THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2017-0142

Appeal of N. Miles Cook, III.

RULE 10 APPEAL OF FINAL DECISION
OF THE WETLANDS COUNCIL

BRIEF OF APPELLEE, STATE OF NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES

October 10, 2017

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL
SERVICES

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STATEMENT OF THE CASE AND FACTS

Appellant currently has a tidal docking structure consisting of a sixty foot by six foot (60' x 6') pier to a forty foot by three foot (40' x 3') ramp to a thirty foot to ten foot (30' x 10') float. Certified Record ("CR") 331, 10/09/15 Department Decision. The overall length of the structure is one hundred and seven feet (107'). *Id.* Appellant also has a mooring located on the Piscataqua River in front of his property. *Id.* at 332 ¶ 3. Further, Appellant is a property owner in a development called the Brickyard Estates. *Id.* at 389, Transcript of Hearing. In 1992, the Department of Environmental Services ("Department") approved a permit to the Brickyard Estates for an all tide access dock for use of the homeowners in the Brickyard Estates subdivision. *Id.* at ¶ 9a; 356, ¶ 10, Department Decision #2012-3200.

In order to use the Brickyard Estates dock, a homeowner in the Brickyard Estates has to join the Brickyard Estates Dockowners Association ("BEDA"). *Id.* Although there are 53 homeowners in the association, only 15 homeowners are members of the BEDA. CR 390, Transcript of Hearing.

In 2015, Appellant filed a permit application with the Department to expand his existing dock. CR 333, ¶ 12, 10/09/15 Department Decision. Under this permit application Appellant proposed to remove (4) 4' x 4' Permanent Mooring Blocks; add a 4' x 160' L Aluminum Truss Pier supported by 10 pilings and 6 helical Piling Anchors; add 7' x 14' landing float; and remove and re-install the existing 3' x 40' ramp, and 10' x 30' float supported by float stops, and helical mooring anchors. CR 8, Application for Permit. Appellant stated that he needed the new dock to gain additional access to water and for commercial reasons. *Id.* at 13.

Based upon information Appellant provided in response to a request for more information, the Department determined that Appellant would have 6 inches of water at the

proposed float location at 0.0' elevation mean low tide. CR 333, ¶ 16, 10/09/15 Department Decision.

The Department also found that a review of the prior year's tide tables for that location showed that of 365 days in the year there were 258 occasions of minus tides over 181 days that are less than the 0.0' elevation of mean low water, meaning that there would be 258 occasions in the year when there would be no water at the float location.[1] *Id.* at ¶ 17.

While there is no regulation regarding the length of dock in tidal waters, the Department strives for consistency in allowing permittees to install docks in tidal waters such that they have access to usable water over some range of the tidal cycle, usually one foot of water. CR 302, Decision and Order in Wetlands Council Docket # 13-12.

The Department's records show that of 228 residential tidal dock approvals issued from 1990 to 2013, all docks except 2 were less than 200 feet long. CR 302 Decision and Order, Wetlands Council #13-12; CR 356 ¶ 10, Department Decision 2012-3200. The two docks longer than 200 feet, (one of which was the dock for the Brickyard Estates), were approved more than 20 years ago and they were not representative of the Department's policy and practice. *Id.*

The Army Corps of Engineers ("ACE") reviewed Appellant's permit application and found that the proposal did not minimize impacts to living marine resources as expressed by the Environmental Protection Agency ("EPA") and the National Marine Fisheries Association ("NMFA"). CR 335, 11/16/15 Letter from Dept. of the Army at ¶ 1. The ACE also found that the proposed dock would have more mudflat and navigation impacts than his current dock. *Id.* at ¶ 2.

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[1] The Department's calculation reflects that there are some days in which minus tides will occur twice a day because the tide cycle is 13 hours.

The ACE further informed Appellant that the EPA and the NMFA expressed concern that his consultant's Essential Fish Habitat ("EFH") study was in error and lacking information. *Id.* at ¶ 3. Finally the ACE conveyed to Appellant that his residence was part of an authorized community water access subdivision plan to minimize EFH impacts and access deep water, and that plan gave him access to the facilities of the dock that abuts his property. *Id.* at ¶ 4. The ACE pointed out to Appellant that he currently had a dock with half tide access and the availability to use the Brickyard Estates all tide dock to access his mooring. *Id.* at ¶ 4.

