THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0650

Appeal of New Hampshire Department of Environmental Services

APPEAL PURSUANT TO RULE 10 FROM AN ORDER

OF THE WETLANDS COUNCIL

ANSWERING BRIEF OF NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES

July 17, 2019

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES

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ARGUMENT

I. THE APPELLEES' BRIEF DESCRIBES A PROCESS UNLIKE THE ONE THAT ACTUALLY OCCURRED.

It appears that the Corrs, Appellees/Cross-Appellants ("Appellees"), essentially now assert that the Hearing Officer left the issue of whether height can be regulated entirely to the Council members,[1] that the Department somehow acquiesced to this delegation, and that the Council remanded the decision to the Department because it found the Department's method for measuring height "unenforceable." Even as asserted, this presents several problems but it also bears no resemblance to what actually occurred.[2]

A. The Appellees Incorrectly Describe the Statutory Appeal Process.

The foundation of the Appellees' argument rests on their own description of the Wetlands Council process which they splice together from pieces of RSA 21-M, RSA 21-O, RSA 541, and RSA 541-A into a puzzling administrative slaw. AB 16-20. The State will not reiterate the entire argument made by the Appellees but, by way of example, the Appellees assert that because the Wetlands Council statute (RSA 21-O) mentions that appeals of Council decisions shall conform to RSA 541, the specific statutes governing council proceedings must be ignored.

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[1] Appellees' Brief, 3 (stating: "The Hearing Officer left the consideration of those matters to the Council….").

[2] "AB" refers to Appellees' Brief;
"State's Brief" refers to the State's opening brief;
"Supp." refers to the supplement included with the State's opening brief;
"Supp.2" refers to the supplement included with the State's answering brief;
"App." refers to the appendix submitted with the State's opening brief;
"H" refers to the May 8, 2018 Hearing transcript;
"Del.Tr." refers to the June 12, 2018 deliberations transcript;
"Rec.Tr" refers to the October 9, 2018 reconsideration deliberation transcript;

Specifically, they argue that RSA 21-M must be abandoned during requests for rehearing in favor of the broad description of rehearing in RSA 541:3.

First, RSA 21-M:3, VIII-X describes the relative duties of the Council and Hearing Officer in great detail. It clearly states that "the hearing officer shall … Decide *all* questions of law *during the pendency of an appeal*." RSA 21-M:3, IX(e) (emphasis added). Therefore, while an appeal is pending, the Hearing Officer, and only the Hearing Officer, must decide all questions of law. The statute further states that the Hearing Officer shall "Prepare and issue written decisions *on all motions* and on the merits of the appeal…." RSA 21-M:3, IX(f). "[A]ll motions" necessarily includes motions for reconsideration.

Second, there is nothing inconsistent between this division of responsibilities in RSA 21-M:3 and the generic rehearing provision in RSA 541:3. RSA 541:3 merely states that the "commission" as defined in RSA ch. 541 may grant a rehearing, it does not prescribe how the "commission" will function with respect to rehearing. Similarly, RSAs 21-M, RSA 21-O, RSA 541-A do not conflict with RSA 541. However, even if there were conflicts, the specific provisions of RSA 21-M:3 would control. In an appeal under the Department's groundwater withdrawal statute, RSA 485-C, this Court held that "in providing an explicit procedure for appeals, RSA 485-C:21, VI excludes any other, and, as the more specific statute, it controls over RSA 21-O:7." *Appeal of Town of Nottingham (N.H. Dep't of Envtl. Servs.)*, 153 N.H. 539, 552 (2006). The same is true here.

B. The Appellees Incorrectly Describe What the Hearing Officer Actually Held.

The Appellees next purport to describe the ruling of the Hearing Officer in the Dismissal Order and subsequent orders. The Appellees assert that the "record amply indicates that the Hearing Officer did not defer, acquiesce or otherwise allow the Council to overrule him on his rulings

relative to the issues of law he decided." AB 19. However, the text of the Reconsideration Order expressly allowed the Council to revisit his interpretation of RSA 483-B:11, stating:

> The Hearing Officer stated during reconsideration, that the Council's consideration at the hearing of the applicability of RSA 483-B:11 was tied to the question of height raised by the appellants, was not estopped by the Ruling on the Motion to Dismiss, and being a question of applying fact to relevant law *it was within the Council authority*.

Supp. 63-68 (emphasis added).[3] The deliberations on reconsideration show that the Hearing Officer deferred to the Council whenever an issue was *important* to the appeal. For instance, with respect to interpreting RSA 483-B:11, the Hearing Officer stated: "it's…my view that the issue the Council properly had that issue before it and addressed an issue that was obviously inherent in the whole appeal…." Rec. Tr. 10. Later he stated: "the State argues that that issue was not properly before the council and I disagree. I think it was, it was part and parcel of the appeal itself…." Rec. Tr. 28. He again stated that when facts and law are "intertwined" it results in a "joint decision." Rec. Tr. 34.[4] These are not standards established by statute. For the reasons described in the State's original brief, this attempt at deference to the Council fails as a matter of law.

The Appellees also state that "The Dismissal Order left the question as to whether DES's methodology for determining height under N.H.

