision in *Hess* contemplated the Plaintiffs use of the state-wide approach and, thus, rejects that portion of the Plaintiff's argument.

MDL Court Site-Specific Approach

To support their argument, the Defendants also point to the MTBE MDL currently taking place in the New York Federal District Court. Specifically, the Defendants cite two opinions that they believe are relevant here. The Court summarizes them briefly.

The Defendants first cite *In re MTBE*, 175 F.Supp.2d 593 (2001). This consolidated MDL comprised several putative class actions brought on behalf of private well-owners seeking relief from the contamination or threatened contamination of their wells. *Id.* at 598. The common charge was that defendants knowingly caused the widespread contamination of groundwater as a result of their use of MTBE. *Id.* The request from the class consisted of a "court-supervised program of MTBE testing,

monitoring, education, and, where appropriate, the provision of clean water and/or remediation." *Id.* Some of the plaintiffs were non-detect or non-test. *Id.* at 604-05. In other words, some plaintiffs sought to represent a class of well owners in New York whose properties, while allegedly at risk for contamination, had either not detected any MTBE or had not yet been tested for MTBE.

The question for the *MTBE* court was whether the non-test or non-detect plaintiffs had article Ill standing to bring the action. *Id.* at 606. That is, whether the plaintiffs had established that they had suffered an "injury in fact" or "imminent harm." *Id.* at 607. Ultimately, the court found that the non-test and non-detect plaintiffs lacked the standing required to bring their claim. *Id.* 610-11. The court reasoned that "[t]he fact that these plaintiffs seek to represent a class does not affect the standing inquiry because class representatives must show that they themselves personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Id.* 607, n. 21.

In terms of "imminent harm" for the non-detect plaintiffs, the court found, "Notwithstanding the somewhat alarming nature of the general contamination allegations, they are insufficient to demonstrate a clearly impending harm." *Id.* at 608. Tests taken from wells showed *no* MTBE contamination, and there were no allegations of any known releases of gasoline containing MTBE *near* their residences. *Id.* Further, the plaintiffs' "allegations d[id] not contain any statistics pertaining

to MTBE detection rates for private wells in Madison County or Illinois in general." *Id.*

In terms of "imminent harm" for the non-test plaintiffs, the allegation was that MTBE accounted for nearly 95% of the oxygenates used in New York, and MTBE consumption statewide was between 17,500 to 21,500 barrels per day. *Id.* at 609. The non-test plaintiffs also cited to statistics from the USGS that found MTBE in 125 of 1100 private wells tested in New York. *Id.* However, the court found these allegations insufficient and stated, "The line of environmental contamination cases relied upon by the plaintiffs do not support a contrary result." *Id.* at 610. "The plaintiffs in those cases were either proximately located to, or had a direct connection to, an alleged area of contamination on or near an identified release site." *Id.* As a result, there was no standing.

In re MTBE, 209 F.R.D. 323 (S.D.N.Y. 2002) was factually similar to the MTBE case above. The plaintiffs were "residential well owners who brought several actions against 20 oil companies, of whom one or more had allegedly caused contamination of their well water." *Id.* at 328. The issue before the court was whether the parties should be certified as a class under Rule 23. *Id.* at 329. The court found that they could not be certified because the "typicality" prong had not been satisfied. *Id.* at 338.

A named plaintiff's claims are "typical" pursuant to Rule 23(a)(3) where "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendants' liability." *Id.* The court determined that the claims were not typical because the contamination

of each named plaintiffs "well c[ame] about through a factually unique set of circumstances, e.g. a leaking UST owned by Big Saver, a burst pipeline, etc." *Id.* Further, "applying a market share theory of liability to plaintiffs' case illustrate[d] that the named plaintiffs' claims [were] not typical." *Id.* "Under market share liability, when a plaintiff is unable to identify the specific manufacturer of a fungible product that causes her injury, the plaintiff may recover damages from a manufacturer or manufacturer's share of the total market of the product." *Id.* at 337-38 (quotation omitted). "Most of the class representatives c[ould] identify a responsible gasoline manufacturer with ease and, therefore[,] face[d] an uphill battle in utilizing the market share liability theory." *Id.* at 338.

The Defendants argue that these cases demonstrate the MDL court's rejection of attempts by plaintiffs to bring claims without proof of concrete, particularized injury. Furthermore, they argue that the Plaintiff attempts to do precisely the same thing in this case. However, the Court finds the MTBE cases unhelpful. With regard to the MTBE action involving a determination as to "injury-in-fact," the facts of this case are very different. In that case, the court dismissed full categories of class plaintiffs who had actually tested and detected no MTBE in their wells. In the present case, the Plaintiff has tested many wells where it has discovered the existence of MTBE. It merely seeks to extrapolate that information in order to establish further injury. The Court agrees that if the Plaintiff had not tested any wells or had tested wells and found no MTBE, the Plaintiff's pursuit of a statistical approach would be fruitless.

Additionally, the MTBE court also provided that it was dismissing the plaintiffs' claims because their "allegations d[id] not contain any statistics pertaining to MTBE detection rates for private wells in Madison County or Illinois in general" and because the plaintiffs did not establish that they were located in close proximity to possible release sites. *In re MTBE*, 175 F.Supp.2d at 608. Implicitly, it appears that the Court would have denied the defendants' motion to dismiss if there had been requisite statistics and accusations. In the present case, the Plaintiff has provided the Court with adequate statistical evidence through their experts, at least when assuming reliability for the purposes of this motion. Further, the Plaintiffs seek recovery on the basis of "high-risk" areas only. As a result, the MTBE "injury-in-fact" case is factually distinct.

Likewise, the MTBE case involving Rule 23 class certification suffers from the very same flaws as the Defendants' other class action cases: it does not address the method that an *individual* plaintiff may use to establish his or her *individual* injury in a particular case. In that MTBE action, the court found that the factual allegations of each of the parties were not "typical." It did not hold, however, that they could not use statistical evidence to establish their own injuries in individual trials. As a result, that case is factually distinct and unhelpful.

Proving Defenses

The Defendants argue that if the Court allows the Plaintiff to proceed on a state-wide approach, they will be unable to present site-specific defenses in violation of Due Process and the Seventh Amendment. The

Plaintiff objects and maintains, "the party against whom statistical evidence is admitted can challenge the evidence using data in the 'non-sample' universe and/or 'evidence of a different random sample from the universe' that yields a different result." Pl.'s Mem. In Support of its Obj. to the Defs.' Mot. at 32 (citing *Chaves County Home Health Services, Inc. v. Sullivan*, 931 F.2d 914,921 (C.A.D.C. 1991)). Further, the Plaintiff provides that "were the Court to permit the State to proceed with its state[-]wide evidence at trial, nothing other than the Court's normal discretionary power to manage the trial and limit the presentation of duplicative or cumulative evidence would prevent defendants from presenting 'site-specific' evidence in their case." *Id.* The Court agrees with the Plaintiff.

In *Mid-Atlantic Toyota*, the Maryland U.S. District Court addressed a very similar argument after it upheld the *parens patriae* plaintiffs' right to prove damages through aggregation. 525 F .Supp. at 1285. The court held that so long as "plaintiffs' method is a reasonable estimate based on relevant data, defendants still retain the opportunity of rebutting the method of proving damages, the facts or assumptions upon which the method rests, or the uniformity of application of the price increase." 525 F.Supp. at 1285. The same holds true in the present case when refuting injury. With the exception of the Court's power to manage the trial, nothing will prevent the defendants from introducing select, site-specific evidence or from attacking the opinions of the Plaintiff's experts.

As a corollary matter, the Court does not believe allowing the Defendants to admit site-specific evidence will overly burden a single trial. The New

Hampshire legislature has contemplated mechanisms for presenting such complex issues to juries. Under RSA 507:7-e, the Court is allowed, "due to the presence of multiple parties or complex issues," to submit to the jury "special questions necessary to the determination" of the case. In fact, at the May 24, 2011 status conference, counsel for the Plaintiff provided the Court with a sample special jury verdict form, which had been used to manage a complex California trial. As a result, the Court is confident that allowing the Defendants to submit site-specific defenses will not create an unmanageable trial.

Based on the foregoing, the Court finds that the Defendants' state-wide proof motion must be denied on the merits because the Plaintiff's evidence has a tendency to make the existence of its injury more likely than it would be without such evidence. Now that the Court has addressed the Defendants' arguments on the merits of their motion to exclude, the Court now briefly addresses important issues affected by the Court's determination.

DeBenedetto

The Defendants have argued that allowing the Plaintiff to prove injury through statistical evidence would negate the Defendants' *DeBenedetto* rights. *See generally DeBenedetto v. CLD Consulting Eng'rs. Inc.*, 153 N.H. 793 (2006). In other words, the Defendants maintain that the disclosures required by. RSA 507:7-e will no longer be necessary, possibly opening them up to further liability. The Plaintiff contends that *DeBenedetto* disclosures may not even apply to the present case. In support, it cites to RSA 507:7-e, IV, which provides, "Nothing contained in this section

shall be construed to modify or limit the duties, responsibilities, or liabilities of any party for personal injury or property damage arising from pollutant contamination, containment, cleanup, removal or restoration as established under state public health or environmental statutes ...."

The Court finds that it does not need to rule on the *DeBenedetto* issue at this time. The issue has not been briefed in any manner that would permit this Court to make a reasoned determination of its application to the present case. However, the next section of this Order, wherein the Court discusses alternative liability theories for proving causation, may shed some light on the applicability of *DeBenedetto* in the present case.

Market Share Liability Theory

Much disagreement exists regarding the method the Plaintiff may use to prove causation in this case. It stems, primarily, from an Order of this Court (Mangones, J.), where the Court provided,

> [R]equiring the [Plaintiff] to allege specifically which defendant caused each injury would create an impossible burden given the allegations of commingling of MTBE and the asserted indivisible injury to the State of New Hampshire's water supplies. To mandate the State to establish more particularized causation would essentially allow the defendants to seek to avoid liability because of lack of individualized proofs where the gravamen of the claim is, as noted by the United States District Court, that all defendants placed gasoline containing MTBE

> into the stream of commerce, thereby causing Plaintiff's injury. To allow such a state of events would be to allow claims for tortious conduct for discrete, identifiable, and perhaps lesser tortious acts, but to deny claims for tortious conduct where the conduct alleged may be part of group activity which is alleged to have led to a common, and more deleterious, result. Therefore, the Court finds that in the present action, if established at trial, the defendants' alleged group participation in the asserted tortious act would not shield the defendants from potential liability.

State v. Hess Corp., Merrimack County, 03-C-0550, *6 (Oct. 1, 2008) (Order, *Mangones*, J.). In other words, this Court has already presupposed the Plaintiff's use of an alternative liability theory. The Defendants have argued, however, that the state-wide theory of liability "would cut off [D]efendants' basic right to present [exculpatory evidence]." Defs.' Mem. in Support of its State-Wide Proof Motion, at 27. The Court now briefly addresses the Defendants' concerns.

Courts begin "with the proposition that ... imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control." *Sindell v. Abbott Lab.*, 607 P.2d 924, 928 (Cal. 1980). However, situations exist where a plaintiff may not necessarily be able to identify, specifically, which members of a group, who are engaged in the same activity, caused his or her damages. *See*, *e.g.*, *Summers v. Tice*, 199 P.2d 1, 5

(1948). Where those situations arise, Courts allow plaintiffs to prove causation through alternative theories of liability. Some alternative liability theories are: (1) concert of action theory; (2) enterprise liability; (3) market-share liability; and, seemingly specific to the MTBE cases, (4) commingled product theory.

The first' two theories cited are inapplicable to the present case. The "concert of action theory" does not apply because no evidence exists that the Defendants "knowingly" acted in concert with one another, as required by *Goudrealt v. Kleeman*, 158 N.H. 236, 255 (2009). The "enterprise liability theory" is likewise inapplicable because it unfairly imposes joint and several liability upon the defendants, which may very well violate New Hampshire's strict joint and several liability jurisprudence. *See* RSA 507:7-e; *see also Gourdrealt*, 158 N.H. at 252-54 (citing to the legislative history of RSA 507:7-e).

Nor is the "commingled product theory" useful in this case. The commingled product theory provides,

> When a plaintiff can prove that certain gaseous or liquid products … of many refiners and manufactures were present in a completely commingled or blended state at the time and place that the harm or risk of harm occurred, and the commingled product caused plaintiff's injury, each refiner or manufacturer is deemed to have caused the harm.

In re MTBE, 644 F.Supp.2d 310, 314 (S.D.N.Y. 2009). The commingled product theory is inapplicable here because it would require the Plaintiff to prove that a specific Defendant's gasoline is present at a particular

site. In effect, it only relieves the Plaintiff of its burden to prove the percentage of a particular Defendant's gasoline found at a particular site. Because this Court has already found that a specific site-by-site approach is unfeasible and unnecessary in this case, the commingled product liability theory does not apply.