The ACE provided information to Appellant's consultants from the EPA including: concern with the claim that there would be more access at the proposed dock due to the failure to address the days of minus tides, *i.e.* 20 days with minus tides in September; concern with the claims that that the design would prevent the 398 sq. ft. float from resting on the mudflat at low tide because none of the plans detailed the float stops - and based on the plans submitted there would not be 18 inches of clearance at low tide; and concern that there were errors and missing information in Appellant's EFH study. CR 360, Email chain from David Kedell/Michael Johnson to Adele Fiorello.

When Appellant testified before the Wetlands Council ("Council"), he agreed that he was still a member of the Brickyard Estates and he was eligible to join the Dockyard association. CR 390, Transcript of Hearing. He also agreed that only 15 homeowners of the Brickyards Estates were members of the BEDA. *Id.* Further, Appellant acknowledged that DES' denial of the permit was grounded in the Wetlands regulations. *Id.* at 394-395. Appellant also testified that in response to DES's request for more information, specifically related to additional findings as to how much water he would have at the proposed float location, he submitted evidence that he

would have .5 feet of water at mean low tide. *Id.* at 397-398. He testified that he purchased a skiff that drafted six to eight inches of water. *Id.* at 398.

Appellant further acknowledged that the DES analysis included not only the amount of water at the mean low tide but also on minus tide days and found that 258 instances of minus tides over 181 days in which there would be no water at the proposed float location at low tide. *Id.* at 399. Appellant disagreed with the number of days that DES determined there would be no water at low tide, but he agreed that there would be times when the minus tides would result in no water at low tide. ("Yes there are times when those minus tides will lead to that – the 6 inches of water being further out.") *Id.* at 400, 401.

Appellant stated that one of the reasons he needed to expand the dock was for his business, but he agreed that he did not live in the commercial zone and the use he described to the city was not described as commercial. *Id.* at 433. Appellant acknowledged that the primary use for the proposed dock was private recreational. *Id.* at 434. Appellant admitted that even if he was using the boat for clients, he would still have to check the tide before he went out. *Id.* at 436-437.

Appellant also admitted that he would have access 4 -6 hours a tide cycle. *Id.* at 436.

Appellant agreed that he currently had a foot of water for a good portion of the tide cycle but he didn't consider it safe. *Id.* at 443. Still, Appellant acknowledged that his proposed dock would provide him with only 6 inches of water at dead low tide, and while he would have more water at other times of the tide cycle, there would be instances when he would have less than 6 inches. *Id.* at 427. Finally, Appellant testified that the additional amount of water he was going to get from the 260% expansion from the existing dock was not ideal, but he described the appreciable gain as "a little bit." *Id.* at 404-405.

The Council heard Appellant's appeal of the Department's decision denying his permit application on August 9, 2016. RSA 21-O:5-a, V. Pursuant to RSA 482-A:10, Appellant had the burden to prove that the Department's decision was unreasonable or unlawful. RSA 482-A:10, V. After hearing the evidence, the Council was evenly split on a motion that Appellant had not met his burden to demonstrate that he had a need for the expanded dock within the meaning of N.H. Admin. Rules, Env-Wt 302.01(a), and therefore the Department acted neither unreasonably nor unlawfully. CR 140-141, Decision and Order #15-12.

The Council was also evenly split on a motion that the Department acted unreasonably in finding that there was no more usable water at the proposed dock float compared with the existing dock. *Id.* at 141. Further, the Council was also split on a motion that Appellant failed to meet his burden of proof that the Departments' denial of his application was illegal or unreasonable. *Id.* Because the burden was on Appellant before the Council and he did not meet that burden to prove that the decision by the Department was unlawful or unreasonable, the appeal was denied. *Id.* at 142. The Council then took up the parties findings of fact, and made determinations consistent with their decisions. *Id.* at 143-148.

Unfortunately, part of the record of the adjudicatory hearing was inadvertently missing. The record contained Appellant's entire case in chief but was missing part the direct, cross-examination and re-direct of the Department's chief witness, Collis Adams, and part of the direct and cross examination of the Department's rebuttal witness, Rene Pelletier. The Department submitted evidence that the regular clerk for the Wetlands Council was unexpectedly absent from the hearing due to a family emergency. CR 168-169, Affidavit of Carolyn Guerdet. The individual who was called upon to substitute for the regular clerk was unaware that the tape recording device had not recorded the entire hearing until after the proceedings, and she

submitted a sworn statement that the failure to record the proceedings in their entirety was not due to any intentional act but due an equipment malfunction. *Id.*