[3] *See also* Supp. 65 (wherein the Hearing Officer states: "mixed questions of fact and law [are] the purview of the Council and Hearing Officer together").

[4] The Hearing Officer provides no explanation of how a council with 15 members can issue a "joint decision" with a hearing officer any more than a jury could issue a "joint decision" with a judge. For instance, it is unclear whether the Hearing Officer envisions a decision resulting in a majority of the combined 16 votes, whether he believes the Hearing Officer and the Council have a negative on the other (which could result in deadlock), or some other form of control. In any event, the relevant statutes envision nothing of the sort. Instead, they give most authority to the Hearing Officer and fact-finding duties to the Council.

Admin. Rule Env-Wq 1405.03(b) as a question of fact…" AB 11. In truth, the Dismissal Order found that the claim regarding the unenforceability of height might involve factual matters that could require findings by the Council and subsequent deliberations. Nothing in the Dismissal Order would alert a party that the Hearing Officer would defer to the Council in ways that violated the statute and his Dismissal Order. More importantly, as discussed below, even if one believed that he left open the concept of a remand related to the unenforceability of height, such a remand never occurred and, in any event, could not have been ordered by the Council.

C. No Remand Based on Height Ever Occurred.

The Administrative Order in this case was remanded to the Department for one reason: the Wetlands Council felt, notwithstanding the structure's increase in nonconforming height, that some kind of analysis was required under RSA 483-B:11. The Wetlands Council admitted that it never reviewed height when ordering remand in its Final Order. Supp. 67. Yet the Final Order is the only operable order. The Reconsideration Order did nothing other than state that reconsideration was "denied." Supp. 68; *see also* Rec. Tr. 34 (wherein the Hearing Officer stated: "just send it back under the original order … the order would stand as is"). It did not say that the Council was remanding the case on a new basis related to height or any other claim. It simply affirmed the previous decision, one based solely on the alleged need for balancing under RSA 483-B:11. Nevertheless, as explained below, even if the Council had attempted to remand the case based on the Appellees' remaining claim related to height, it lacked the ability to do so.

II. THE WETLANDS COUNCIL DID NOT MAKE AND COULD NOT MAKE ANY DECISION THAT THE DEPARTMENT'S HEIGHT MEASUREMENT WAS UNENFORCEABLE.

A. The Wetlands Council Never Found That the Department's Rule on Height Was So Vague As to Be "Unenforceable" In Its Entirety.

Notwithstanding that the only basis for remand related to balancing under RSA 483-B:11, the Appellees attempt to rely almost exclusively on the Wetlands Council finding on reconsideration that the Department's method for measuring height was "unreasonable"[5] in order to salvage what is in truth an irretrievably unlawful Council process. To understand why the Appellees' argument fails, it must be examined in the context of the issues actually raised in the appeal to the Wetlands Council.

The Appellees' never claimed that the Department's method for measuring height was unreasonable *in this case*, nor could they. As found by both the Hearing Officer and the Council, the height of the Appellees' structure was not in dispute. Supp. 37-38; *see also* App. 13, ¶31. Instead, the Appellees sought a broad ruling that the Department's method for measuring height was indicative of a regulatory regime so vague that it could not be enforced in its entirety. *See* App. 14-17 (Appellees' Notice of Appeal wherein, "Claims of Error" A, B, and C solely challenge the Department's authority to regulate rather than the application of regulations to the structure at issue). The Appellees, in other words, lodged a facial challenge to the rule based on vagueness.[6] Although, as described more

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[5] The Appellees assert that the Council found the Department's methodology "unenforceable." The Council actually described the task before it as determining whether or not "DES's method of measuring height was arbitrary," eventually finding that it was "unreasonable" – meaning arbitrary – not "unenforceable" and certainly not "impermissibly vague." Supp. 67.

[6] As stated above, the factual findings by the Hearing Officer and the Council in this case preclude any "as applied" challenge for vagueness and the Appellees did not appeal on this basis. *State v. Hollenbeck*, 164 N.H. 154, 158 (2012) ("[A]n

below, a ruling that a regulatory regime is "impermissibly vague" could be informed by factual information, such a ruling is a legal decision, not a factual decision. This type of ruling must be made by the Hearing Officer.

The Hearing Officer recognized the inherently legal nature of the Appellees' argument in his Dismissal Order, holding that the Appellees asserted that "the lack of a standard for determining the height of a building renders that authority unenforceable." Supp. 39. This summarized the Appellees' own Petition for Appeal which stated: "As such, the regulation as written grants unfettered discretion to those enforcing it to elect a means of determining the height of a structure and, such unfettered discretion is *unlawful*." App. 16, ¶ 66 (emphasis added). The Appellees maintained the same view in communications to the Department, stating: "The challenge involves legal questions rather than matters of fact." Supp.2, Page 37 (Letter from Attorney Cronin to DES, August 9, 2017 (DES Hearing Ex. 26)).