"Market share liability" is a more reasoned approach to this case. Market share liability "provides an exception to the general rule that a plaintiff must prove that the defendant's conduct was a cause-in-fact of the injury." *Id.* at 313 (quotation omitted). The purpose behind market share liability is that,

> In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs .... [I]n an era of mass production and complex marketing methods the traditional standard of negligence [is] insufficient to govern the obligations of manufacturer to consumer, [courts] should acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances. The Restatement comments that modification of the *Summers* [alternative liability] rule may be necessary in [those] situation[s].

Sindell, 607 P.2d at 610. Further, in deciding whether or not to utilize market share liability, courts look to six factors:

> (1) The generic nature of the product; (2) the long latency period of the harm; (3) the inability of plaintiffs to discover which defendant's product caused plaintiff's harm ...; (4) the clarity of the causal connection between the defective product and the harm suffered by plaintiffs; (5) the absence of other medical or environmental factors that could have caused or materially contributed to the harm; and (6) the availability of sufficient "market share" data to support a reasonable apportionment of liability.

Restatement (Third) of Torts: Products Liability §15 cmt. c (2010). The Court finds that, at least at this time, these factors weigh heavily in favor of utilizing market share liability.

The Defendants' concerns regarding the use of alternative theories of liability to prove causation are unfounded. First, an important distinction between market share liability and other alternative liability theories is that it exposes named defendants only to several liability, not joint and several liability. *See In re MTBE*, 739 F.Supp.2d 576, 598 (S.D.N.Y. 2010). Thus, the Defendants will only be held liable for their specific shares of the market and not, individually, for the entirety of the harm. Second, although the Court is not prepared to require the Plaintiff to demonstrate which Defendants were present at each individual site, the Court will require the Plaintiff to introduce

market share data as targeted as possible (e.g. market share data specific to RFG and non-RFG counties). In this way, the correlation between market share liability theory and actual cause-in-fact increases dramatically.

Finally, the Court also notes that utilizing market share liability, which is a several liability theory, may minimize *DeBenedetto* concerns. *DeBenedetto* and the RSA 507:7 -e statutory scheme in general are concerned with a plaintiff holding a deep-pocket defendant liable for the entirety of the harm where that defendant is only responsible for a small percentage of the harm. Such a concern does not exist here. Further, although the Defendants may be able to present site specific evidence to demonstrate other possible intervening causes (e.g. car accidents), that inquiry may be conducted in an efficient manner. For instance, as the Plaintiff suggested, the Defendants may be able to introduce a limited number of other possible causes and the Court may submit a special verdict form to the jury. As such, utilizing a market share liability theory to prove causation and a state-wide approach to proving injury-in-fact and damages will not deprive the Defendants of any meaningful defense.

Conclusion

Based on the foregoing, the Court finds that the opinions provided by the Plaintiff's experts are relevant to prove injury-in-fact and damages in the present case. Implicit in that finding is the Court's acceptance of proof of injury through the use of statistical evidence and extrapolation, i.e. the "state-wide approach."

The Court also finds that *DeBenedetto* disclosures do not present an insurmountable obstacle in light of utilizing the state-wide approach. Importantly, market share liability significantly reduces the need for *DeBenedetto* type disclosures. Finally, at this juncture, the Court believes that market share liability is an appropriate method to prove causation in this case.

As a collateral matter, the Court notes that it has yet to decide whether the Plaintiff's experts' opinions are reliable under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (2003). The Defendants' motion concerning *Daubert* will be decided by this Court as promptly as possible. In sum, this Court will not rigidly apply theories of tort law where doing so would either be impractical or unfairly "tilt the scales" in favor of one party or another. Both public policy and practicality have always had a place in shaping the application of the law in this State. As a result, the Defendants' state-wide proof motion is DENIED.

So ordered.

6-24-11	s/
Date	Peter H. Fauver Presiding Justice

Appendix E

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

No. 03-C-0550
Merrimack, SS.

STATE OF NEW HAMPSHIRE,
Plaintiff,
v.
HESS CORPORATION, *et al.*,
Defendants.

ORDER [1772]

At the close of the State's case-in-chief, Defendants (Exxon and ExxonMobil are the only remaining Defendants, collectively "Exxon") moved for a directed verdict on all of the State's claims and on Exxon's affirmative counterclaims. The State objects. For the reasons largely stated in the State's objection, Exxon's motion is DENIED.

"A trial court may grant a motion for a directed verdict only if it determines, after considering the evidence and construing all inferences therefrom most favorably to the non-moving party, that no rational juror could conclude that the non-moving party is entitled to any relief." *Becksted v. Nadeau*, 155 N.H. 615, 618 (2007). If the evidence adduced at trial is conflicting or permits several reasonable inferences, a motion for a directed verdict should be denied. *Id.*

The State brought three claims against Exxon for its manufacture and supply of MTBE gasoline into the State of New Hampshire between 1988 and 2005. These claims are: negligence, strict liability for a design defect, and strict liability for failure to warn. Exxon moved for a directed verdict on several bases. For the reasons stated in turn below, Exxon's motion is DENIED.

Parens Patriae Standing

Exxon first asserts the State has failed to establish *parens patriae* standing because it has not shown injury to a substantial segment of the population. The State responds that there is no numerical cutoff for what constitutes a substantial segment. Standing is a question of law, *ACG Credit Co. v. Gill*, 152 N.H. 260, 261 (2005), and the State has presented sufficient evidence at trial for the Court to reaffirm its prior rulings that the State is entitled to *parens patriae* standing.

Parens patriae standing, as articulated by the New Hampshire Supreme Court, requires that the State (1) assert a quasi-sovereign interest and (2) assert injury to a substantial segment of the population. *State v. City of Dover*, 153 N.H. 181, 185 (2006). The Supreme Court has already held that the State fulfilled the first requirement by asserting injury to New Hampshire's water resources. *Id*. As to the second requirement, testimony from various State witnesses at trial demonstrated MTBE detects in every county in the state, including some 40,185 currently contaminated wells. The State has presented evidence: (1) that there are 1,584 known MTBE contamination sites; (2) that there are

approximately 230,000 potentially effected private drinking water wells; and (3) that combined, there are some 155,156 people receiving water from wells contaminated with MTBE in New Hampshire. State's Obj. 4-5. This testimony is sufficient for the State to maintain *parens patriae* standing. Exxon is not entitled to a directed verdict on this basis.

Design Defect

Defendants next assert the State has failed to present sufficient evidence to fulfill its design defect claim. In this claim the State asserts "that the risks of using MTBE in gasoline outweigh any benefits alleged by Exxon." State Obj. 6. A defective design claim requires plaintiff to prove:

> (1) the design of the product created a defective condition unreasonably dangerous to the user; (2) the condition existed when the product was sold by a seller in the business of selling such products; (3) the use of the product was reasonably foreseeable by the manufacturer; and (4) the condition caused injury to the user or the user's property.

Vautour v. Body Masters Sports Indus., 147 N.H. 150, 153-54 (2001). A jury determines the dangerousness of a product using a risk-utility analysis. *Price v. BIC Corp.*, 142 N.H.386, 389 (1997). Exxon asserts the State has failed to show that MTBE gasoline is distinct from traditional gasoline and thereby failed to prove it is defective. Defs.' Mot. 3. Exxon also argues the State has not shown MTBE gasoline is unreasonably dangerous to the end users and that the State has not shown that even if MTBE gasoline were

defective, that such defect caused the State's harm. *Id.* 4.

Taking these contentions in turn, the State has presented sufficient evidence from which a jury could conclude that MTBE gasoline poses a unique risk compared to that of traditional gasoline. State witnesses included Dr. Graham Fogg, Duane Bordvick, Bruce Burke, Marcel Moreau, Kenneth Colburn, and a key exhibit was Barbara Mickelson's memorandum to Exxon describing her recommendation not to use MTBE in New England. State Obj. 7-9.

The State, as the consumer and in its *parens patriae* capacity, was an end user of MTBE gasoline. This Court has previously ruled the State has standing to assert claims brought on behalf of the people of New Hampshire. Additionally, the State is a consumer itself, and the State has born the cost of some remediation efforts. In this way, the State has presented sufficient evidence to show that MTBE gasoline impacted end users.

Finally, the State has presented sufficient evidence to demonstrate causation, as will be more fully addressed below. *See infra* 6-7. The State is proceeding on traditional causation and a market share liability theory. The State has presented evidence sufficient for a reasonable jury to determine that either based on traditional causation, due to the commingled nature of gasoline, or because of Exxon's share of the gasoline market in New Hampshire, Exxon should bear some portion of the State's alleged harm. State Obj. 14, 19-22.

Failure to Warn

Defendants next move for a directed verdict on the State's failure to warn claim. Defs.' Mot 4-5. This Court has extensively discussed the standard of proof required for the State to prove its failure to warn claim:

> The key inquiry for the State's failure to warn claim with respect to the issue the parties currently dispute is whether the end user's or consumer's behavior toward MTBE gasoline would have changed enough to prevent the injury complained of had that person or entity received a sufficient warning. *Bartlett*, 731 F. Supp. 2d at 145; *see Meade v. Parsley*, No. 2:09-cv-00388, 2010 WL 4909435 at *10 (S.D. W.Va. Nov. 24, 2010) (explaining that the plaintiffs must establish that an adequate warning would have changed behavior "in a manner which would have avoided [the plaintiff's injury]").

See Order dated Mar. 13, 2013 at 2-3 (*Fauver*, J.). Defendants allege (1) the State did not present evidence that Exxon failed to warn the end users of MTBE gasoline and only presented evidence that the State itself as a regulatory entity did not receive a warning and (2) the State failed to show that a warning would have prevented the State's alleged injuries.

As discussed in the March 13 Order referenced above, the State is the party who—if a jury determined a warning was required—would have been owed the warning. *Id.* 3. Additionally, the State presented testimony from Department of Environmental

Services officials who stated that if they had received warnings regarding the nature of MTBE gasoline, they would not have chosen to participate in the RFG program or would have opted out of such program. State Obj. 10. This testimony is sufficient for a reasonable juror to conclude that a warning would have altered the State's behavior and prevented the State's alleged injury.[1]

Negligence

Next, Exxon moves for a directed verdict on the State's negligence claim. To prove this claim, the State must show Exxon owed the State a duty, it breached that duty, and the breach proximately caused the State's injury. *Estate of Joshua T. v. State*, 150 N.H. 405,407-08 (2003).[2] Exxon primarily assert the State failed to show Exxon owed it a duty because the State did not present evidence regarding the care exercised by other manufacturers and refiners in the industry in order to show that Exxon's actions were unreasonable. Defs.' Mot. 6.

In fact, the State presented testimony from Duane Bordvick regarding the risk-benefit analysis his company, Tosco—another manufacturer during the relevant time period of this case—conducted. State

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[1] There is a currently pending "Defendants' Motion to Strike Certain Testimony and Exhibits and for a Curative Instruction or, in the Alternative, for a Mistrial" [1791]. This ruling on Defendants' Motion for a Directed Verdict does not resolve the issues presented in the Motion to Strike.

[2] "It is axiomatic that in order to prove actionable negligence, a plaintiff must establish that the defendant owed a duty to the plaintiff, breached that duty, and that the breach proximately caused the claimed injury." *Id*.

Obj. 12. Bordvick testified that Tosco decided not to use MTBE because of the unique and increased risks Tosco perceived MTBE to have. *Id*. This testimony not only directly contradicts Exxon's argument that the State failed to show the care exercised by other members of the refining industry, it also serves as some evidence from which a jury could conclude that Exxon's behavior in selecting MTBE as its RFG formula oxygenate and doing so without providing a warning was unreasonable.

Exxon also argues it is only liable to the foreseeable extent of the State's injuries, and the State has failed to demonstrate Exxon could have foreseen "all manners in which" the State's alleged harm occurred. Defs.' Mot. 7. This argument is not supported by the record. The State admitted Barbara Mickelson's memorandum to Exxon that demonstrates Exxon received warnings against the use of MTBE—that MTBE would take longer and cost more to remediate than traditional gasoline spills. State Obj. 13. Other witnesses corroborated Exxon's possession of information regarding the expense associated with MTBE remediation as early as the 1980s. *Id*. In this way, a reasonable jury could conclude that Exxon should have foreseen the harm the State now alleges—increases remediation costs of a different nature than those associated with traditional gasoline.

Finally, Exxon argues the State has failed to prove causation. As discussed above and in more detail below, *see infra* 6-7, the State has presented sufficient evidence from which a jury could find Exxon liable pursuant to traditional or market share liability.

Causation

Exxon moves on an independent basis for a directed verdict for the State's general failure to prove causation. Exxon first asserts the State failed to present evidence sufficient to prove its claims through traditional causation and alternatively using market share liability. Exxon claims "specific, non-market share proof was utterly lacking from the State's presentation". Defs.' Mot. 7. The State responds that it has presented testimony that MTBE gasoline is a fungible product and that the fungibility of MTBE gasoline allowed it to be commingled at every step in the gasoline distribution system. The State presented this testimony through Bruce Burke, and other witnesses corroborated it. From this testimony—like *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 739 F. Supp. 2d 576, 609 (S.D.NY 2010)—a reasonable jury could conclude that Exxon was the proximate cause of the State's alleged injury under a traditional causation theory.