SUMMARY OF THE ARGUMENT

The Department acted reasonably and lawfully in denying Appellant's application for a permit to enlarge his existing dock after reviewing criteria for evaluation established under N.H. Admin. Rules, Env-Wt 302 and the approval conditions established under N.H. Admin. Rules, Env-Wt 304.04(a) (1) - (20). Among the grounds relied upon by the Department was that Appellant failed to meet N.H. Admin. Rules, Env-Wt 302.01(a) relative to "need" based upon the Department's finding that Appellant had an existing dock with partial tide access, a mooring in the Piscataqua River in front of his property, and the ability to become part of the Brickyard Estates Dockowner's Association and use the all-tide access dock on the abutting property to access his mooring. CR 106, Department Denial. In so finding, the Department concluded that Appellant's proposed dock included constructing an additional 160 linear feet of permanent structure, an additional 105 square feet of float onto the tidal resource where none currently existed, and an expansion of 260% with no appreciable gain in water depth at the new float location, and as such did not meet the criteria relative to avoidance and minimization of impacts to the maximum extent practicable under N.H. Admin. Rules, Env-Wt 302.03. *Id.* The Department found further that the alternative proposed by Appellant did not represent one with the least impact to wetlands or surface waters on the site because it had been established that alternatives existed that involved no additional impact to the tidal resources, those being use of his existing dock, the mooring, and membership in the community dock association and use of the association's all tide dock on the abutting property. *Id.*

There is no specific definition of the term "need" in RSA 482-A, or in the Wetlands Rules. As noted by the Administrator of the Wetlands Bureau, because of the variety of permit applications, this analysis has to be made on a case-by-case basis, and the applicant has to articulate his or her need for the proposed dock. CR 140, Decision and Order on Petition for Appeal; CR 505-506, Transcript of Hearing. However, the Department has consistently interpreted this term in the context of dock permits in a manner that reflects the purpose of the statute, and also an applicant's common law right to wharf out. In the context of this case, involving dock length, the Department's interpretation of "need" consisted of an analysis as to whether the proposed tidal dock would afford the permittee access to "usable water." CR 302, Decision and Order in Wetlands Council Docket # 13-12.

While RSA 541-A:31 requires the council to maintain a complete audio recording of the hearing, the statute provides only a remedy for the failure to maintain a complete record in disciplinary or occupational license cases, in which case the statute calls for dismissal of the action. RSA 541-A:31, VII. The statute provides no remedy for the failure to maintain a complete oral recording for hearings related to agency decisions, other than disciplinary or other occupational licenses. *Id.* Under the circumstances of this case, where the portion of the missing transcript occurred due to machine malfunction and not due to any intentional act by any member of the Council or the Department, remand of this case is not the proper remedy for such an occurrence. Rather, Appellant should be required to demonstrate specific prejudice to his appeal. *State v. Marshall*, 162 N.H. 657, 672 (2011) (*citing State v. Jerot*, 158 N.H. 181, 183 (2008)). Because Appellant cannot establish specific prejudice, any error that occurred as a result of the incomplete record is harmless.

Finally Appellant has raised the issue of a council member arriving late for deliberations as grounds for remand. The record shows that Council Member Sheridan Brown was present and participated throughout the adjudicatory hearing and arrived just moments after deliberations had begun. Council Member Brown fully participated in the remainder of the three hour deliberations and discussed the evidence and exchanged his thoughts and opinions as to that evidence, as one would expect from a full and fair proceeding. To the extent that Appellant argues that Council Member Brown missed a discussion related what Council Member St. Pierre characterized as "unpromulgated regulations," the record is clear that the Department's interpretation of the term "need" was discussed throughout the deliberations and Appellant suffered no unfair prejudice and/or due process violation as a result of Mr. Brown being a few moments late for the start of deliberations.

ARGUMENT

I. STANDARD OF REVIEW

This Court's review of agency decisions is narrow in scope. *Appeal of Town of Rindge*, 158 N.H. 21, 24 (2008); *Appeal of Town of Bethlehem*, 154 N.H. 314, 318 (2006). To prevail on appeal, Cook "must show that the Council's order was 'clearly unreasonable or unlawful.'" *Appeal of Old Dutch Mustard Co.*, 166 N.H. 501, 505 (2014). The Council's findings of fact "shall be deemed to be prima facie lawful and reasonable, and the decision shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable." *Id.; see also Appeal of Regenesis Corp.*, 156 N.H. 445, 451 (2007); RSA 541:13 (2007). The presumption that the findings of fact are deemed *prima facie* lawful and reasonable may be overcome only by a showing that there

was no evidence from which the fact finder could conclude as it did. *See Regenesis Corp, supra.*; *Appeal of Basani*, 149 N.H. 259, 261-62 (2003).