The Appellees' brief to this Court further reflects the legal nature of their claim: "If the height restriction is *not enforceable* … then all of DES's claims of error fail." AB 11 (emphasis added). Appellees' brief further describes the rule as "impermissibly vague." AB 11, 12; *see also* AB 4 (stating the "height rule… might be found to be *unenforceable*") (emphasis added). To support their position, the Appellees' brief cites to cases concerning statutes alleged to be "impermissibly vague," arguing that a "person of reasonable intelligence" could not have understood its meaning. AB 11, 14. This language is the very hallmark of a vagueness claim. *MacPherson v. Weiner*, 158 N.H. 6, 11 (2008) (discussing "ordinary intelligence" as it relates to vagueness). Not only did the Council fail to

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as-applied challenge … concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case").

ever remand the case for any reason related to height, the Council never found the rule on height to be "impermissibly vague" or otherwise unlawful, nor could it. The Council merely found it to be "unreasonable." Neither the Council nor the Hearing Officer then did anything with this determination. As discussed below, the Wetlands Council had no authority to find the rule at issue to be "impermissibly vague."

B. The Hearing Officer, Not the Council, Must Determine Whether the Department's Regulatory Program Related to Height is Unenforceable as "Impermissibly Vague."

The Appellees' argument further illustrates the fundamental error in this proceeding; namely, the nebulous and incorrect division of responsibilities between the Hearing Officer and the Wetlands Council. Some reflection is due. In the past, many viewed the Council process as inefficient and difficult to understand. In 2012, the Legislature tried to change that by creating the position of a professional Hearing Officer. The Hearing Officer took on the role of a judge, but with additional responsibilities in that the Hearing Officer was to decide all mixed questions whereas as a trial judge decides many, but perhaps not all. RSA 21-M:3, IX(d). The legislature limited the role of the Council in an appeal to that of a jury – i.e., fact-finding only. RSA 21-M:3, IX(c); RSA 21-O:5-a, V; *see also* Supp.2, page 40 (House Judiciary Committee DES Testimony Letter re SB 480, April 6, 2010 (stating: "[T]his bill would enable the Council members to do what they do best – to serve as a fact-finding body – while freeing them from addressing the procedural and legal issues that are best handled by trained professionals")). The Council retained its other responsibilities unrelated to appeals such as its ability to comment on agency rulemaking.

By contrast, in this case, the Wetlands Council mused at length about the meaning of RSA 483-B:11. One council member, James Gove,

postulated that the statute envisioned a third, unregulated type of structure in a class called "nonconforming." Del.Tr. 5-6; *see also* Del. Tr. 26 ¶¶ 9-23. The Council (not the Hearing Officer) adopted this position almost verbatim in its order on the merits.[7] Supp. 46-47. It further attempted to divine legislative intent by analyzing how the statute used the word "height." Supp. 66. In short, the Wetlands Council usurped power the statute vests solely and exclusively in the Hearing Officer: legal analysis. Had a jury engaged in such a purely legal discussion, and had a judge simply entered the jury's legal determination, any observer would have been, at best, unnerved. A process in which a jury member offered to (and then did) write – *and sign* – a court order turns the statutory scheme on its head.[8]

The Appellees now ask this Court to exacerbate the already contorted appeal process by holding that the Council committed even more unpermitted acts. Although, as discussed above, the Council never actually remanded anything to the Department based on a finding related to height, the Appellees ask this Court to manufacture a decision that it did. In addition to being something the Council did not do, it is something the Council would have had no authority to do.

As discussed above, the finding related to vagueness is a legal one. *State v. Wilson*, 169 N.H. 755, 767 (2017) (criminal case noting that the judge, not the jury, ruled on the defendant's "as applied" vagueness challenge); *see also State v. Lamarche*, 157 N.H. 337, 340 (2008) (noting that the "trial court" denied the defendant's motion related to vagueness). This Court has consistently reviewed challenges for vagueness *de novo*

[7] As noted in the State's initial brief, it later abandoned this decision; however, this clearly demonstrates that the council members were engaging in legal analysis throughout.
[8] As stated in the State's opening brief, a council member volunteered to draft, and eventually co-signed, the Reconsideration Order. State's Brief 16.

because they constitute a legal claim. *See State v. Bortner*, 150 N.H. 504, 510 (2004) (pertaining to a vagueness claim and stating that this Court would "review the superior court's determination *de novo*"); *see also State v. Lamarche*, 157 N.H. 337, 340 (2008) ("The defendant first argues that RSA 651-A:25, IX is void for vagueness, both on its face and as applied. The constitutionality of a statute is a question of law, which we review *de novo*").[9] As stated above, the Appellees have admitted as much.

When conducting a review for vagueness, a judge must apply distinct legal principles. "A party challenging a statute as void for vagueness bears a heavy burden of proof in view of the strong presumption favoring a statute's constitutionality." *MacPherson v. Weiner*, 158 N.H. 6, 11 (2008). A facial challenge faces an even stricter burden. *State v. Furgal*, 161 N.H. 206, 210 (2010) (describing a facial challenge as "the most difficult challenge to mount successfully"). To succeed on a facial challenge, a "challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.*; *see also State v. Hollenbeck*, 164 N.H. 154, 158 (2012).