Alternatively, Exxon asserts the State failed to present market share data that was targeted enough to satisfy this Court's previous rulings.[3] This Court has previously issued several rulings on market share liability, the most recent of which states:

> MSL, on the other hand, requires a plaintiff to prove the elements of a cause of action, that it has joined a substantial share of the relevant market, and that it is unable to identify the specific tortfeasor responsible for

[3] The Court recognizes this is not a factual dispute. Exxon's market share arguments raise primarily questions of law.

> the plaintiff's injury. *In re MTBE*, 379 F. Supp. 2d. 348, 375 (S.D.N.Y. 2005). Once the plaintiff makes this initial showing, each defendant is held severally liable for the portion of the judgment that represented its market share at the time of the injury. *Id.* Defendants bear the burden of apportioning liability among one another and any other liable third or nonparty. *See Trull v. Volkswagen of Am., Inc.*, 145 N.H. 259, 265-67 (2000) (once plaintiff proves causation, burden shifts to defendants to apportion liability).

Order dated Oct 29, 2012 at 4 (*Fauver*, J.). Exxon also argues "the State has presented two different market share periods but only one damages number that apparently spans both of those periods". Defs.' Mot 10. Exxon claims this mathematical inconsistency demonstrates that the State failed to show that "market share is appropriate in this case." *Id.* Exxon also argues the State failed to name a substantial segment of the market and that it failed to establish a connection between Exxon's alleged market share and the State's injury.

Taking these contentions in turn, Dr. Justine Hastings testified for the State as its market share expert. She explained that her calculations were based on 100 percent of the gasoline market for New Hampshire for the relevant time period. State Obj. 20. In this way, the State has presented evidence that a substantial segment of the market has been included in the market share calculation. Additionally, refiners and manufacturers representing approximately 51 percent of the manufacturing industry were originally named as Defendants in this case. Thus, the Court

rejects Exxon's first contention—that a substantial share of the market is not represented in this case—as required by this Court's prior rulings.

Turning next to Exxon's claim that Dr. Hastings' calculations are somehow unrelated to the State's purported damages figure, this argument also fails. The Court has previously addressed this argument Dr. Hastings relied on two different data sets to calculate Exxon's supplier market share for the relevant time period because earlier supplier data was less reliable than later data. She was required to compile the data into percentages separately (one figure for data between 1988 and 1995 and one figure for data between 1996 and 2005) because the data were not the same and could not be aggregated.

Finally, to the extent Exxon argues the market share values the State has presented do not relate to the State's alleged injury, this argument merely realleges the causation argument Exxon has repeatedly asserted regarding market share liability. Exxon asserts the mere presence of its gasoline in a given market during a given time does not mean the injury the State alleges was caused by Exxon gasoline. This argument attacks the viability of market share liability generally, and does not address the State's evidentiary presentation in this case. The Court has repeatedly ruled on this issue—that the State is entitled to rely on market share liability and that it met its threshold showing.

In its case-in-chief through various witnesses, the State has shown evidence sufficient for a jury to find that, given the commingled nature of gasoline, it is more likely than not that every spill in the State

contained some Exxon gasoline. State Obj. 20. And, even if a reasonable juror does not agree with the State's commingling argument, if the jury believes that MTBE gasoline caused the State's harm, Exxon can be assigned liability according to its share of the gasoline market. In this way, the State has presented evidence from which a reasonable juror could conclude that Exxon's gasoline caused the State's alleged injury. Exxon is not entitled to a directed verdict for the State's failure to present evidence establishing causation.

Damages

Exxon also argues the State failed to present its damages figure with sufficient certainty. Exxon actually makes this claim in two different ways. First, Exxon argues the State failed to prove it is injured. Second, Exxon argues the State's damages evidence is legally insufficient. Neither argument succeeds.

The State need only show an approximation of its harm. As this Court's prior orders on this issue explain, the State does not need to have identified every contaminated well in New Hampshire to show it is injured. Nonetheless, the State presented testimony in its case-in-chief through Gary Beckett, Dr. Ian Hutchison, Dr. Graham Fogg, Steve Guercia, and Brandon Kernen. State's Obj. 16-18. These witnesses estimated the number of wells that are currently suffering contamination based on statistical sampling, the location of spill sites, and the number and proximity of drinking water wells in New Hampshire. The mere fact that the State's damages figure is based on an approximation does not make it speculative or legally insufficient. Further, the evidence presented

during the State's case-in-chief regarding the estimated costs of remediation efforts based on estimated contamination is sufficient for a reasonable juror to conclude the State has suffered a cognizable injury.

Defendants' Affirmative Defenses

Exxon's final argument alleges it is entitled to a directed verdict in its favor on all of its affirmative defenses. Defs.' Mot 11-12. This argument is presented in a highly summary fashion. The substance of this argument can be summarized as follows (1) Exxon argues the State's case-in-chief demonstrates the State's conduct was a substantial factor in bringing about its alleged injuries; (2) the State assumed any risk associated with the injuries it allegedly suffered; (3) the State is estopped from raising the claims it has in this case; (4) the State established that Exxon warned supply chain intermediaries, so Exxon has already proven its bulk supplier defense; and (5) the State's claims are preempted.

Arguments number three and five are legal claims this Court has already decided and will not revisit. As to the first and second arguments, these defenses raise questions of fact. The State presented some evidence from which a jury could conclude the State was not a substantial factor in bringing about its own harm. Additionally, the Court has not definitively ruled that Exxon may rely on assumption of the risk as an affirmative defense. Exxon was invited to submit further briefing on this issue and never has, therefore as a matter of law,[4] Exxon is not entitled to a directed

[4] *See* Order dated Jan 9, 2013 at 2, 4 (*Fauver*, J.).

verdict on an affirmative defense is has not properly asserted.

Finally, with respect to Exxon's fourth argument, the State's case-in-chief did demonstrate that Exxon warned supply chain intermediaries of the dangers of traditional gasoline. Neither party disputes this. The State also presented evidence that Exxon never warned intermediaries of the unique nature of MTBE gasoline. The State asserts an MTBE-specific warning was required; whereas, Exxon asserts a general gasoline warning was appropriate. These arguments raise questions of fact; the sufficiency of a warning is a matter for the jury to decide. *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 809 (1978); *see Dosdall v. Smith*, 415 N.W.2d 332,335 (Minn. App. Ct.1987) (citations omitted) ("Furthermore, a manufacturer who gives a warning on a product assumes the duty of providing an adequate warning. A warning's adequacy, however, is a question of fact for the jury to decide."). During the State's case-in-chief it presented sufficient evidence for a reasonable jury to decide what warning, if any was necessary.

Conclusion

Accordingly, Exxon is not entitled to a directed verdict on any of the State's claims or on any of Exxon's affirmative defenses. Once again, the Court instructs Exxon to submit further briefing supporting its purported use of assumption of the risk as an affirmative defense if it intends to rely on this theory.

So ordered.

3-18-13	s/
Date	Peter H. Fauver Presiding Justice

Appendix F

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

No. 03-C-0550
Merrimack, SS.

STATE OF NEW HAMPSHIRE,
Plaintiff,
v.
HESS CORPORATION, *et al.*,
Defendants.

ORDER ON DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND DEFENDANTS' MOTION TO SET ASIDE THE VERDICT AND FOR NEW TRIAL [1840, 1841]

After ten years of litigation and a four-month jury trial, resulting in a verdict in favor of the State, amounting to $236,372,664, Defendants (Exxon Mobil Corporation and Exxon Mobil Oil Corporation) (together "Exxon") have filed several post-verdict motions. These motions will be addressed in multiple orders. In this order, the Court will address Exxon's Motion for a Judgment Notwithstanding the Verdict, Motion to Set Aside the Verdict, and incorporated Motion for a New Trial. After considering the parties arguments, the applicable law, and the substantial trial transcript, Exxon's motions are all DENIED.

I. JNOV

Exxon first moves for judgment notwithstanding the verdict ("JNOV").

> Motions to set aside the verdict are distinguished from motions for judgment notwithstanding the verdict by the grounds upon which they are granted and the relief sought. A motion for judgment notwithstanding the verdict sets forth an issue of law. In contrast, a motion to set aside the verdict sets forth a question of fact ... motions for judgment notwithstanding the verdict, if granted, result in a finding that the trial was adequate but that the ... record is so clear that the court is justified as a matter of law in entering a different verdict without a new trial.

Broderick v. Watts, 136 N.H. 153, 162 (1992). The standard for deciding a directed verdict motion is the same as for deciding a JNOV. "A trial court may grant a motion for a directed verdict only if it determines, after considering the evidence and construing all inferences therefrom most favorably to the non-moving party, that no rational juror could conclude that the non-moving party is entitled to any relief." *Becksted v. Nadeau*, 155 N.H. 615, 618 (2007). If the evidence adduced at trial is conflicting or permits several reasonable inferences, a motion for a directed verdict should be denied. *Id.*

In this case, both parties moved for directed verdict, and the Court denied those motions.[1] Thus, to the extent Exxon's post-verdict motions reallege the arguments this Court already considered and rejected, the Exxon's JNOV motion is DENIED for the reasons stated in this Court's directed verdict orders. Order (Mar. 18, 2013); Order (Mar. 22, 2013).

A. Market Share Liability

Defendants raise several arguments alleging the market share liability ("MSL") evidence the jury considered was insufficient for the jury to find them liable. Defendants arguments are as follows: (1) assuming the Court's jury instruction regarding MSL was accurate—which Defendants dispute—, there was still no evidence supporting the conclusion that Exxon's market share was 28 percent for MTBE gasoline because the 28 percent figure measured all gasoline supplied into New Hampshire; (2) there was no evidence to support the jury's finding that MTBE gasoline was fungible; (3) no rational trier of fact could have found that the State was unable to trace MTBE gasoline back to the company that supplied it to New Hampshire because Exxon contends that from 1996 to 2005, the State could trace MTBE back to particular stations and thus specific suppliers; (4) the State failed to identify a substantial share of the relevant market because it never identified the entire MTBE gasoline market and only presented evidence as to the wholesale market; and (5) the State failed to present

[1] In denying the State's directed verdict motion, the Court deferred ruling on Exxon's *DeBenedetto* claim. Because the jury rejected Exxon's *DeBenedetto* claim, the State's directed verdict motion became moot to this extent.

evidence identifying the relevant market at the time of each injury, meaning if MTBE contamination was detected in a particular year, the State presented no evidence indicating when that MTBE gasoline came into New Hampshire. In this way, Exxon had no way to exculpate itself from the market.

Exxon has raised, and this Court has rejected all these arguments before. *See* Order on Defs.' Mots. Challenging Pl.'s Expert Justine Hastings (Dec. 14, 2012); Order on Defs.' Request for Clarification (Oct. 29, 2012); Order on Defs.' Request for Interlocutory Transfer (Sept. 20, 2012); Order on Certain Defs.' Mot. to Strike Certain Opinions of Justine Hastings and Bruce Burke (Mar. 15, 2012). Because Exxon raises no new law or facts to support its motion now, the Court's ruling remains the same as in its directed verdict orders. As such, the Court will address these arguments only for the purpose of further explanation and clarification.

Considering Exxon's first and fifth arguments together, Exxon raised and this Court rejected these precise arguments in the Court's directed verdict order. Order at 8 (Mar. 18, 2013). As in the March 18 Order, the Court will not readdress an "argument [that] attacks the viability of market share liability generally, and does not address the State's evidentiary presentation in this case[;]" especially not on a JNOV motion. *Id*. Exxon's argument now restates the theories this Court has previously rejected without citing new factual or legal bases. As discussed in the directed verdict Orders, the State presented sufficient evidence for a reasonable juror to conclude that all gasoline imported into New Hampshire was

commingled with MTBE gasoline. From there, the jury could reasonably have assigned Exxon the share of the gasoline market that its supply represented.

Next, with respect to Exxon's second argument, the Court considered this argument in its March 18 Order, finding the State had "presented testimony that MTBE gasoline is a fungible product and that the fungibility of MTBE gasoline allowed it to be commingled at every step in the gasoline distribution system. The State presented this testimony through Bruce Burke, and other witnesses corroborated it." Order at 7 (Mar. 18, 2013). Exxon makes no new legal argument now and raises no new facts. There was sufficient evidence from which a reasonable jury could find that MTBE gasoline was fungible.