This Court's review of statutory interpretation is *de novo*. *Coan v. New Hampshire Dept. of Envtl. Servs.*, 161 N.H. 1, 5 (2010). However, the Department's interpretation of its laws "is to be accorded great deference." *In re Pelletier*, 125 N.H. 565, 569 (1984). Generally, the agency's interpretation is of controlling weight unless it is plainly erroneous or inconsistent. *Cheshire Hosp. v. New Hampshire – Vt. Hospitalization Servs., Inc.*, 689 F.2d 1112, 1117 (1st Cir. 1982). This Court will uphold the agency's statutory interpretation if it is consistent with the language of the law and consistent with the purposes the law is intended to serve. *Appeal of Old Dutch Mustard*, 166 N.H. at 506.

II. THE DEPARTMENT OF ENVIRONMENTAL SERVICES AND THE WETLANDS COUNCIL'S DENIAL OF APPELLANT'S APPLICATION FOR A DOCK PERMIT WAS SUPPORTED BY EVIDENCE AND WAS REASONABLE AND LAWFUL.

A. The Department's Interpretation of the "Need" Criteria is Supported Under RSA 482-A:1, RSA 482-A:11, I, and N.H. Admin. Rules, Env-Wt 302.01 and Env-Wt 304.04(a)(1).

The Department of Environmental Services acted reasonably and lawfully in denying Appellant's application for a permit to construct a dock after reviewing criteria for evaluation established under N.H. Admin. Rules, Env-Wt 302 and the approval conditions established under N.H. Admin. Rules, Env-Wt 304.04(a) (1) - (20). The rules establishing the criterion and approval conditions for fill and dredge permits were properly promulgated by the Department under RSA 482-A:11, which directs the Commissioner to adopt reasonable rules to implement the purposes of this chapter. RSA 482-A:11, I. Further, the statute mandates that decisions of the "department or council under this chapter shall be consistent with the purposes of this chapter as set forth in RSA 482-A:1." RSA 482-A:1, II.

Under RSA 482-A:1, entitled "Finding of Public Purpose," the purposes of the chapter have been established as follows:

> [i]t is found to be for the *public good* and welfare of this state to protect and preserve its submerged lands under tidal and fresh waters and its wetlands, (both salt water and fresh-water), as herein defined, from despoliation and unregulated alteration, because such despoliation or unregulated alteration will adversely affect the value of such areas as sources of nutrients for finfish, crustacea, shellfish and wildlife of significant value, will damage or destroy habitats and reproduction areas for plants, fish and wildlife of importance, will eliminate, depreciate or obstruct the commerce, recreation and aesthetic enjoyment of the public, will be detrimental to adequate groundwater levels, will adversely affect stream channels and their ability to handle the runoff of waters, will disturb and reduce the natural ability of wetlands to absorb flood waters and silt, thus increasing general flood damage and the silting of open water channels, and will otherwise adversely affect the interests of the general public. RSA 482-A:1. (Emphasis added).

The Department's decision was based upon its determination that Appellant failed to demonstrate "need" under N.H. Admin. Rules, Env-Wt 302.01(a) because Appellant had an existing dock with partial tide access, a mooring in the Piscataqua River in front of his property, and the ability to become part of the Brickyard Estates Dockowner's Association and use the all-tide access dock on the abutting property to access his mooring.

While there is no specific definition of the term "need" within RSA 482-A or N.H. Admin. Rules, Env-Wt 100 *et seq.*, the term "need" has been interpreted by the Department in the context of the overall statutory scheme, mindful of the intent of the legislation. *Appeal of City of Portsmouth*, 151 N.H. 170, 174 (2004). N.H. Admin. Rules, Env-Wt 302.01(a) specifies that for tidal wetlands:

> need shall be demonstrated by the applicant prior to department approval of any alteration of tidal wetlands. No project shall be allowed that intrudes into a tidal wetland unless the department finds it to be for the *public good* as set out in RSA 482-A:1. Preserving the integrity of salt marshes and other tidal wetlands shall be given highest priority by the department, because of the high productivity and rarity of such wetlands and the difficulty in restoration of value and function for those environments.

N.H. Admin. Rules, Env-Wt 302.01(a) (emphasis added).

Because the legislature has dictated that the rules in implementing the chapter, as well as decisions of the Department, be consistent with the purposes of the chapter identified in RSA 482-A:1, the Department has promulgated and interpreted its regulations in such a way that purposes of the chapter are reflected and applied to the various fill and dredge permit applications that come before it. RSA 482-A:1; N.H. Admin. Rules, Env-Wt 302.01(a). Thus the "public good" that the Department is required to find under N.H. Admin. Rules, Env-Wt 302.01(a) has been interpreted to mean the "preservation and protection of its submerged lands under tidal and fresh water and its wetlands." *See* RSA 482-A:1.