The Wetlands Council did not know about these legal principles, did not apply them, and could not have applied them. The Hearing Officer, in contrast, could have used factual findings by the Wetlands Council to inform his decision as to whether the rule was impermissibly vague; for instance, to discern whether any valid applications of the rule existed. In addition, the Hearing Officer may have found it helpful to determine how the agency implemented the rule historically to determine any administrative gloss. He never did so. Instead, the Council simply

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[9] To support their claim of vagueness, the Appellees' brief itself cites to *State v. MacElman*, 154 N.H. 304, 307 (2006). In *MacElman*, the trial court judge ruled on the defendant's claim as a matter of law. *MacElman*, 154 N.H. at 306 ("the trial court denied both motions").

provided an anomalous finding related to height out of context without ever amending the original remand order. Neither the Council nor the Hearing Officer ever ruled that the entire system of measuring height was unenforceable in its entirety and the Council certainly could not have done so.

III. THE DEPARTMENT'S RULE ON HEIGHT IS NOT IMPERMISSIBLY VAGUE.

If the Hearing Officer had ruled that the Department's regulation on height was impermissibly vague, and therefore unenforceable it its entirety, such a decision would have been incorrect. The hearing produced evidence about only two ways to measure height: (1) the Department's method, which is simply to measure from bottom to top, and (2) an averaging method used by the Town of Moultonborough. The Department's method comports with generally accepted usage. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1050 (unabridged ed. 2002) (defining "height" as "the distance extending from the bottom to the top of something standing upright..."). When examining whether a statute is impermissibly vague, this Court allows interpretations of terms "according to their generally accepted usages." *Asselin v. Town of Conway*, 137 N.H. 368, 371 (1993) ("reject[ing] the argument" that a statute was "impermissibly vague"). Therefore, the Department's method is acceptable.

Contrary to the Appellees' argument, the use of the word "height" in Env-Wq 1405.03 is not misleading. A common sense interpretation of "height" naturally lands a reader on the Department's methodology. In contrast, the averaging method raised by the Appellees requires a mathematical process of averaging the highest and lowest measurements. *See State v. Porelle*, 149 N.H. 420, 425 (2003) (finding that "the term 'no legitimate purpose' … does not leave too much discretion to police

officers" and "does not render the statute unconstitutionally vague"); *see also Carbonneau v. Town of Rye,* 120 N.H. at 98 (declining to find a zoning ordinance prohibiting anything "injurious, noxious, or offensive" void for vagueness); *State v. Bortner*, 150 N.H. 504, 510 (2004) ("Mathematical exactness is not required … nor is a law invalid merely because it could have been drafted with greater precision"). This averaging method may be valid but it is not intuitive and its existence does not render the Department's straightforward method unlawful, and certainly not unlawful under all circumstances.

In the end, however, both methodologies produce very similar results on flat ground. The Council acknowledged this fact stating: "on level ground these two methods produce nearly the same result…." Supp. 67.[10] Therefore, the Appellees cannot assert that there are "no set of circumstances" under which the rule could be valid.

The Appellees take issue with the Department's method on sloping ground, claiming that the Appellees' proposed method for measuring height must be used in order "to allow a usable structure." AB 13. However, both methods may be restrictive on sloping ground. To achieve an average height on sloping ground, for every foot one side is increased relative to a prior structure, the other side must be decreased. This can force one side of the structure to become unusably short or possibly non-existent depending on the slope.[11] Under any methodology, it may simply be more difficult to

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[10] When moving from flat ground to sloping ground, the Department's method may be more restrictive; however, when moving from sloping ground to flat ground the Department's method is more lenient as it gives the applicant the benefit of being able to construct the entirety of the new structure to the tallest measurement of the original structure.

[11] By way of example, a building 10 feet long and 7 feet high on flat ground obviously averages 7 feet in height (14 feet divided by 2). On a 45-degree slope, the foundation of such a building alone would need to be 10 feet high, leaving only 2 feet for the superstructure. Similarly, a 20-foot long building would need

build on sloping land. All of this is irrelevant here. The Appellees moved a structure on a steep slope to a location with a similarly steep slope as evidenced by the fact that both structures lose similar elevation over the same distance (the original structure measured 17 feet high lakeside and up to 10 feet high landward over a horizontal span of about 38 feet; the new structure measures 27 feet high on the lakeside and 17 feet high on the landward side over the same horizontal span).

In summary, the method for measuring height proposed by the Appellees fares no better in application than that used by the Department. The Department's method, however, is intuitive and does not depend on a mathematical formula. The case presents no dispute about the height of the Appellees' structure and the Appellees failed to show that there are "no circumstances" under which the Department's method can be validly applied. In fact, the Wetlands Council found just the opposite. Therefore, the Department's method cannot be held to be "unenforceable."

IV. IRRELEVANT TESTIMONY, INCLUDING LEGAL INTERPRETATION BY LAY WITNESSES, HAS NO BEARING ON THE WHETHER OR NOT THE WETLANDS COUNCIL DECISION WAS UNLAWFUL.