Exxon's third and fourth arguments restate the basis upon which they disputed the State's reliance on MSL in the first place: (1) the State's reliance on Dr. Justine Hastings for market share data; and (2) the State's use of a supplier market share value, rather than a refiner value. The Court addressed both of these issues in its pretrial and limine rulings. *See* Order on Defs.' Mots. Challenging Pl.'s Expert Justine Hastings (Dec. 14, 2012); Order on Certain Defs.' Mot. to Strike Certain Opinions of Justine Hastings and Bruce Burke (Mar. 15, 2012). Exxon argues the only market share data that was relevant was that for MTBE gasoline, and because Dr. Hastings provided data for 100 percent of the gasoline market, which includes non-MTBE gasoline, she overestimated the size of the market and thereby artificially inflated Exxon's contribution to the New Hampshire gasoline supply market. Exxon also

disputes that supply was the proper measure of the gasoline market. The State presented evidence through various witnesses from which a juror could reasonably conclude that all gasoline in New Hampshire was statistically likely to be commingled with MTBE to some concentration. Thus, it was for the jury to decide whether it would rely on the 100 percent figure Dr. Hastings provided, or a lower figure. Additionally, in its pretrial limine rulings, and various trial rulings regarding Dr. Hastings' testimony, this Court found Dr. Hastings qualified. Her testimony was based upon sufficient facts and data; her testimony was the product of reliable principles and methods; and she applied the principles and methods reliably to the facts of the case. RSA 516:29-a, I.

Exxon additionally argues because MTBE gasoline could be traced to a supplier from the refinery, the State failed to prove its market share case. The State's theory of the case, as addressed in pretrial, trial, and directed verdict rulings, was that MTBE gasoline is untraceable once spilled or leaked; once it causes harm to the State. It is wholly irrelevant that gasoline might be traceable to a particular supplier from a wholesale distributor or even the refinery because, as the State alleged, once the gasoline causes harm, it cannot be traced to a supplier, distributor, or refiner. The jury heard evidence to this extent, and could thereby have found that the State met the requisites of relying on market share liability for causation purposes. As such, the record is not so clearly in Exxon's favor that the Court can find the jury's verdict is unsustainable, and Exxon's motion for a JNOV on this basis is DENIED.

B. Products Liability

Exxon next argues that causes of action arising in products liability were legally unsupportable because: (1) the doctrine is inapplicable on the facts of the case because MTBE impacts occurred outside the use/consumption nexus; and (2) based on the facts of the case, there was no design defect or failure to warn. With respect to Exxon's first argument, this raises a pure question of law; whether strict liability should have applied as a legal theory on the facts of this case. As such, a JNOV is not the proper vehicle for raising this allegation. To the extent this argument forms the basis for Exxon's motion to set aside the verdict, in that, it alleges a mistake of law caused Exxon prejudice at trial, the Court addresses that argument in Section II *infra*. With respect to this second argument, Exxon explains that no rational juror could conclude that MTBE was unreasonably dangerous because there was no reasonable alternative to using MTBE as an oxygenate, as Exxon's own internal research revealed. Additionally, Exxon argues no rational juror could have found that a warning would have prevented the State's injury because the State already knew MTBE's characteristics. Exxon also argues that the State failed to prove causation.

As a preliminary matter, the Court addressed these arguments in its directed verdict order. Order at 3-5 (Mar. 18, 2013). The State presented testimony regarding the feasibility of opting out of the RFG program, including testimony from a Tosco employee, Duane Bordvick. *See* Trial Tr. 5472 (Feb. 19, 2013). Tosco is a competitor of Exxon's that chose not to use MTBE because of the health and environmental risks.

See Trial Tr. 5474-75. The jury could reasonably have concluded that, although difficult to implement functionally and practically, MTBE was not a mandate. Additionally, State witness Robert Varney testified that the State would have behaved differently had it received a warning regarding MTBE's true nature originally. *See* Trial Tr. 1393:11-13 (Jan. 22, 2013). Several witnesses also testified regarding the steps the State took once it learned of MTBE's characteristics. *See* Trial Ex. 31. The State presented sufficient evidence from which a jury could conclude: (1) that there were alternatives to MTBE; and (2) that, had the state received a warning, it would have protected itself from the injury it now faces. As such, the record is not so clearly in Exxon's favor that the Court can find the jury's verdict is unsustainable, and Exxon's motion for a JNOV on this basis is DENIED.

C. Negligence

With respect to negligence, Exxon's arguments primarily focus on the element of duty.[2] Exxon argues the State failed to show what the appropriate standard of care is, and in fact, that it presented testimony showing that the industry—including Exxon—engaged in careful research and yet decided to use MTBE. Exxon asserts that this evidence shows the companies that used MTBE—Exxon included—did not breach a duty. Exxon also argues that the evidence

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[2] Negligence requires that the plaintiff establish the defendant owed it a standard of care, breached that standard, and the breach must be shown to be the proximate cause of the plaintiff's harm. *Macie v. Helms*, 156 N.H. 222, 224 (2007). Because the scope of the duty is based on foreseeability, Exxon's foreseeability argument addresses duty. *Id.*

it presented regarding storage tank tightness and upgrades demonstrates that oil companies and the State believed that upgraded tanks would solve leak problems, thereby making MTBE safe and bolstering Exxon's claim that it did not breach any duty. Exxon finally argues that the State's injury was not foreseeable because oil companies and even regulators believed that upgraded storage tanks would prevent MTBE from leaking.

Exxon raised, and this Court rejected, these arguments in its directed verdict ruling. Order at 5-6 (Mar. 18, 2013). Because Exxon raises no new facts or law, the Court relies on its directed verdict ruling in declining to consider these arguments again. As such, the record is not so clearly in Exxon's favor that the Court can find the jury's verdict is unsustainable, and Exxon's motion for a JNOV on this basis is DENIED.

D. Apportionment

Exxon argues that the evidence presented at trial overwhelmingly showed that nonparties actually caused the State's harm. The jury heard evidence that the actions of nonparties and the nature of the oil supply chain itself were all foreseeable to Exxon. *See* Order at 3 (Mar. 18, 2013). In this way, there was sufficient evidence from which a jury could reasonably conclude that despite the actions of nonparties, Exxon could have foreseen and guarded against those actions by, at a minimum, issuing a warning. As such, the record is not so clearly in Exxon's favor that the Court can find the jury's verdict is unsustainable, and Exxon's motion for a JNOV on this basis is DENIED.

E. *Parens Patriae*

Exxon further argues that the State failed to prove its *parens partiae* standing at trial because it presented no evidence regarding legally significant MTBE impacts (i.e., those above 13 parts per billion "ppb"). In other words, Exxon asserts that the contamination evidence the State did present at trial demonstrates that water contamination with MTBE is not widespread enough to warrant the State's intervention as steward of New Hampshire's waters.

Exxon raised this same argument in its directed verdict motion, and the Court previously rejected it, finding the State had presented sufficient evidence to support the State's assertion that there is widespread MTBE contamination.[3] Additionally, standing is a question of law, so a JNOV is not the proper vehicle for this argument. *ACG Credit Co. v. Gill*, 152 N.H. 260, 261 (2005). The State presented sufficient evidence at trial for the Court to reaffirm its prior rulings that the State is entitled to *parens patriae* standing. As such, the record is not so clearly in Exxon's favor that the Court can find the jury's verdict is unsustainable, and Exxon's motion for a JNOV on this basis is DENIED.

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[3] *Parens patriae* standing, as articulated by the New Hampshire Supreme Court, requires that the State (1) assert a quasi-sovereign interest and (2) assert injury to a substantial segment of the population. *State v. City of Dover*, 153 N.H. 181, 185 (2006). The Supreme Court has held that the State fulfilled the first requirement by asserting injury to New Hampshire's water resources. *Id*. Testimony from various State witnesses at trial demonstrated MTBE detects in every county in the state, including some 40,185 currently contaminated wells.

F. Damages

Exxon argues that many aspects of the State's damages figure are unsupported by the evidence, especially the State's future damages figure. Exxon explains that even if it is liable, the damages figure the jury awarded is speculative because it is based on expert estimations and not supported by evidence; it is not sufficiently definite. The Court considered and rejected this argument in its directed verdict order: "The mere fact that the State's damages figure is based on an approximation does not make it speculative or legally insufficient." Order at 10 (Mar. 18, 2013). Because Exxon raises no new facts or law, the Court will not reconsider its prior ruling. As such, the record is not so clearly in Exxon's favor that the Court can find the jury's verdict is unsustainable, and Exxon's motion for a JNOV on this basis is DENIED.

G. Exxon's Affirmative Defenses

Exxon argues that all of its affirmative defenses were overwhelmingly supported by evidence, especially the plaintiff's misconduct defense. Exxon contends the State and nonparties contributed to the State's harm. Further, the actions of nonparties were not foreseeable to Exxon, the jury should have found Exxon not liable on the basis of a superseding intervening cause defense. Exxon also explains that its evidence supports its argument that it complied with the state of the art and the jury's verdict rejecting the state of the art defense is conclusively against the weight of the evidence. This argument is similar to Exxon's negligence argument in which it asserts it made the same choices as the rest of the industry; because Exxon conducted substantial research and

was in line with a majority of the industry at the time in choosing MTBE as an oxygenate, it complied with the state of the art.

The State responds the evidence at trial also showed Exxon failed to prove its affirmative defenses.

1. Intervening Superseding Cause

With regard to its intervening superseding cause defense, the State explains that because it was foreseeable to Exxon that MTBE gasoline would leak, Exxon failed to show that any underground storage tank, aboveground storage tank, or salvage yard operator was legally at fault for the State's injury. Both parties presented evidence regarding foreseeability. Exxon demonstrated that gasoline handlers regularly spilled and leaked MTBE gasoline but failed to show these handlers knew of the existence of MTBE. Trial Tr. 9133-34 (Mar 20, 2013). As such, the record is not so clearly in Exxon's favor that the Court can find the jury's verdict is unsustainable, and Exxon's motion for a JNOV on this basis is DENIED.

2. Plaintiff's Misconduct

The State also explains Exxon failed to prove its Plaintiff's misconduct defense because the evidence supports the jury's finding that the State did not know MTBE's characteristics, and even when it did, it acted to protect itself. *See* Trial Ex. 31. Exxon argues because it presented testimony from several witnesses who were or are State employees that knew of MTBE's characteristics, no reasonable juror could find in favor of the State. Exxon also asserts that because the State itself spilled gasoline, such as the Department of Corrections, the State caused its own harm. As

mentioned above, the State presented evidence that it did not initially know the true nature of MTBE, and once it acquired some knowledge, it acted to protect itself. As such, the record is not so clearly in Exxon's favor that the Court can find the jury's verdict is unsustainable. Exxon's motion for a JNOV on this basis is DENIED.

3. State of the Art

Finally, the State contends that Exxon failed to prove its state of the art defense because the risks relating to MTBE were discoverable, and in fact, other members of the gasoline industry knew them as early as the 1980s. The State of the Art defense requires that the science at the time be too imprecise to locate and/or identify risks, Exxon's defense fails. In fact, evidence presented at trial from past and present Exxon employees tends to disprove this defense. A key exhibit presented to the jury was the Mickelson memorandum. *See* Trial Ex. 128. In this memo, an Exxon engineer, Barbara Mickelson, notified Exxon that using MTBE gasoline in a region like New Hampshire would be environmentally detrimental. *Id.* This memo was dated 1985. *Id.* As such, the record is not so clearly in Exxon's favor that the Court can find the jury's verdict is unsustainable, and Exxon's motion for a JNOV on this basis is DENIED.

H. Failure of Proof as to Mobil

Exxon reasserts the motion it made at the end of trial regarding the corporate separateness of Mobil prior to the Exxon-Mobil merger. This argument claims that the jury cannot have found Mobil liable because State presented absolutely no evidence regarding Mobil's MTBE gasoline sales, decisions,

marketing, or supply activities. This argument is identical to the one Exxon made in its directed verdict and is denied for the same reasons, which the Court will not readdress. Order at 7-9 (Mar. 22, 2013).

Thus, for the reasons discussed above, Exxon's Motion for Judgment Notwithstanding the Verdict is DENIED.

II. Motion to Set Aside

Exxon's Motion to Set Aside the Verdict and its Motion for a New Trial are included within the same filing, but the motion seeks a new trial for all the same reasons it moves for the verdict to be set aside. In New Hampshire, a new trial can be awarded as the outcome of a successful motion to set aside a verdict and on independent grounds "when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable." RSA 526:1. These circumstances exist when a trial is unfair because some event occurs, like a ruling of the court, mistake of counsel, or circumstance that makes it unlikely the case was decided impartially. 5 Gordon J. MacDonald, Weibusch on New Hampshire Civil Practice and Procedure § 55.02 (Matthew Bender & Co. 1984). Additionally, a new trial is appropriate when there has been juror misconduct or newly discovered evidence. In this way, a party moving to set aside a verdict could be entitled to a new trial as a remedy for the set aside motion or independently.

In this case, because Exxon's motion to set aside and for a new trial does not allege mistake of counsel, partiality of the judge, juror misconduct, or newly discovered evidence, the only issue the Court must address is whether it made erroneous rulings that

caused Exxon to be denied a fair trial. As such, the Court considers Exxon's motion for a new trial within this narrow context and as the remedy Exxon requests in its motion to set aside the verdict.