In the instant case, in the context of a permit for a longer dock in tidal waters, the Department applies a balance of interests in interpreting the "need" criteria reflecting the littoral rights of property owners, *i.e.* the right to wharf out, balanced with the public purposes of the chapter, *i.e.* preservation and protection of the State's submerged lands under tidal and fresh water and its wetlands. RSA 482-A:1; N.H. Admin. Rules, Env-Wt 302.01(a); *See also Lakeside Lodge v. Town of New London*, 158 N.H. 164,169-170 (2008)(Common law right to use and occupy waters adjacent to their shore are subject to the paramount right of the State to control them reasonably in the interests of navigation … health and other public purposes.).

As noted by the Administrator of the Wetlands Bureau, the Department expects the need criteria to be articulated in the application, but also expects that the applicant will undertake an alternatives analysis. CR at 506, Transcript of Hearing. But in the context of tidal docks, the criteria are analyzed on a case by case basis. *Id.* at 504-506. Still, the Department strives for consistency in allowing permittees to install docks in tidal waters such that they have access to usable water over some range of the tidal cycle, (usually one foot of water). CR 302, Decision

and Order in Wetlands Council Docket # 13-12. As noted by some members of the Council, this is not an unwritten rule, but rather guidelines used by the Department based upon their expertise in Wetlands permitting and also their knowledge and experience in evaluation impacts to the State's valuable tidal wetlands. CR 531, Transcript of Deliberations.

The record reflected that the Department determined that Appellant currently had a dock that affords him 4-6 hours of access per tide cycle, a mooring in front of his property, and the deeded right to a membership in the all-tide access private community dock that abuts his property. CR 104, 105, 10/9/15 Department Decision. Thus the Department found that Appellant currently had practicable alternatives that would have less adverse impact to areas and environments under the Department's jurisdiction. N.H. Admin. Rules, Env-Wt 302.04(d)(1). The Department determined that it could not grant the permit because based upon the findings, the project caused random or unnecessary destruction of wetlands. N.H. Admin. Rules, Env-Wt 302.04(d)(3).

Considerable weight and deference should be given to the agency's interpretation. *In re Pelletier*, 125 N.H. at 569. Under the rules of statutory construction, this is referred to as the doctrine of "administrative gloss." *Nash Family Inv. Prop. v. Town of Hudson*, 139 N.H. 595, 602, 660 A.2d 1102 (1995). An "administrative gloss" is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." *Id.* To the extent that the term "need" is not specifically defined in statute or rule, deference should be shown to the Department's interpretation because it was guided by, and is consistent with the statutory context in which the term appears. *Pelletier*, *supra*; *See also* RSA 482-A:1. In the context of this case, the Department's interpretation was grounded upon fair and consistent

application of guidelines it has established based upon its extensive permitting experience, its knowledge and understanding of impacts to the State's tidal wetlands, and the legislative purpose – "preservation and protection of its submerged lands under tidal and fresh water and its wetlands." *See* RSA 482-A:1.

The Court should reject Appellant's argument that the term "need" should be defined as in *Nottingham*, a case involving a large groundwater withdrawal. *Appeal of Town of Nottingham*, 153 N.H. 539, 553-54 (2006). Among the issues decided in *Nottingham* was whether the policy expressed in RSA 481:1 applied to large groundwater withdrawals governed under RSA chapter 485-C. *Id.* at 544. The Court found that RSA 481:1, which contained the statement of purpose for an entirely different chapter, did not impose any specific additional test that DES must apply to rules relating to large groundwater withdrawals. *Id.* at 545. The Court agreed that the more specific chapter, RSA chapter 485-C, provided the criteria that the Department must follow and that RSA 481:1 imposed no specific additional test that the Department need apply. *Id.*[2]

The statute at issue in *Nottingham,* RSA 485-C, and the statute at issue in the instant case, RSA 482-A, relate to entirely different chapters under the Department's jurisdiction. Defining the term "need" to mean "requisite, desirable and useful" would not be consistent with the purposes identified by the legislature in RSA 482-A:1 because it does not address the protection and preservation of tidal and fresh waters or wetlands. *See* RSA 485-C:1; RSA 482-A:1. Thus, the guidance in *Nottingham* does not support borrowing a definition that does not reflect, but rather ignores the dictates of the legislature that the rules established and decisions made by the Department implement the purposes of this chapter as identified in RSA 482-A:1. *Id.* at 545.

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[2] In addition, the Court found that the proposed withdrawal at issue was *not* subject to the permitting requirements of RSA 482-A:3, I. *Id.* at 547.