The Appellees make much of statements by Department witnesses during the hearing interpreting the law. For instance, the Appellees claim that "DES admitted during the hearing that it had been operating under a misunderstanding of the law…" AB 18. They further describe "its [alleged] admission after the Dismissal Order that it had been operating under a mistake of law…" AB 19. They claim that "DES *introduced* a competing interpretation of RSA 483-B:11 at the appeals hearing." AB 24 (emphasis added). These references are non-sequitur. Although it is true

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20 feet of rise, already violating the average height requirement given that 20 divided by 2 is greater than the original 7 feet.

that the Appellees often cross-examined Department witnesses or called a Department employee in order to elicit opinions about the law, the Department never "introduced" any concept. At times, the Appellees, or Council members, were able to get these lay people to give legal opinions about a statute, often from memory or in response to hypotheticals. At other times, the Department witness merely offered a simple clarification. The Department's legal position through counsel, however, remained constant at all times. In addition, the examples above pertained to RSA 483-B:11. Again, the Appellees never asked for relief under B:11; therefore, the Department never conducted an analysis under B:11 in this case. These statements have nothing to do with the Council's ruling on measuring height. In short, the Appellees merely point to their own cross-examinations of witnesses providing hypothetical interpretations of a statute that was never applied.

The Appellees also discuss Department testimony about measuring height from "the lowest contour" versus the water line or "reference line." AB 13-14. Specifically, they note that Jay Aube of the Department testified that he measures to the "lowest contour line" but guessed that another employee might have measured from "the reference line." *Id*. They further note that Collis Adams of the Department may measure from the "water line." *Id*. This is a sidelight of no import. When a structure is on the water's edge, as the Appellees' was, the lowest contour and the "reference line" or "water line" are the same. RSA 483-B:4, XVII (defining "reference line" as "the surface elevation" of the water of a lake). Nevertheless, again, asking a Department witness hypotheticals about how it *might* measure height does not bring the Appellees closer to success. No dispute as to measurement exists in this case and in many instances, measurement is a simple matter. In addition, as discussed above, the law allows for some level of enforcement discretion. *See State v. Porelle*, *supra*

(concluding that even in the criminal context a "degree of judgment" in implementing a statute is acceptable and declining to accept the defendant's "hypothesiz[ing]" that some police officers may interpret the law slightly differently).

V. THE DEPARTMENT DID NOT WAIVE ITS ARGUMENT THAT THE WETLANDS COUNCIL CANNOT OVERRULE THE HEARING OFFICER'S DECISION THAT RSA 483-B:11 DOES NOT PERMIT STRUCTURES TO BECOME MORE NONCONFORMING WITH RESPECT TO HEIGHT.

The Appellees assert that the State did not object when issues concerning B:11 and nonconforming structure were raised at the council hearing and that this constitutes a waiver preventing the Department from contesting the attempt of the Wetlands Council in the Hearing Order to overrule the decision of the Hearing Officer. First, the State does not need to preserve by contemporaneous objection an issue that it had already won by motion. Second, the State did object at the hearing to covering issues already addressed in the Dismissal Order. H 115 ("Objection, this calls for legal conclusions I think we've kind of been through that…"). Third, the Appellees had alleged some connection between "non-conforming" structures addressed by B:11 and their claim of "vested rights," an issue still before the Wetlands Council at that time. Specifically, page 18, paragraph 80, of their Petition for Appeal, states: "By applying its size regulations for accessory structure to the *non-conforming* boathouse, DES not only violates the Act, but deprives the Appellants of a *vested right* without just compensation contrary to the State and federal constitutions." App. 17, ¶80. The connection between non-conforming structures and vested rights may have been tenuous, but it was the Appellees' argument to make (and eventually lose). Finally, with respect to any concept addressed by the Wetlands Council for the first time in the Hearing Order or the Reconsideration Order, the State could not object ahead of time to

something no one could have known would happen or object contemporaneously during the Council's non-hearing public meeting deliberations in which the appeal record was closed.

VI. THE DEPARTMENT HAD NO DUTY TO INVESTIGATE THE APPELLEES' PROPOSED PROJECT, DISCOVER THAT IT INVOLVED AN EXPANSION IN HEIGHT, AND SUGGEST ALTERNATIVES PROCEDURES.

The Appellees argue that the Department violated Part I, Art. I of the N.H. Constitution. This Court has held that Part I, Article I, prevents municipalities from refusing to answer questions from the public or engaging in dilatory tactics as a manner to discourage project applications. The cases cited by the Appellees, however, have no application to this case.

In *Carbonneau v. Town of Rye,* 120 N.H. 96 (1980), the petitioner had attempted to obtain local approval for four and one-half years with no help or guidance. *Id*. at 99. Nevertheless, this Court merely "encouraged" the town to provide some level of assistance. *Id*. In *Savage v. Town of Rye*, 120 N.H. 409 (1980), the town specifically violated a statute requiring it to render a decision within 90 days of an application. *Id*. at 411. The town apparently used the form of the request as a pretext to ignore it entirely. *Id*. The Court chastised the town with respect to its obligation under Part I, Article I, but, again, found that the town had also violated its statutory obligation. *Id*. In both cases, this Court "reminded the towns" of their general obligation to assist. *Richmond Co. Inc. v. City of Concord*, 149 N.H. 312, 315 (2003).