With respect to a motion to set aside the verdict:

> In New Hampshire, two distinct standards exist for determining whether a jury verdict may be set aside. A jury verdict may be set aside if it is conclusively against the weight of the evidence. [C]onclusively against the weight of the evidence' should be interpreted to mean that the verdict was one no reasonable jury could return. Second, a verdict may be set aside if it is the result of mistake, partiality, or corruption, but such a finding must be based on grounds independent from whether the verdict was conclusively against the weight of the evidence.

Broderick, 136 N.H. at 162 (citations and quotations omitted). "With regard to the relief sought, motions to set aside the verdict seek a trial de novo at which the facts related to some or all of the issues may be determined anew." *Id.* In this way, Exxon's post-verdict motion to set aside and for a new trial are related, yet, in deciding them, the Court must apply several different legal standards. "In passing on the defendants' motions for nonsuits and directed verdicts the evidence must be considered most favorable to the plaintiff." *Brown v. Gottesman*, 103 N.H. 33, 34 (1960).

The topical areas Exxon raises in its motion to set aside the verdict substantially overlap the topical areas Exxon challenges in its JNOV motion. As a

preliminary matter, Exxon misconstrues the standard for setting aside a jury verdict in New Hampshire. The New Hampshire Supreme Court conducted an extensive analysis of the two distinct standards upon which parties can raise motions to set aside a verdict in *Panas v. Harakis*, 129 N.H. 591, 600-04 (1987). On the one hand, a verdict may be conclusively against the weight of the evidence, meaning it was one no reasonable jury could reach. *Id.* at 601-02. On the other hand, the verdict may be the result of mistake, corruption, or partiality. Exxon does not allege the jury was partial or corrupt. In fact, Exxon does not allege that the jury erred.[4] Rather, Exxon argues that the Court made legal mistakes. However, "mistake" in this context refers to jury mistake, not a legal mistake made by the Court unrelated to the jury, and not pretrial legal error. *Id.* at 603-04. As such, Exxon's motion to set aside only properly alleges that the verdict was conclusively against the weight of the evidence, and the Court will therefore only address the motion on this basis.

A. Market Share Liability

With regard to their challenge to this Court's market share rulings, Exxon restates all the arguments it has previously made.[5] For this reason,

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[4] The only reference Exxon makes to the jury's conduct is a passing challenge to the short deliberation time the jury took. However, as will be addressed below, this challenge fails for separate reasons.

[5] These arguments are as follows: (1) MSL is not widely used and the New Hampshire Supreme Court would not adopt it; (2) the Court-defined market is too big; temporally and geographically; (3) retroactive application of MSL violates the DP clause; (3) the Court erred by allowing the State to use the

the Court declines to readdress any of these arguments in a substantive way. Nonetheless, some arguments require discussion. Exxon alleges the State was not entitled to rely on MSL because: (1) MSL is only proper when there are no other viable theories and the State repeatedly asserted it could prove traditional causation until it abandoned that theory at the end of trial; and (2) the State abandoned its commingling argument late in the trial, and this is the only reason the Court approved MSL. Taking these contentions in turn, both fail.

1. Last Resort

First, Exxon argues that because the State withdrew its traditional causation theory, the jury did not have to find that the State could not prove traditional causation, and for that reason, the Court improperly allowed MSL. According to Exxon, MSL was improper absent the State failing to prove traditional causation because MSL is only viable when there are no other avenues of proof. Exxon therefore asserts that the jury needed to go through the formality of finding the State could not prove traditional causation in order to find the State entitled to rely on MSL.

Traditional causation would have required the State to prove that MTBE gasoline was the actual and proximate cause of water contamination and that

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wholesale market measure because the State could trace gasoline containing MTBE back to these suppliers, so MSL was not required; (3) Exxon's total share of the market bore no relationship to the alleged harm; and (5) the State failed to link its injury in any given year to Exxon's share of the market in that year.

Exxon supplied the MTBE to New Hampshire. "Causation focuses on the mechanical sequence of events. Proximate cause involves both cause-in-fact and legal cause. Cause-in-fact requires the plaintiff to show that the injury would not have occurred but for the negligent conduct." *Carignan v. N.H. Intern. Speedway, Inc.*, 151 N.H. 409, 414 (2004).[6] "[L]egal cause requires the plaintiff to establish that the negligent conduct was a substantial factor in bringing about the harm." *Id.*

By comparison, MSL required the State to prove: (1) the elements of its three causes of action; (2) that it joined a substantial share of the relevant market; and (3) that it was unable to identify the specific tortfeasor responsible for its injury. *In re MTBE*, 379 F. Supp. 2d. 348, 375 (S.D.N.Y. 2005). MSL—as an alternative to traditional causation—did not require the State to prove that it could not establish traditional causation; it required the State to show

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[6] For example, for its negligence claim, in addition to the other elements of negligence, the State would have had to: "[P]roduce evidence sufficient to warrant a reasonable juror's conclusion that the causal link between the negligence and the injury probably existed." *See id.* The negligent conduct need not be the sole cause of the injury; however, to establish proximate cause, the plaintiff must prove that the defendant's conduct caused or contributed to cause the harm. *See also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. __, 133 S.Ct. 2517, 2525 (2013) (citing Restatement of Torts § 9 (1934)) ("Causation in fact [refers to] proof that the defendant's conduct did in fact cause the plaintiff's injury-is a standard requirement of any tort claim"). "In strict products liability, it is the product defect or the failure to warn, rather than the defendant's conduct, that must be shown to be a substantial cause of the plaintiff's injuries." *In re MTBE*, 739 F. Supp. 2d 576,596 n.128 (S.D.N.Y. 2010).

that it could not identify the tortfeasor responsible for its injury. Exxon accurately explains that MSL is a "theory of last resort" but applies the theory incorrectly. The "last resort" requirement focuses on the inability of the plaintiff to identify the manufacturer of a product, not the absence of alternative causes of action or theories of recovery. *See Conley v. Boyle Drug Co.*, 570 So.2d 275, 285 (Fla. 1990).

During trial, the State presented several witnesses who testified that MTBE gasoline is fungible and commingled at nearly every step in the distribution network, thereby making it virtually impossible if not impossible to trace from a spill or leak back from a contamination site to a retailer or supplier. Trial Tr. 10296-10297 (Mar. 26, 2013); Trial Tr. 5575-76 (Feb. 19, 2013). This testimony tended to fulfill the State's burden of proving that it was unable to identify the specific tortfeasor responsible for its injury. The jury's verdict-finding that the State was unable to identify the specific tortfeasor responsible for its injury-was not conclusively against the weight of the evidence. Exxon's motion for a directed verdict on this basis is DENIED.

2. Commingling

Exxon's second argument is factually inaccurate. The State did not abandon its assertion that MTBE gasoline is commingled. It declined to present to the jury the question of whether, due to the commingled nature of MTBE gasoline, Exxon was directly liable as opposed to liable pursuant to MSL. At all times during its case, the State presented testimony that MTBE gasoline was commingled with regular gasoline and

MTBE gasoline from other suppliers and refiners. Nonetheless, there was sufficient evidence presented from which a jury could reasonably have found that, due to the commingled nature of MTBE gasoline, it was impossible for the State to trace a spill or leak back to the supplier. For these reasons, and based on this Court's pretrial rulings regarding MSL, Exxon's motion to set aside on this basis is DENIED.

B. Products Liability

Exxon makes several arguments with respect to products liability.[7] These arguments generally raise questions of law, so a motion to set aside a jury verdict is not the proper vehicle for their disposition. *Broderick*, 136 N.H. at 162. Exxon does make two arguments that are not purely questions of law. First, it argues that for purposes of deciding the design defect claim, there was no evidence from which a reasonable jury could conclude that MTBE gasoline was dangerous to end users. Exxon argues the State presented no evidence anyone was directly harmed by the product (*i.e.*, no harm to cars, storage tanks, or people). Second, with respect to the State's failure to warn claim, Exxon argues that the warnings it failed to provide are unrelated to an end user because any warning Exxon would have given would not have been read and heeded in the manner the law requires

[7] Exxon asserts that the State should not have been allowed to rely on products liability when the State also asserted negligence because products liability is only permissible when there is no other avenue of relief. Exxon argues that the verdict was also legally unsupported because products liability only applies at the use/consumption nexus, and MTBE gasoline worked as designed in motor vehicles.

because the State would not have banned MTBE gasoline, as is evident from the fact that the State failed to ban MTBE gasoline even after it acquired knowledge regarding MTBE's characteristics.

Addressing these claims in turn, Exxon's first argument appears to allege there was insufficient evidence from which a jury could conclude MTBE gasoline is a defective product. Although this argument facially addresses the jury's decision-making process and the sufficiency of the evidence, the theory underlying this argument raises a pure question of law. Exxon explains that because MTBE gasoline causes harm outside the use/consumption context, the State should never have been permitted to rely on products liability causes of action. Specifically with respect to the State's defective design claim, Exxon explains that because there was no evidence presented that MTBE gasoline causes harm to end users or consumers when they use the product, the jury could not have found the product to be defective.

This argument raises a legal issue that Exxon never previously addressed. Exxon[8] filed a Motion for Summary Judgment attempting to preclude the State from relying on products liability theories. This Court denied Exxon's motion because it restated Judge Mangones' decision on Exxon's Motion to Dismiss. However, Exxon did not raise this precise issue in its Motion to Dismiss or its Motion for Summary

[8] In this context, "Exxon" refers to Exxon to the extent that it joined other then-joined Defendants in filing these motions.

Judgment.[9] In addition, Exxon did not file a limine motion raising this issue, and Exxon's directed verdict motion did not raise this issue. Further, Exxon consented to the final jury instructions regarding design defect. Exxon makes no argument justifying its delay in raising a pure issue of law post-trial. Had this argument been timely raised, it would have afforded the Court an opportunity to address the fact that there is no law on this issue in New Hampshire. The Supreme Court has never addressed the temporal or physical scope of the use/consumption nexus. Based on the procedural history of the case, the Court treats this argument as waived due to Exxon's delay. *See State v. Torres*, 130 N.H. 340, 343 (1988) (explaining that waiver may be implicit or explicit); *State v. Sullivan*, 130 N.H. 64, 68 (1987). As such, Exxon's Motion to Set Aside the Verdict on this basis is DENIED.

With regard to Exxon's second argument, first, New Hampshire law does not recognize the read and heed presumption, *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 16 (1st Cir. 2001), which states: "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." Restatement (Second) of Torts § 402A cmt j. (1965).

Second, it is based on hypothetical testimony that the jury never heard, it is speculative, and it is

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[9] Even if Exxon had raised this issue, the Court's ruling would preclude it from realleging the matter now.

therefore irrelevant to the jury's verdict. The State presented testimony of Robert Varney from which a reasonable jury could have determined that the State would not have opted in to the RFG program if it had received a warning. *See* Trial Tr. 1393:11-13 (Jan. 22, 2013). The jury apparently found this testimony persuasive, and the Court cannot conclude that the verdict was conclusively against the weight of the evidence. Exxon's Motion to Set Aside the Verdict is therefore DENIED on this argument.

C. Negligence

Exxon also asserts the State's injuries were not foreseeable and the State's evidence was not sufficient for the jury to find that Exxon acted negligently in deciding to use MTBE as an oxygenate. The State responds that it presented testimony that tank leaks were common in the industry and everyone knew about it, so there was ample evidence for the jury to conclude that MTBE leaks were foreseeable to Exxon. The State also presented testimony from which the jury could reasonably find that Exxon knew New Hampshire has a vulnerable aquifer system due to the geological composition of the State. *See* Trial Ex. 128. Because Exxon knew of New Hampshire's geology, according to the State, Exxon was negligent by supplying MTBE gasoline to the State.

Based on the testimony the State presented, the Court cannot find that the jury's verdict was conclusively against the weight of the evidence; the jury could have found that State's contamination injury was foreseeable to Exxon. Exxon's Motion to Set Aside the Verdict is therefore DENIED on this argument.

D. Apportionment

Exxon further argues that the jury's verdict on apportionment was against the weight of the evidence. The State responds that with respect to its own misconduct, it presented evidence that it did all it could do to protect itself from MTBE once it learned of the chemical's characteristics. *See* Trial Ex. 31. The State further contends, with respect to nonparties, the jury heard substantial evidence from which it could reasonably conclude that nonparties bear no portion of the fault for the State's harm. *See*, *e.g.*, Trial Tr. 8954-56 (Mar. 20, 2013). In fact, the State highlighted that no Exxon witness testified that nonparties were actually aware of MTBE's presence in gasoline. Rather, Exxon witness Jeffrey Klaiber testified that some consumers might have been on notice that MTBE was used as an oxygenate; thereby thinly establishing constructive knowledge, if the jury believed Klaiber's testimony. Trial Tr. 9133-34 (Mar. 20, 2013). Thus, the jury's verdict apportioning zero fault to the State and all nonparties was not conclusively against the weight of the evidence because the evidence was conflicting. Exxon's Motion to Set Aside the Verdict on this basis is therefore DENIED.