Similarly, the Court should also reject Appellant's suggestion that the term be defined as "necessary", *i.e.*, that without a *permit* the project cannot be completed. Appellant's Brief p. 9. As in the case of RSA chapter 485-C, the purposes of the two chapters, RSA chapter 482-A and RSA chapter 483-A are different, with the latter not reflecting the emphasis on the protection and preservation of tidal and fresh waters or wetlands.

Appellant appears to argue that because RSA 482-A:11 does not specifically grant the Department the authority to promulgate the "need" criteria under N.H. Admin. Rules, Env-Wt 302.01 and Env-Wt 304.02(a)(1), and the Department has exceeded its authority in this regard. This argument is without merit. The statute does not contain detailed criteria for the permitting process but delegates to the Department broad authority to promulgate rules in order to implement the purposes of the chapter. RSA 482-A:11, I. As noted *supra.*, the need criteria as interpreted by the Department is consistent with the purposes of the chapter. Further, the Joint Legislative Committee on administrative rules approved the Department's rules pursuant to RSA 541-A:2. Thus, the Department has not usurped any power allocated to the legislature.

Moreover, this argument was not raised in Appellant's Motion for Reconsideration or in his Notice of Appeal. It is well established that arguments not raised in a party's notice of appeal are not preserved and they are deemed waived. *See* RSA 541:4; *See also Sara Realty, LLC v. Country Pond Fish & Game Club, Inc.*, 158 NH 578, 582 (2009); *Dupont v. N.H. Real Estate Commission*, 157 NH 658, 661-62 (2008); *State v. Blackmer*, 149 NH 47, 49 (2003); *State v. Martin*, 145 NH 313, 315 (2000).

B. The Wetlands Council's Decision that Appellant Did Not Meet his Burden is Properly Supported by Specific Factual Findings.

The Council took up deliberations on August 30, 2016, and issued its Order on December 13, 2016. The record demonstrates that the Council was evenly split on whether Appellant had

met his burden to establish that he had a need for the expanded dock within the meaning of N.H. Admin. Rules, Env-Wt 302.01(a), and therefore the Department acted neither unreasonably or unlawfully. CR 620-623, Transcript of Deliberations. The Council was also evenly split on a motion that the Department acted unreasonably in finding that there was no more usable water at the proposed dock compared with the existing dock. *Id.* at 661-671. Further, the Council was also split on a motion that Appellant failed to meet his burden of proof that the Department's denial of his application was illegal or unreasonable. *Id.* at 673.[3] The fact that the Council split its vote five to five on these motions does not mean that it did not reach any decision because Appellant had the burden of proof. RSA 482-A:10, V. The failure of Appellant to convince a majority of the Council that the decision of the Department was unreasonable or unlawful results in a decision by the Council to affirm the Department's denial of Appellant's permit application. CR at 142, Decision and Order.

As noted, *supra.*, the Council also addressed the parties requests for findings of fact, which it attached to the Decision and Order in this matter. In that regard, the Council made findings of fact consistent with its rulings. For example, the Council found that Appellant had not submitted sufficient evidence to establish that his proposed dock would result in an appreciable gain of water from his current dock and reduce impacts to the tidal mudflat. CR 677-679, Transcript at 165-167:17. The Council also determined that Appellant did not prove that Mr. Adams agreed that his proposed dock would result in fewer environmental impacts than his current dock. CR 679 – 682, Transcript at 167:17 – 170:4. The Council found that Appellant did not prove that Mr. Adams agreed that the new dock would result in an appreciable gain of

[3] However, later in the proceedings when addressing the parties' Finding of Fact the Council found "true" that Appellant had not submitted sufficient evidence to establish that the Department's denial of his permit was unlawful or unreasonable, reflecting their ultimate decision on the appeal. CR at 731.

water over the tidal cycle. CR 682 – 684, Transcript at 170:8 - 172:7.

With regard to the Department's findings of fact, the Council found that the dock built for the Brickyard Estates was 247 feet long and had all tide access, and all property owners in the Brickyard Estates were eligible to become members of the Brickyard Estates Dockowners Association with a right to use the all-tide access dock. CR 697, Transcript 185:9-25. The Council found that Appellant currently had a dock that provided him with partial tide access, the plans for which indicated 6 feet of water at mean high tide. CR 697, Transcript at 185-22 – CR 697, Transcript at 186:19. The Council also found that the proposed dock would not provide Appellant with all tide access, CR 711, Transcript 199:7-16, and there would be no additional impacts to wetlands if Appellant continued to use his private partial tide dock, and the full tide access dock next door, CR 711, Transcript at 199:18-23.