In this case, the Department did not refuse to answer questions or engage in dilatory tactics. The process was dictated by the actions of the Appellees. Instead of filing an application, the Appellees chose to use a Permit-by-Notification ("PBN") process that put the onus on the applicant to determine whether their project meets Department rules. RSA 483-B:5-

b, I(a); *see also* Env-Wq. 1406.16-19. The Appellees could have submitted a full application. Had they done so, the application would have triggered a full review by the Department. This review would have included communications on any deficiencies and a definitive timeline for approval or disapproval. Env-Wq 1406.06-1406.15. Instead, they chose to submit two separate PBN's: The first specifically stated that there would be no change in height; the second merely referenced the first. It is not up to the State to analyze aspects of a project about which they were never informed or to direct an applicant to a process other than the one they specifically chose. Relevant opinions support this conclusion.

In *Richmond Co., Inc. v. City of Concord*, the City of Concord Planning Board denied a developer's application because it failed to meet multiple local requirements. *Richmond Co., Inc. v. City of Concord*, 149 N.H. 312 (2003). The trial court found that the board violated Part I, Article I because the "board failed to engage in good faith dialogue with Richmond to assist it in satisfying the requirements for site plan approval" by not informing the developer of "its concerns" with the proposed project. *Richmond Co.*, Inc.149 N.H. at 314. This Court reversed the trial court, finding that the board did not fail in its constitutional duty simply because it did not volunteer helpful information:

> The situations in which we have required a municipality to assist applicants are distinguishable from this case. Cases such as *Carbonneau* and *Savage* are aimed at preventing municipalities from ignoring an application or otherwise engaging in dilatory tactics in order to delay a project.

Id. at 315. Neither of those occurred in *Richmond* and neither occurred here.

In *In re Kilton*, this Court again refused to expand the "assistance" required of the government under the constitution to include proactive

exchanges of information. *In re Kilton*, 156 N.H. 632, 645–46 (2007). In *Kilton*, the petitioner claimed that he was due "notice of his 'right' to seek free legal counsel" in his case before the N.H. Dept. of Health and Human Services. *Kilton*, 156 N.H. at 642. In other words, he claimed that the government should have informed him of his "essential" rights. *Id*. at 645. The petitioner cited to *Carbonneau* and *Savage* to support his position. *Kilton*, 156 N.H. at 645. This Court, however, ruled against the petitioner, recognizing that: "In neither case did we adopt the broad rule the petitioner advocates in this appeal"; namely, that the government provide general, proactive assistance to the public. *Id*. at 645–46.

Similarly, in *Kelsey v. Town of Hanover*, "town residents approached a town official to both inquire and express concern about a proposed project in their neighborhood." *Kelsey v. Town of Hanover*, 157 N.H. 632, 638 (2008). "The petitioners contend[ed] that because [town residents] inquired and expressed concern about the … project, the zoning administrator had a duty to provide them with basic information about the proposed plan and the basic permit and appeal process." *Kelsey*, 157 N.H. at 639. However, the petitioners pointed to no evidence indicating that the town failed to address any question posed by the petitioners. *Id*. In addition, the petitioners did "not suggest that any statutes, local regulations or the particular file regarding the … project were unavailable to them." *Kelsey*, 157 N.H. at 639.

In this case, the Appellees did not ask the Department any questions with respect to their project and, in fact, never informed the Department that the height of the structure would be expanded. The Appellees' brief merely alleges that "DES does not identify any instance in which it advised the Corrs that they needed to file another form to claim protection under RSA 483-B:11 as the duty to assist requires." AB 23. The cases above make clear that the Department is under no duty to proactively engage

applicants, discover previously undisclosed aspects of their project, and steer them to various alternatives. In addition, all of the relevant statutes and rules are available on multiple public websites including the Department's website. Therefore, this case does not fit the narrow set of circumstances in which this Court has found a violation of Part I, Article I.

VII. THE CROSS-APPEAL LACKS MERIT.

A. The Appellees Did Not Preserve The Issues Raised in Their Cross-Appeal.

The Appellees' cross-appeal should be dismissed because they did not request reconsideration as required. *Appellee/Cross Appellant's Objection to Motion to Dismiss Petition for Rule 10 Cross Appeal*, 1 ¶ 3. The Appellees contend that they did not have to seek an interlocutory review of the Dismissal Order in order to preserve their issues for appeal. The State agrees. An interlocutory appeal or reconsideration would have been effective but was not required; however, the Appellees had to preserve their appeal issues in a motion for reconsideration at least at the time that the Wetlands Council issued its order on the merits. The Appellees did not ask for reconsideration after the Hearing Order, after the Reconsideration Order, or at any time. To accept the Appellees' argument would mean that a cross-appellant has no duty to ever request reconsideration. This contravenes both Supreme Ct. R. 10(8), which specifically applies to cross-appeals, and RSA 541:3.