E. *Parens Patriae*

Exxon also argues the Court erred by not requiring the State to do more to prove its *parens patriae* standing by establishing the aggregate number of wells that are impacted above the maximum contaminant level ("MCL"). According to Exxon, because the MCL is the trigger for water remediation efforts and because the State did not seek

remediation damages for contamination below the MCL, any contamination below the MCL is irrelevant for purposes of *parens patriae* standing. Exxon explains that because the State's damages figures were based on statistical estimations, it failed to identify a sufficient number of wells impacted at or above the MCL and thereby failed to establish *parens patriae* standing. In fact, the Court has previously addressed this argument. *See* Order on Defs.' Renewed Mot. for Partial Summ. J. on Claims for Private Damages (Sept. 26, 2013).

The State presented testimony based on predictive modeling that identified wells contaminated with MTBE in every county in the State. *See* Trial Tr. 630, 637 (Jan. 16, 2013). Although some of these wells were not currently suffering contamination levels at or above the MCL, the State also offered evidence that MTBE contamination could change in concentration over time and often increased. *See* Trial Tr. 4530-31 (Feb 15, 2013). The Court ruled that this proffer was sufficient pretrial to uphold the State's standing. Order on Defs.' Renewed Mot. for Partial Summ. J. on Claims for Private Damages (Sept. 26, 2012). Exxon has raised no new law or fact to support its Motion to Set Aside the Verdict, and at trial, the State presented sufficient evidence from which this Court can again reaffirm the State's standing. As such, Exxon's Motion to Set Aside the Verdict on this basis is therefore DENIED.

F. Damages

Exxon makes four primary arguments challenging the jury's damages award: (1) Exxon challenges the Court's collateral source ruling as

legally improper; (2) Exxon asserts that the Court's framing of the case allowed the jury to award speculative and unsupported damages based on Dr. Graham Fogg's unreliable expert testimony; (3) Exxon argues that the jury's award for the high risk sites was improper because 49 of those sites are closed, meaning the State could not remediate them now even if it chose to, so the jury's award for those sites is unsustainable; and (4) Exxon believes the jury's award of past cleanup costs was patently unreasonable because evidence presented to the jury demonstrated that 54 percent of past spills did not even contain MTBE. At a minimum, Exxon requests a new trial just on issue of damages.

With regard to Exxon's first and second arguments, these raise pure questions of law that the Court has addressed in prior orders. *See* Order on Defs.' Mot. Exclude Statewide Opinions of State Experts Fogg, Beckett, & Hutchison Under N.H. R. Ev. 702 & RSA 516:29-a (Jan. 4, 2012); Order on Certain Defs.' Mot. Exclude Pl.'s Experts as Irrelevant (June 24, 2011). Because Exxon raises no new arguments, the Court declines to reconsider its prior rulings, and Exxon's Motion to Set Aside the Verdict on this basis is DENIED.

Exxon's third and fourth arguments state a challenge to the weight of the evidence. Exxon argues that the jury could not reasonably have found there would be further work needed at the high risk sites. The State responded that the level of risk is assigned not only by the characteristics of the individual site but also based on nearby contamination levels. Similarly, the State's witness Gerry Beckett did not

testify that 54 percent of the past cost calculations were for sites that never had MTBE. Rather, he testified that MTBE tends to increase costs in remediation, and he explained how he determined increased remediation costs were attributable to MTBE as opposed to other factors. Trial Tr. 4381-83 (Feb. 11, 2013). As such, the jury's verdict was not conclusively against the weight of the evidence, and Exxon's Motion to Set Aside the Verdict on this basis is therefore DENIED. The Court construes Exxon's alternative request for a new trial solely on the issue of damages as the remedy it seeks, and because neither of Exxon's damages arguments succeeds, that remedy is therefore also DENIED.

G. Exxon's Affirmative Defenses

Exxon further asserts that the jury had no basis for rejecting its affirmative defenses. Exxon also alleges that the Court made several legally erroneous rulings depriving it of the ability to defend itself. Exxon's challenge essentially asserts it was prejudiced by this Court's evidentiary rulings. A new trial analysis properly considers this argument, so the Court evaluates it in Section III(B) *infra*.

H. Statewide approach

Exxon's next argument asserts that the statewide extrapolation approach the Court approved: (1) constituted legal error and prevented Exxon from defending itself because Exxon could not exclude itself from a market as large as all of New Hampshire and as extensive as 20-plus years; and (2) applied MSL retroactively and thereby violating Exxon's due process rights. The Court disagrees.

As discussed in Section I(A) *supra*, the Court's pretrial rulings regarding MSL and the statewide approach were rulings of law. *See* Order on Defs.' Request for Interlocutory Transfer (Sept. 20, 2012); Order on Defs.' Mot. for Parallel Relief (Aug. 22, 2013). Exxon does not raise any new facts regarding these rulings and it does not contend that the jury's verdict was conclusively against the weight of the evidence. As such, this argument does not properly fall within the purview of a motion to set aside and Exxon's Motion to Set Aside the Verdict on this basis is therefore DENIED.

I. Future Well Impacts

Exxon also argues the State's alleged injuries have not yet happened. Because MTBE is in groundwater does not mean it will injure private wells in the future, and it is legally unsound to rely on modeling for this valuation. Therefore, it argues damages the jury awarded are speculative and unripe. The State responds that this argument improperly seeks to restate the Court's pretrial rulings. The Court agrees.

This Court has ruled that the State's injury already occurred; MTBE has already been brought into New Hampshire. Exxon sought a jury instruction on imminent and immediate harm, which the Court denied. Whether the State has been injured is a question for the jury, but prospective damages are proper where "there was evidence from which the jury could find it more probable than otherwise that such damage would occur." *Dunham v. Stone*, 96 N.H. 138, 138 (1950) (approving jury award of prospective

damages for future pain and suffering);[10] *see Porter v. City of Manchester*, 151 N.H. 30, 45 (2004) (approving jury award of future earnings where jury heard some evidence from which to determine pecuniary value); *see also* Order on Defs.' Mot. for Partial Summ. J. on the State's Claim for Future Well Impacts and Unknown Impacts (May 30, 2012). Because Exxon's motion raises no new issues of law or fact, the Court declines to reconsider its prior rulings. Exxon's Motion to Set Aside the Verdict is therefore DENIED on this argument.

J. Separation of Powers

Exxon argues that due to the jury verdict, there now exists a conflict between the judiciary and the legislature with respect to remediating contamination sites. Exxon explains that based on the jury's verdict, the judiciary is essentially forcing the legislature, through DES, to reopen remediation sites that were closed pursuant to statute in order to perform further, unnecessary remediation. Exxon asserts this is an untenable conflict between two branches of government and creates a separation of powers issue. Also, Exxon argues the State's theory presumes the legislature made a policy mistake by opting in to the RFG program, which means this entire case raises a nonjusticiable policy question.

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[10] In *Dunham v. Stone*, "damage" referred to future pain and suffering, but in this case, the jury heard testimony supporting the State's testing plan and likelihood of finding MTBE contamination. From this, a verdict finding that the State would be required to pay for further testing and remediation in the future was not conclusively against the evidence.

These arguments assert pure questions of law that this Court has previously rejected. *See* Order on Defs.' Mot. for Summ. J. on Separation of Powers Grounds (Oct. 1, 2012). Because Exxon has raised no new law or facts, the Court declines to reconsider this issue now. Exxon's Motion to Set Aside the Verdict on this basis is therefore DENIED.

K. *DeBenedetto*

Exxon challenges this Court's *DeBenedetto* rulings, alleging the Court improperly: (1) required it to prove nonparties were liable for the State's claims as opposed to that they contributed to the State's harm; (2) rejected Exxon's attempt to rely on RSA chapter 146-A for establishing nonparty fault; (3) required proof of actual or constructive knowledge of nonparties; and (4) required Exxon to present "categories" of *DeBenedetto* evidence under a statewide approach, thereby prejudicing Exxon's defense theory.

The State responds the Court did allow Exxon to join parties that caused or contributed to the State's harm, RSA chapter 146-A's strict liability provisions do not apply to private actors seeking to enforce the statute, and that nonparties needed some awareness of MTBE to be liable for contamination harm. The Court agrees.

Exxon's first three challenges raise pure questions of law that this Court addressed pretrial. *See* Second Order on Defs.' Pre-Trial DeBenedetto Disclosure (Feb. 21, 2013); Order on Pl.'s Mot. to Expedite Defs.' Responses (Oct. 19, 2012). Exxon has raised no new fact or law to convince the Court to

readdress these arguments. Exxon's Motion to Set Aside the Verdict is DENIED on these bases.

With regard to Exxon's statewide proof claim, the State explains that Exxon could have presented evidence regarding every individual *DeBenedetto* party, as opposed to categorical evidence. In other words, allowing categories was a convenience, not a requirement. The Court agrees.

Regarding the categories, Exxon presented little evidence establishing nonparty liability. Exxon's primary witness was Jeffrey Klaiber, who testified regarding typical spill and leak scenarios for the various categories of nonparties. However, Klaiber did not indicate that nonparties were aware of MTBE's presence in gasoline during the relevant time period, and he never stated that nonparties were aware their actions caused spills and leaks that caused MTBE contamination. Thus, the Court cannot say that a jury verdict rejecting Exxon's *DeBenedetto* defense was conclusively against the weight of the evidence. Exxon's Motion to Set Aside the Verdict on this basis is DENIED.

L. Evidentiary Rulings

Finally, Exxon raises several evidentiary challenges. However, these challenges allege that the Court's rulings prevented Exxon from receiving a fair trial. As such, the Court will construe these challenges as supporting Exxon's Motion for a New Trial, and the Court evaluates them below. *See infra* § III(B).

III. Motion for a New Trial

As discussed above, many of Exxon's arguments allege the Court's rulings prejudiced Exxon and

prevented it from receiving a fair trial. These arguments properly form the basis for a motion for a new trial but not for a JNOV or motion to set aside the verdict, so they are considered together here. *See* RSA 526:1; 5 Gordon J. MacDonald, Weibusch on New Hampshire Civil Practice and Procedure § 55.02 (Matthew Bender & Co. 1984).

A. Juror Misconduct

Exxon challenges the speed of the verdict: "Given the length and complexity of the case .... the speed at which the jury reached its verdict indicates that the jury either did not deliberate or did not follow the judge's instructions regarding waiting until the close of all the evidence to deliberate." Exxon's Mot. Set Aside 20. The Court disagrees. As the State noted, New Hampshire does not presume juror misconduct merely from a swift verdict. *Patten v. Newton*, 102 N.H. 444, 446 (1960) (citations omitted) ("There is no statute which prescribes the length of time that a jury should deliberate before reaching their verdict and in some states they are permitted to do this without retirement from the jury box. While a quick verdict may with other circumstances indicate passion or prejudice, promptness alone in returning a verdict is not the basis for a new trial for misconduct of the jury."). There must be some indication of juror misconduct beyond a short deliberation time, which Exxon has not cited. *See Id*. at 447 (finding no error or bias following a quick verdict even where juror indicated that he would like to be made foreman so that he could "make short work of it."). Accordingly, Exxon's Motion to Set Aside the Verdict on this basis is DENIED.

B. Evidentiary Rulings

Exxon raises challenges to this Court's evidentiary rulings in its JNOV and Motion to Set Aside the Verdict. For efficient resolution and because these claims are more properly addressed under a new trial inquiry, the Court considers them together. Because the Court already addressed each of the challenged evidentiary rulings, individually, as they were raised during trial, the Court's review of them now, is cumulative. The appropriate inquiry is whether, in the totality, these rulings deprived Exxon of a fair trial.[11]

Exxon challenges: (1) the Court's exclusion of Barbara Mickelson's testimony regarding her work after she left Exxon because it constituted improper expert testimony and she was never disclosed as an expert; (2) the limits the Court imposed on Richard Wilson's testimony regarding what the U.S. Environmental Protection Agency ("EPA") knew about MTBE; (3) the Court's decision to limit testimony

[11] It is unclear whether New Hampshire recognizes a cumulative error claim in civil cases similar to that which exists for criminal appellants. 5 Am. Jur. 2d *Appellate Review* § 668 (2013) (referencing the criminal cumulative error which "protects a criminal defendant's right to a fair trial and applies to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial."). Even assuming New Hampshire does recognize such a claim, Exxon was not prejudiced by the cumulative effect of the evidentiary rulings that it challenges because there was no error in the individual rulings. *See Mattos v. Patriarca*, 304 A.2d 355, 357 (R.I. 1973) (assuming without deciding that civil law recognizes a cumulative error claim but finding it did not apply because there had been no error).

regarding federal approval of MTBE as an oxygenate by requiring documents to be redacted before shown to the jury; (4) the Court precluding distributors from testifying that they would have handled MTBE gasoline differently if they had been warned but permitted the State's fact witness Robert Varney to testify that New Hampshire would not have joined the federal RFG program if it knew of MTBE's characteristics; (5) the Court's decisions excluding Exxon's undisclosed expert opinions but permitting the State's undisclosed expert witnesses to testify; (6) the Court's exclusion of evidence of the ODD and GREE funds; (7) the State's delay in handing over e-911 data identifying the location of the roughly 250,000 private wells in New Hampshire; (8) Exxon's inability to present evidence regarding contamination sites for which it had already been held responsible under New Hampshire law; (9) that Exxon could not call DES employees to ask them why they never tested their own private wells for MTBE contamination; and (10) that the Court required Exxon to prove that it warned supply chain intermediaries about the specific hazards of MTBE gasoline.