Based upon the foregoing, the record demonstrates that the Council performed it statutory duty in deciding that Appellant did not meet his burden to establish that the Department's decision was unreasonable or unlawful, and in so doing the Council specified the factual and legal basis for that decision and identified the evidence in the record supporting that decision. RSA 582-A:10, VI.

C. Appellant Suffered No Specific Prejudice by the Failure to Maintain a Complete Audio Recording of the Adjudicatory Hearing.

The Department does not dispute that part of the record of the adjudicatory hearing was missing. The record contained Appellant's entire case-in-chief, but was missing part of the direct, cross-examination, and re-direct of the Department's chief witness, Collis Adams, and part of the direct and cross-examination of the Department's rebuttal witness, Rene Pelletier. The evidence showed that the entirety of the proceedings was not recorded when the recording

equipment malfunctioned, a malfunction that was not caught by a substitute clerk for the proceedings.[4]

Under RSA 541-A:31, the Council is required to record verbatim the adjudicatory hearing, and at the request of any party or upon the agency's own initiative, such record shall be transcribed by the agency if the requesting party or agency shall pay all reasonable costs for such transcription. RSA 541-A:31, VII. The statute provides that if a transcript is not provided within 60 days of a request by a person who is a respondent party in a disciplinary hearing before an agency responsible for occupational licensing, the proceeding shall be dismissed with prejudice. *Id.* But the statute provides no remedy in cases where a record or a portion of the record is missing for an appeal of any other type of agency decision. *Id.*

Appellant is requesting that his appeal be remanded due to the fact that part of the oral proceeding was not recorded. In that sense, Appellant appears to argue that the failure of the Council to record the entire proceedings is error *per se*, but there is nothing in RSA 541-A:31 that provides for such a remedy, and he has submitted no authority to support such a finding. The Department submits that such a remedy is not appropriate where the missing portion of the record occurred through no intentional act, but was caused by machine malfunction. Further, the error that occurred was not the fault of the Department because this evidence was never in the Department's possession or control.

In seeking such a remedy, Appellant should be required to demonstrate how the incomplete record has caused him "specific prejudice." *State v. Marshall*, 162 N.H. 657, 672

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[4] The State submitted evidence that the regular clerk for the Wetlands Council was unexpectedly absent from the hearing due to a family emergency. The individual who was called upon to substitute for her was unaware that the tape recording device had not recorded the entire hearing until after the witnesses testified and the failure to record the proceedings in their entirety was not due to any intentional act but due an equipment malfunction. CR 168-169, Affidavit of Carolyn Guerdet.

(2011). In *Marshall*, this Court has held that a criminal defendant's convictions would not be vacated based upon the fact that seven (7) minutes of trial testimony from the State's expert witness were unrecorded because the defendant failed to carry his burden of demonstrating specific prejudice. *Id.*, (*citing State v. Jerot*, 158 N.H. 181, 183 (2008)). In reaching this decision, the Court explained that even if the defendant had correctly characterized the content of the missing testimony, it would not be grounds to vacate the jury verdict, as there was sufficient countervailing evidence to support the jury's convictions. *Id.* Furthermore, the court noted that the missing testimony did not affect the defendant's ability to appeal his case, reasoning that "[a]t no time . . . has the defendant demonstrated, or even argued, how Dr. Barbieri's missing cross-examination testimony has any relevance to his conviction for receiving stolen property." *Marshall*, 162 N.H. at 671-72.

In the instant case, Appellant has failed to submit sufficient evidence that the incomplete hearing transcript has caused "specific prejudice" to his case. To that end, Appellant states that the Council relied on testimony from Mr. Adams and Mr. Pelletier on the issue of need and whether there would be an appreciable gain in water depth. The certified record reflects, however, that the Council did not rely on Mr. Pelletier's testimony on either of these issues. CR 140, Decision and Order. Further, on the issue of "need" the record reflects that the Council reviewed the testimony of many of Appellant's witnesses, including the testimony of Mr. Adams and the Department's Exhibit B which was a series emails from the Army Corps of Engineers to one of Appellant's experts which addressed the issues he raised, but the a majority Council did not find Appellant's evidence persuasive. *Id.*

Finally, Appellant is not entitled to another form of relief against the Department because neither the Department, nor the Council destroyed or intentionally withheld the missing portions

of the record. In his pleadings, Appellant stated that the Council "*kept* only the direct examination of Department witnesses and *turned off* the recorder for cross examinations," (Appellant's Brief at p. 6), and also that the State "*destroyed* the recording of their cross examinations . . . ." CR 173 Appellant's Reply at 3 (emphasis added). These statements incorrectly describe the mis-recording of the hearing as an intentional act of destruction by the State. As clearly described in Ms. Guerdet's affidavit, however, the Council did not turn off the recorder or destroy any recordings, but rather "[a]t the close of the hearing, [Ms. Guerdet] noticed that the recording device had turned off before [she] turned it off." CR 168, Affidavit of Carolyn Guerdet ¶ 5.