The Appellees claim that what they argue relates to "subject matter jurisdiction" and can, therefore, be raised at any time. AB 28. The Appellees, in this argument, simply employ a misnomer. The Appellees, in some respects, take issue with the Department's authority. While their argument could generously be described as a challenge to the Department's "regulatory jurisdiction," it cannot be viewed as challenging "subject matter

jurisdiction." The "subject matter jurisdiction" to which the Appellees refer, and which can be raised at any time, relates to the jurisdiction of a court or other tribunal. *See* BLACK'S LAW DICTIONARY 983 (10th ed. 2014) (defining "subject-matter jurisdiction" as "(1936) Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things."). The case cited by the Appellees provides an example of such a claim challenging a tribunal's jurisdiction. *Gordon v. Town of Rye*, 162 N.H. 144, 149 (2011) ("Absent subject matter jurisdiction, a *tribunal's* order is void") (emphasis added). It lacks any application to the scope of an agency's regulatory authority.[12] Accepting the Appellees' assertion would mean that whenever a person claimed that the Department lacked authority to do something, the Department's action could be challenged at any time, thereby negating the 30-day deadline for appeals (RSA 482-A:10, RSA 541:6), the requirements for reconsideration (Supreme Ct. R. 10(8); RSA 541:3), any procedural rulings, and anything else that would lend itself to a definitive conclusion. No authority supports such a conclusion.

B. The Appellees' Reading of the Statute is Incorrect.

Notwithstanding the fact that the cross-appeal should be dismissed because Appellees never challenged the legal conclusions the Hearing Officer made in the Dismissal Order, the Appellees misinterpret and misapply the Department's authority to regulate accessory structures within the waterfront buffer and incorrectly attempt to withdraw "height" from the plain meaning of "size."

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[12] Ironically, any challenge actually based on subject matter jurisdiction would, of course, be purely a legal one to be decided solely by the Hearing Officer.

1. <u>The Statutory Authority to Regulate the Size of Small Accessory Structures in the Waterfront Buffer Did Not Constitute an Invitation to Construct Large Accessory Structures.</u>

The Appellees argue that RSA 483-B:17, IV only grants the Department the authority to regulate "small" accessory structures, not all accessory structures and, therefore, their new "large" structure cannot be regulated by the Department. AB 29-31. As argued in the *State's Motion to Dismiss* prior to the hearing (App. 64-96) and as found by the Hearing Officer, this reading of the statute is incorrect and would lead to absurd results.

The legislature's grant of rulemaking authority in RSA 483-B:17, IV was not an invitation to construct large accessory structures between the primary building line and the reference line ("waterfront buffer") as the Appellees' argument necessarily implies. RSA 483-B:17, IV provides the Department with the authority to adopt rules relative to the "[p]rocedures and criteria for the size and placement of small accessory structures such as storage sheds and gazebos, which are consistent with the intent of this chapter, between the reference line and the primary building line." RSA 483-B:17, IV. The statute defines "accessory structure" to mean "a structure, as defined in paragraph XXII of [RSA 483-B:4], on the same lot and customarily incidental and subordinate to the primary structure, as defined in paragraph XIV of [B:4]; or a use, including but not limited to paths, driveways, patios, any other improved surface, pump houses, gazebos, woodsheds, garages, or other outbuildings." RSA 483-B:4, II. The Appellees read RSA 483-B:17, IV, however, to mean that the Department cannot regulate any accessory structure that is not "small," claiming that because their newly built structure is large, the Department is unable to regulate it.

To support their position, the Appellees first argue that "DES's current rules purport to govern all accessory structures contrary to the enabling legislation." AB 30. However, the very rule Appellees cite to support their premise is limited to accessory structures within the *waterfront buffer*. *Compare* Env-Wq 1405.03(a) *with* RSA 483-B:17, IV. Outside the waterfront buffer there are no regulations on accessory structures other than the requirement to abide by local zoning. *See* Env-Wq 1405.02. This comports with RSA 483-B:17, IV. Clearly, the legislature intended for accessory structures within the waterfront buffer to have limitations different than those that exist outside of the waterfront buffer, an intent and directive that the Department has respected in its rules at all times. Accordingly, the Department is not regulating *all* accessory structures in violation of the enabling authority. The Appellees' real grievance relates to the legislature's decision to require accessory structures in the waterfront buffer to be "small," not with the Department's use of its authority to enact rules related to accessory structures in the waterfront buffer.

Had the legislature intended to allow for an unregulated type of accessory structure in the waterfront buffer it would have specifically provided for one. *In re John Hancock Distributors, Inc.*, 146 N.H. 124, 127 (2001) (the Court "will not add words to the plain language of a statute which the legislature chose not to include"). Since it did not, the reasonable interpretation is that the statute only allows small accessory structures within the waterfront buffer and all other accessory structures in that buffer are prohibited. In other words, the statute prohibits any large accessory structures but allows the Department to promulgate rules allowing certain small ones.