Exxon explains that the Court's rulings precluding the evidence in the first four categories was harmful because, in the end, all of this evidence would have gone to show that the State knew or should have known of the nature and characteristics of MTBE. At trial, numerous witnesses from both the State and Exxon testified regarding industry and regulatory knowledge of MTBE. *See* Trial Tr. 2117 (Jan. 28, 2013) (Marcel Moreau); Trial Tr. 5472 (Feb. 19, 2013) (Duane Bordvick). Despite some evidentiary rulings limiting potentially relevant evidence on this point,

there was overwhelming evidence that Exxon knew the characteristics of MTBE gasoline and to the extent the State had knowledge, that knowledge did not come from Exxon and did not develop until after MTBE was used as an oxygenate. There was certainly evidence presented to the contrary, despite this Court's evidentiary rulings. As such, the Court cannot say that Exxon was prejudiced by the combined effect of the first four contested evidentiary rulings.

With regard to the contested evidentiary rulings in their totality, they did not prejudice Exxon. Contested evidentiary rulings two, four, eight, and nine all raise irrelevant information. Exxon sought to introduce several instances of irrelevant evidence, and the Court rejected them.[12] It cannot be prejudice for the Court to preclude irrelevant evidence from the jury's consideration.[13]

With regard to rulings number one and five, the Court decided objections that were timely made. Exxon, throughout trial, withheld objections and delayed making motions to strike until days or weeks after the contested witness had presented the challenged testimony. Based on the timeliness and

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[12] Relevant evidence need only have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Watkins*, 148 N.H. 760, 767 (2002) (citation and quotation omitted); *N.H. R. Ev.* 401

[13] *Wilson v. Manchester Sav. Bank*, 95 N.H. 113, 118 (1948) ("[N]o principle of law requires that the introduction of incompetent, prejudicial and circumstantial matter be attached as a condition to a party's offer of direct, competent evidence vital to his case and to the jury in their search for truth.")

substance of the motions, the Court's rulings did not prejudice Exxon. Rather, the Court attempted, at all times, to balance the fairness to the parties based on Exxon's delay in objecting and/or moving to strike testimony that had already been concluded.

With regard to ruling number three, the parties and the Court struggled at length throughout trial to ensure the parties presented federal approval of MTBE as an oxygenate in the most accurate light possible. Federal approval did not consider health or environmental impacts of MTBE; it only considered MTBE's safe use for engine function. The Court's trial rulings attempted to remain consistent with pretrial rulings indicating that the word "approval" was not to be used to misconstrue the manner in which the federal government vetted MTBE. The fact that documents were redacted in an effort to ensure that the jury did not receive an inaccurate impression did not prejudice Exxon.

With regard to the State's delay in disclosing enhanced 911 ("e-911") data, the State explained:

> Months before the state of trial, the State produced its plan to sample private wells, which explicitly states that DES uses e-911 data and other databases to find location information for private wells with contact information for owners. ExxonMobil had an opportunity to depose Mr. Kernen [the witness who presented the e-911 data] on February 8, 2013 on all aspects of the State's plan, including the e-911 database. ExxonMobil first requested the e-911 database *two weeks after* Mr. Kernen testified

> at trial. Since the contact information for private well owners in the e-911 database is confidential pursuant to RSA 106-H, the State offered to produce hundreds of maps that plotted the location of households using private wells.

State Obj. Defs.' Mot. Set Aside 14-15 (emphasis in original). Exxon would not agree to receive only the maps and insisted on receiving the underlying data or alternatively having the court conduct an *in camera* review of the underlying data to ensure that Kernen's testimony accurately represented the underlying data. The Court was able to confirm that the underlying data represented some 230,000 private residences. Exxon was not prejudiced by the State's refusal to disclose confidential information because Exxon never sought this information prior to the sponsoring witness's testimony. Further, the Court was able to review the State's disclosure *in camera* to verify it.

Finally, Exxon challenges the Court's preclusion of ODD and GREE fund evidence from the jury. The Court made several pretrial and trial rulings regarding the collateral nature of these funds. Originally, the Court ruled:

> Defendants argue they are entitled to present evidence of the State's receipt of funds to prove its damages figure is too high and to rebut arguments State witnesses may make that the reason certain cleanup efforts were not undertaken but should be undertaken in the future was because of lack of funding in the past. This evidence is unduly prejudicial for three reasons: (1) it is minimally relevant;

> (2) it is highly confusing and time consuming to present such evidence; and (3) there are other ways for Defendants to make this argument.

Order on Defs.' Mot. Reconsider at 6 (Jan. 11, 2013). However, Exxon made several motions during trial regarding these funds based on State witness testimony. Primarily, Exxon argued that there were permissible and highly relevant uses of evidence relating to the funds, and the Court's prior ruling improperly limited the scope of this relevant evidence. Eventually, the Court reconsidered its ruling and allowed Michael Wimsatt, an *ex officio* member of the Oil Fund Disbursement Board-which is charged with administering the ODD and GREE funds—to testify in a limited way regarding the funds. *See* [Corrected] Order on Defs.' Mot. for Mistrial (Feb. 8, 2013). Exxon was permitted to inquire about: (1) past expenditures from the funds; (2) that MTBE is not as costly to remediate as the State alleges; and (3) that DES has already completed all remediation it believes is necessary. *Id*. at 6-8. Exxon was not entitled to elicit any testimony tending to suggest that because the funds had a surplus every year: (1) the State's damage value should be reduced; or (2) the State has not been harmed or should not have brought this suit. *Id*.

In this way, the Court permitted Exxon to present some relevant evidence regarding the funds and excluded otherwise prejudicial evidence. This ruling was consistent with the Court's prior collateral source rulings, and it was beneficial to Exxon.

Because none of these rulings constituted error in their individual capacity, they did not constitute error

when considered as a whole. *See Gethers v. Roden*, No. 10-11988-RGS, 2011 WL 6698436 at *5 (D. Mass. Nov. 14, 2011) ("none of the Petitioner's individual claims is meritorious, and a claim based on cumulative error is therefore likewise unavailing"). Further, because these rulings related to different categories of evidence—they were relevant to different theories and defenses—, they could not have combined to preclude Exxon from receiving a fair trial. Thus, in totality, these rulings did not prejudice Exxon's ability to receive a fair trial and Exxon's Motion for a New Trial on this basis is DENIED.

C. Jury Instructions

Exxon finally argues that the Court made several errors in instructing the jury. Exxon raises the following challenges: (1) that the Court instructed the jury on waiver pretrial but then omitted an instruction from the final jury instructions; (2) the issue of preemption should have gone to the jury; (3) the Court should have instructed jury on imminent and immediate harm; (4) the Court should have instructed jury that preponderance of the evidence standard applies to jury's remediation of wells and cleanup site evaluation; (5) the Court should have instructed jury to offset from any damages figure any money that the State received from the ODD and GREE funds; and (6) the Court should have instructed on estoppel.

The State responds: (1) there was no evidence to support a waiver instruction; (2) preemption is a legal question that the Court resolves in New Hampshire; (3) the State's injury already occurred, so there was no need for this instruction; (4) the Court did instruct on this; (5) based on the Court's collateral source rulings,

no instruction was required; and (6) there was no evidence to support an instruction on estoppel.

The State's arguments are correct.

> The purpose of jury instructions is to identify issues of material fact, and to explain to the jury, in clear and intelligible language, the appropriate standards of law by which it is to resolve them. A trial court's decision to give an instruction must be based upon "some evidence to support a rational finding in favor of that [instruction]." The scope and wording of jury instructions, however, are within the sound discretion of the trial judge and are evaluated as a reasonable juror would have interpreted them. A jury charge is sufficient as a matter of law if it fairly presents the case to the jury such that no injustice is done to the legal rights of the parties. In a civil case, [the Supreme Court] review[s] jury instructions in context[, and] will reverse if the charge, taken in its entirety, fails to explain adequately the law applicable to the case in such a way that the jury could have been misled.

N.H. Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 433-34 (2009) (citations omitted).

1. Waiver

With respect to Exxon's waiver argument, it was not entitled to a jury instruction on waiver. Waiver is the intentional relinquishment of a known right or conduct indicating the intention to waive said right. *Gianola v. Cont'l Cas. Co.*, 149 N.H. 213, 214 (2003). An implied waiver will exist only if the evidence

indicates an actual intention of foregoing a right. *Id*. Waiver is a question of fact. *S. Willow Props., LLC v. Burlington Coat Factory of N.H., LLC*, 159 N.H. 494, 499 (2009). As this Court ruled in its Order denying Exxon's motion for summary judgment on waiver, laches, and estoppel, Exxon has never argued that the State affirmatively agreed not to seek damages for MTBE contamination. Order on Defs.' Mot. Summ. J. Dismissing State's Claims on the Basis of Equitable Estoppel, Waiver & Laches at 4 (Aug. 22, 2012). Thus, the only viable claim of waiver is one for implied waiver.

In its motion for summary judgment on waiver, Exxon argued that the State knew MTBE's characteristics but still opted in to the RFG program, thereby waiving any claims it had or would develop regarding MTBE contamination. However, the State disputed its level of knowledge. *See* Trial Tr. 1335-1399 (Jan. 22-23, 2013). During trial, Exxon attempted to prove the State's knowledge by presenting witnesses that testified that MTBE's characteristics were widely known and understood thereby suggesting the State should have known about MTBE.

The State countered this testimony with its own witnesses explaining that the first time State employees found MTBE in a contamination site, those employees were unable to identify the compound and asked the U.S. EPA for assistance. The State also presented testimony that it did not become aware of MTBE's full nature until the State of Maine published a study. *See* Trial Tr. 1335-37 (Jan. 22, 2013).

This testimony goes to the issue of waiver but it is also relevant to the issue of plaintiff's misconduct, and the Court gave an instruction on plaintiff's misconduct. In fact, the Court instruction on plaintiff's misconduct encompassed the same elements embodied in a waiver claim. The instruction for plaintiff's misconduct stated in pertinent part:

> If you find that ExxonMobil's product was unreasonably dangerous, ExxonMobil failed to provide a warning, or behaved negligently and ExxonMobil is liable, you should then go on to determine if the State committed misconduct and contributed to cause its own injuries.
>
> With respect to the State's alleged misconduct, ExxonMobil bears the burden to prove that it is more likely than not the State committed misconduct in the use of its product.
>
> Misconduct includes, but is not limited to, abnormal use of the product, misuse of the product, failure to discover or foresee dangers that an ordinary person or entity would have discovered or foreseen, voluntarily perceived to encounter a known danger, or failing to mitigate its damages.

Trial Tr. 12147:16-12148:9 (Apr. 5, 2013). By contrast, the pattern civil jury instructions provide a waiver instruction as follows: "A waiver is the voluntary relinquishment of a known right." Daniel Pope, N.H. Civ. Jury Instructions § 33.10 (2012). These instructions are similar because they both address the

State's knowledge and subsequent actions based on that knowledge.

Depending on the State's knowledge, the jury could have found that the State knew or should have known the characteristics of MTBE gasoline and thereby either waived any challenge it is now raising or should have been held partially responsible for its own injury. In other words, because the jury was instructed on and considered the issue of the State's knowledge-that the State knew of MTBE and used it anyway-the jury also considered whether the State waived any claims about MTBE contamination risks by knowingly using MTBE. The jury nonetheless rejected this theory. Thus, Exxon was not entitled to an independent waiver instruction because the plaintiff's misconduct instruction encompassed this affirmative defense.

Even if the plaintiff's misconduct instruction was insufficient to embody the notion of waiver, Exxon was not entitled to a waiver instruction because it failed to present any evidence of waiver. Exxon never presented testimony from any witness indicating that the State waived its right to protect New Hampshire waters from widespread contamination. Even if the jury believed that the State had some level of knowledge regarding the nature of MTBE, that knowledge does not require a finding of waiver. *See Makowiec v. Prudential Ins. Co.*, 83 N.H. 547, 549 (1929) (explaining that knowledge of an insurance policy naming husband as beneficiary was not conclusive evidence of husband's waiver or rescission of that policy). Thus, without some evidence, even circumstantial, that the State waived its right to bring

suit for MTBE contamination, Exxon was not entitled to an instruction on this affirmative defense. Exxon's Motion for a New Trial on this basis is DENIED.