Moreover, the Department was never in "possession or control" of the missing portions of the transcript and therefore it would be "unfair" to penalize the Department for the inadvertent equipment failure. *State v. Laurent*, 144 N.H. 517, 523 (1999) (missing evidence instruction not warranted where the missing evidence was never in the State's possession or control).

Based upon the foregoing, Appellant's request for a remand as a result of missing portion of the oral recording is not appropriate, as Appellant has submitted insufficient legal or factual justification to remand the case on that ground.

D. Appellant Suffered No Specific Prejudice by the Late Arrival of One Member of the Council for Deliberations.

Finally, Appellant has raised the issue of a council member arriving late for deliberations as grounds for remand. The record shows that Council Member Sheridan Brown was present and participated throughout the adjudicatory hearing and he arrived just moments after deliberations had begun. The record demonstrates that Council Member St. Pierre began reading his prepared statement and Council Member Brown joined the proceedings moments later. CR 516, 520, Transcript of Deliberations. The portion of deliberations Council Member Brown

missed was only four pages in the transcript and part of those four pages was devoted to identifying what part of the record was being discussed. *Id.* at 517-518.

When Council Member Brown arrived, Council Member St. Pierre continued reading his statement. *Id.* at 520. Council Members Brown and St. Pierre, as well as the other council members, fully participated in the remainder of the three hour deliberations, discussed the evidence, and exchanged their thoughts and opinions as to that evidence, as one would expect from a full and fair proceeding. To the extent that Appellant argues that Council Member Brown missed a discussion related what Council Member St. Pierre characterized as "unpromulgated regulations," the record is clear that the issue of how the Department interpreted the term "need" was discussed throughout the deliberations and Appellant suffered no due process violation or prejudice as a result of Council Member Brown being a few moments late for the start of deliberations. Moreover, during Council Member Brown's brief absence, other than Council Member St. Pierre, no other council member spoke as this truly was the commencement of deliberations.

The cases cited by Appellant are not analogous to the circumstances complained of by Appellant. Those cases addressed the dismissal of a juror for cause and substitution of an alternate juror or jurors after deliberations had begun pursuant to RSA 500-A:13, V. *State v. Sullivan*, 157 N.H. 124 (2008); *see also Opinion of the Justices*, 137 N.H. 100, 104-05 (1993)(Review of procedure in SB 61 (N.H. 1993) to allow for substitution of alternate juror after a civil or criminal case had been finally submitted to the jury).

While the Department does not dispute that council members must meet the impartiality standards constitutionally demanded as jurors, *see Winslow v. Town of Holderness*, 125 N.H. 262 (1984), that does not mean that RSA 500-A:13, V is applicable to the instant case, particularly

where there was no substitution of council members, the late arrival of Council Member Brown did not the interrupt the flow of the proceedings (CR 520, Transcript at p. 9:18 "We just started."), and the "need' criteria continued to be discussed and deliberated by the panel throughout the remaining three hours of deliberations. Appellant can only speculate that the absence of Council Member Brown had an impact on the proceeding. Appellant's Brief at p. 12 ("It's unclear what effect hearing the entirety of deliberations would have had on Mr. Brown's ultimate vote.") The prejudice cited by Appellant appears not to be attributable to his absence, but rather his full participation in the proceedings. *Id.* ("Nine members would have been able to reach a five to four decision.") Because the absence of Council Member Brown at the very beginning of deliberations was *de minimus*, and Appellant can show no specific prejudice to the proceedings as a result of that absence, the decision of the Council should be affirmed.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Honorable Court affirm the administrative decision below.

The Department requests a 15-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES

By its attorney,

GORDON J. MACDONALD
ATTORNEY GENERAL

Dated: October 10, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to New Hampshire Supreme Court Rule 16(7) the undersigned certifies that the original and eight copies of this brief have been hand-delivered on October 10, 2017 to the Clerk of the Supreme Court of New Hampshire.

Pursuant to New Hampshire Supreme Court Rule 16(10)(1) the undersigned certifies that on October 10, 2017 two copies of this brief were sent via first class mail to all counsel of record.

Mary E. Maloney