2. Preemption

The preemption argument Exxon raises directly alleges the argument it raised pretrial and in its directed verdict motion. Order at 10-11 (Mar. 18, 2013). As such, the Court will not readdress it here. To the extent Exxon argues the jury should have been instructed on preemption in order to find facts from which the Court could further evaluate preemption, the Court considered and rejected this argument in its March 18 Order. Even assuming New Hampshire courts would adopt this view of preemption, there are no facts to support Exxon's theory. Exxon alleges the State's claims are preempted by the federal Clean Air Act and its RFG program. The Court rejected this legal argument. *See* Order on Defs.' Mot. for Summ. J. on Claims Preempted by Federal Law (Aug. 22, 2012).[14]

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[14] Although the parties did not raise it, the Court has reviewed the United Stated Supreme Court's recent preemption decision in *Mutual Pharm. Co. v. Bartlett*, 570 U.S. __, 133 S.Ct. 2466 (2013), and finds it does not apply to the facts of this case and does not alter this Court's preemption rulings. The facts in *Bartlett* are distinguishable from this case. In *Bartlett*, Mutual was unable to alter the composition of its product, a generic pharmaceutical drug, due to chemistry and federal law restrictions. Additionally, federal law prohibited Mutual from altering its warning label. Thus, as a matter of law, New Hampshire products liability law would have imposed upon Mutual an obligation to not comply with federal law. In this way, the Supreme Court found Bartlett's products liability claims preempted and reversed the jury verdict in her favor. *Id*. at 2473-75. In this case, the federal RFG program did not require manufacturers to use MTBE, and provided no particular labeling

There are no facts that a jury could find that would alter the legal analysis this Court already undertook. As such, Exxon's Motion for a New Trial on this basis is DENIED.

3. Imminent and Immediate Harm

Exxon's challenge regarding imminence of harm raises the same arguments it raised pretrial and in its limine motions; that the State should have been required to prove its injury either already occurred or was imminent. Any other category of injury should have been precluded. The Court addressed this argument in two separate pretrial orders and will not revisit it now. *See* Order on Motion in Limine at 2-5 (Jan. 4 2013); Order on Defs.' Motion for Partial Summ. J. on the State's Claim for Future Well Impacts and Unknown Impacts at 6 (May 30, 2012). Exxon's Motion for a New Trial on this basis is DENIED.

4. Preponderance of the Evidence

Exxon asserts that the jury was not instructed that it must find the State has proven its future testing and remediation damages by a preponderance of the evidence. In fact, this argument misstates the record. The Court instructed the jury that it had to find that it was more probable than not that the State sustained the loss it claimed for each item of loss or harm the State claimed. *See* Trial Tr. 12118:10-15

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requirements or restrictions. Additionally, the Second Circuit's recent ruling affirming the trial court's handling of the New York MTBE litigation supports this Court's preemption analysis. *See In re MTBE*, Nos. 10-4135-cv (L), 10-4329-cv (XAP), slip op. at *43-59 (2d Cir. July 26, 2013).

(Apr. 9, 2013). Exxon's Motion for a New Trial.on this basis is DENIED.

5. ODD & GREE Funds & Offsets

Exxon contested the Court's ruling categorizing the ODD and GREE funds as collateral sources and thereby precluding Exxon from admitting evidence regarding the funds. Nonetheless, Exxon sought an instruction asking the jury to offset any damage amount by the amount of funding the State had received in the past and would receive in the future for remediation efforts from the funds. Based on the Court's pretrial and trial rulings regarding the ODD and GREE funds, it would have been inconsistent for the Court to exclude evidence of the funds but instruct the jury to consider them in awarding damages. As such, because the Court declines to reconsider its substantive rulings on the collateral source, the Court properly declined to instruct the jury regarding the funds.

Additionally, Exxon alleges the Court erred by failing to instruct the jury that it could offset any damage amount it did find the State entitled to receive for preexisting contamination. The jury heard testimony explaining how the State estimated its damages figures. This testimony included an illustration by the State's expert Steve Guercia indicating that sites contaminated with MTBE are more costly to remediate than sites contaminated with other elements and compounds commonly found in New Hampshire. *See* Trial Tr. 5395 (Feb. 14, 2013). Guercia testified that in remediating MTBE contamination, other preexisting contaminants are also minimized. However, Guercia also said that

MTBE remediation costs the most. Trial Tr. 5395:22-5399:3 (Feb. 14, 2013). From this testimony, a jury could have considered the reasonableness of the State's damages figure. Whether Exxon was entitled to an offset and whether the State's damage figure was reasonable—based on the evidence in this case—-are one-in-the-same. There was no need for an independent instruction indicating to the jury that they were entitled to offset the State's damage award for any preexisting contamination. If the jury found that the State's damage figure was unreasonable, then it could have offset the figure by any amount it identified for preexisting contamination. The State noted, and the Court believes it bears highlighting, that Exxon never presented a monetary figure for the jury to consider in evaluating the benefit of remediating preexisting contamination. Instead, Exxon merely cast doubt on the State's damage figure. In this way, the instruction the Court gave-that the State had to prove its damage figure by a preponderance of the evidence-encompassed the offset argument Exxon raised, and an independent instruction on offsetting a damage award for preexisting contamination was unnecessary. Exxon's Motion for a New Trial on this basis is DENIED.

6. Estoppel

Finally, Exxon argues it was entitled to an estoppel instruction. The Court disagrees. As indicated above, Exxon was only entitled to an instruction on defenses for which it presented some evidence. *N.H. Ball Bearings*, 158 N.H. at 433-34. Estoppel requires the following elements be proven:

> [F]irst, a false representation or concealment of material facts made with knowledge of those facts; second, the party to whom the representation was made must have been ignorant of the truth of the matter; third, the representation must have been made with the intention of inducing the other party to rely on it; and fourth, the other party must have been induced to rely upon the representation to his or her injury.

Town of Seabrook v. Vachon Management. Inc., 144 N.H. 660, 666 (2000) (citation and quotation omitted).

Exxon never presented any witness that testified that the State made any statement regarding MTBE upon which Exxon relied to its detriment. Exxon's estoppel theory presumably posits that the State's entry into the RFG program—knowing MTBE was the likely oxygenate that oil refiners would use—induced Exxon to rely on the State's acceptance of MTBE in choosing MTBE as an oxygenate. However, the State's entry into the RFG program does not constitute an affirmative statement or material omission regarding the State's knowledge of MTBE or its willingness to waive any claim it might have regarding MTBE contamination. Further, Exxon never presented any evidence about detrimental reliance. Thus, Exxon failed to establish the requisite elements to be entitled to rely on an estoppel defense and was therefore not entitled to an instruction. Exxon's Motion for a New Trial on this basis is DENIED.

IV. Conclusion

Exxon's Motion for a Judgment Notwithstanding the Verdict, its Motion to Set Aside the Verdict, and its incorporated Motion for a New Trial are all DENIED.

So ordered.

8-9-13	s/
Date	Peter H. Fauver Presiding Justice

Appendix G

U.S. Const. art. VI, para. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. amend. XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §7545 (2000)

§ 7545. Regulation of fuels

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(k) Reformulated gasoline for conventional vehicles

(1) EPA regulations

Within 1 year after November 15, 1990, the Administrator shall promulgate regulations under this section establishing requirements for reformulated gasoline to be used in gasoline-fueled vehicles in specified nonattainment areas. Such regulations shall require the greatest reduction in emissions of ozone forming volatile organic compounds (during the high ozone season) and emissions of toxic air pollutants (during the entire year) achievable through the reformulation of conventional gasoline, taking into consideration the cost of achieving such emission reductions, any nonair-quality and other air-quality related health and environmental impacts and energy requirements.

(2) General requirements

The regulations referred to in paragraph (1) shall require that reformulated gasoline comply with paragraph (3) and with each of the following requirements (subject to paragraph (7)):

(A) NO_X emissions

The emissions of oxides of nitrogen (NO_X) from baseline vehicles when using the reformulated gasoline shall be no greater than the level of such emissions from such vehicles when using baseline gasoline. If the Administrator determines that compliance

with the limitation on emissions of oxides of nitrogen under the preceding sentence is technically infeasible, considering the other requirements applicable under this subsection to such gasoline, the Administrator may, as appropriate to ensure compliance with this subparagraph, adjust (or waive entirely), any other requirements of this paragraph (including the oxygen content requirement contained in subparagraph (B)) or any requirements applicable under paragraph (3)(A).

(B) Oxygen Content

The oxygen content of the gasoline shall equal or exceed 2.0 percent by weight (subject to a testing tolerance established by the Administrator) except as otherwise required by this chapter. The Administrator may waive, in whole or in part, the application of this subparagraph for any ozone nonattainment area upon a determination by the Administrator that compliance with such requirement would prevent or interfere with the attainment by the area of a national primary ambient air quality standard.

(C) Benzene content

The benzene content of the gasoline shall not exceed 1.0 percent by volume.

(D) Heavy metals

The gasoline shall have no heavy metals, including lead or manganese. The Administrator may waive the prohibition

contained in this subparagraph for a heavy metal (other than lead) if the Administrator determines that addition of the heavy metal to the gasoline will not increase, on an aggregate mass or cancer-risk basis, toxic air pollutant emissions from motor vehicles.

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(3)(A)(v) Oxygen Content

The gasoline shall have no heavy metals, including lead or manganese. The Administrator may waive the prohibition contained in this subparagraph for a heavy metal (other than lead) if the Administrator determines that addition of the heavy metal to the gasoline will not increase, on an aggregate mass or cancer-risk basis, toxic air pollutant emissions from motor vehicles.

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(6) Opt-in areas

(A) Upon the application of the Governor of a State, the Administrator shall apply the prohibition set forth in paragraph (5) in any area in the State classified under subpart 2 of part D of subchapter I of this chapter as a Marginal, Moderate, Serious, or Severe Area (without regard to whether or not the 1980 population of the area exceeds 250,000). In any such case, the Administrator shall establish an effective date for such prohibition as he deems appropriate, not later than January 1, 1995, or 1 year after such application is received, whichever is later. The Administrator shall publish such

application in the Federal Register upon receipt.

(B) If the Administrator determines, on the Administrator's own motion or on petition of any person, after consultation with the Secretary of Energy, that there is insufficient domestic capacity to produce gasoline certified under this subsection, the Administrator shall, by rule, extend the effective date of such prohibition in Marginal, Moderate, Serious, or Severe Areas referred to in subparagraph (A) for one additional year, and may, by rule, renew such extension for 2 additional one-year periods. The Administrator shall act on any petition submitted under this paragraph within 6 months after receipt of the petition. The Administrator shall issue such extensions for areas with a lower ozone classification before issuing any such extension for areas with a higher classification.

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(10)(E) Reformulated gasoline

The term "reformulated gasoline" means any gasoline which is certified by the Administrator under this section as complying with this subsection.

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(m) Oxygenated fuels

(1) Plan revisions for CO nonattainment areas

(A) Each State in which there is located all or part of an area which is designated under

subchapter I of this chapter as a nonattainment area for carbon monoxide and which has a carbon monoxide design value of 9.5 parts per million (ppm) or above based on data for the 2-year period of 1988 and 1989 and calculated according to the most recent interpretation methodology issued by the Administrator prior to November 15, 1990, shall submit to the Administrator a State implementation plan revision under section 7410 of this title and part D of subchapter I of this chapter for such area which shall contain the provisions specified under this subsection regarding oxygenated gasoline.

(B) A plan revision which contains such provisions shall also be submitted by each State in which there is located any area which, for any 2-year period after 1989 has a carbon monoxide design value of 9.5 ppm or above. The revision shall be submitted within 18 months after such 2-year period.

(2) Oxygenated gasoline in CO nonattainment areas

Each plan revision under this subsection shall contain provisions to require that any gasoline sold, or dispensed, to the ultimate consumer in the carbon monoxide nonattainment area or sold or dispensed directly or indirectly by fuel refiners or marketers to persons who sell or dispense to ultimate consumers, in the larger of—

(A) the Consolidated Metropolitan Statistical Area (CMSA) in which the area is located, or

(B) if the area is not located in a CMSA, the Metropolitan Statistical Area in which the area is located,

be blended, during the portion of the year in which the area is prone to high ambient concentrations of carbon monoxide to contain not less than 2.7 percent oxygen by weight (subject to a testing tolerance established by the Administrator). The portion of the year in which the area is prone to high ambient concentrations of carbon monoxide shall be as determined by the Administrator, but shall not be less than 4 months. At the request of a State with respect to any area designated as nonattainment for carbon monoxide, the Administrator may reduce the period specified in the preceding sentence if the State can demonstrate that because of meteorological conditions, a reduced period will assure that there will be no exceedances of the carbon monoxide standard outside of such reduced period. For areas with a carbon monoxide design value of 9.5 ppm or more of[2] November 15, 1990, the revision shall provide that such requirement shall take effect no later than November 1, 1992 (or at such other date during 1992 as the Administrator establishes under the preceding provisions of this paragraph). For other areas, the revision shall provide that such requirement shall take effect no later than November 1 of the third year after the last year of the applicable 2-year period referred to in paragraph (1) (or at such other date during such third year as the Administrator establishes

[2] So in original. Probably should be "as of".

under the preceding provisions of this paragraph) and shall include a program for implementation and enforcement of the requirement consistent with guidance to be issued by the Administrator.