Second, "[it] is a fundamental principle of statutory construction that whenever possible, a statute will not be construed so as to lead to absurd

consequences. Thus, as between a reasonable and unreasonable meaning of the language used, the reasonable meaning is adopted." *State v. Wilson*, 169 N.H. 755, 766 (2017) (citing *Appeal of Marti*, 169 N.H. 185, 190 (2016)). The Appellees agree that the Department can promulgate numerous restrictions related to "small" accessory structures within the waterfront buffer. However, by the Appellees' logic, all waterfront property owners could build "large" accessory structures within the waterfront buffer without any agency regulation simply because they are not "small." The absurdity lies in the potential for a landowner interested in building a new structure or seeking to expand a nonconforming structure within the waterfront buffer to look to the size limitations for an accessory structure within Env-Wq 1405.03 and then purposefully build the structure to parameters well beyond those limitations in order to claim it as "large" and not subject to agency regulation. Such an interpretation is unreasonable and would render the legislature's 483-B:17, IV grant of authority inert. Supp. 41-42.

2. <u>The Grant of Authority to Regulate "Size" Includes the Ability to Regulate "Height."</u>

The Appellees next claim, as they did in their Petition for Appeal, that the Department does not have the authority to regulate the height of accessory structures because "height" is not included in the RSA 483-B:17, IV reference to "size." AB 31. However, as the Appellees recognize, "all words in the statute are to be given meaning." AB 29-30 (citing *Winnacunnet Coop. School District v. Town of Seabrook*, 148 N.H. 519, 525-26 (2002)). When determining meaning, "[the courts] first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning.'" *State v. Maxfield*, 167 N.H. 677, 679 (2015)(quoting *Appeal of Local Gov't Ctr.*, 165 N.H. 790, 804

(2014)). "Height" falls within the plain meaning of "size." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2130 (unabridged ed. 2002) (defining "size" as "the physical magnitude, extent, or bulk : the actual, characteristic, normal, or relative proportion of a thing : relative or proportionate dimensions..." and stating that "size usu. applies to things having length, width, and depth or height); *see* WEBSTER'S at 634 (defining "dimension" as a "measure in a single line (as length, breadth, height, thickness, or circumference"); *see also* Supp. 41.

In other contexts, the Legislature has specifically recognized height as a component of size. For instance, RSA 266:16, entitled "Penalty for Exceeding Permitted *Size*," states that "[a]ny person who shall drive or cause to be driven on the ways of this state a vehicle whose *height*, length or width is in excess of that herein prescribed shall be guilty of a violation." RSA 266:16 (emphasis added). The Supreme Court of the United States has done the same. *See Maurer v. Hamilton*, 309 U.S. 598, 615-16 (1940) (finding that "size" in the Motor Carrier Act meant not only "overall length, width, and *height* of the loaded cars" but similar attributes of items in the car (emphasis added)). Accordingly, the Department is not alone in its interpretation of size. The Appellees appear to agree. AB 31. They simply find the plain meaning of "size" to be too "abstract." AB 31.

The Appellees assert that the Department's reliance on this allegedly "abstract" definition ignores the purpose of RSA ch. 483-B which they claim to be solely to reduce contamination in water bodies. However, RSA ch. 483-B protects against any negative impact to public waters. In RSA 483-B:1, entitled "Purpose," the legislature specifically found that "[u]nder current law the potential exists for uncoordinated, unplanned and piecemeal development along the state's shorelines, which could result in significant negative impacts on the public waters of New Hampshire." RSA 483-B:1, IV. The Department's interpretation accounts for this and guards against

the impacts associated with such “uncoordinated” or “unplanned” development.

Finally, the height restriction has an unblemished history of enforcement without legislative interference. Env-Wq 1405.03(b)(1) has existed since 1996 and was readopted by the Joint Legislative Committee on Administrative Rules (“JLCAR”) again in 2004 and 2008. *See* JLCAR Documents #6383, #8219, and #9349 within App. 93-96. Accordingly, a variation of that height restriction has been in place for over two decades. As such, including height within the regulation of “size” is an administrative interpretation not in conflict with the statute. *See N.H. Retirement Sys. v. Sununu*, 126 N.H. 104, 109 (1985). “It is well established in our case law that an interpretation of a statute by the agency charged with its administration is entitled to deference.” *Appeal of Town of Seabrook*, 163 N.H. 635, 644 (2012) (citing *Appeal of Morton*, 158 N.H. 76, 78-79 (2008)); *Appeal of Weaver*, 150 N.H. 254, 256 (2003); *Appeal of Salem Regional Med. Ctr.*, 134 N.H. 207, 219 (1991); *N.H. Retirement Sys.*, 126 N.H. at 108).

The “long-standing practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the legislative intent.” *N.H. Retirement Sys.*, 1026 N.H. at 109 (citing *Hamby v. Adams*, 117 N.H. 606, 609 (1977)). This “doctrine of ‘[a]dministrative 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.’” *Town of Carroll v. Rines*, 164 N.H. 523, 527 (2013) (quoting *Anderson v. Motorsports Holdings*, 155 N.H. 491, 502 (2007)). As stated above, the term “size” plainly includes height. The lack

of legislative interference with the Department's regulation of the height of accessory structures further supports for the Department's interpretation.

If this Court decides to hear the Appellees' cross-appeal, it should deny the Appellees' arguments that "height" is not within RSA 483-B:17's grant of authority to regulate the "size" of small accessory structures in the waterfront buffer, find that the Department's application of that authority constitutes a long-standing interpretation without legislative interference, which should be afforded deference, and determine that the Hearing Officer correctly dismissed the Appellees' claims.

3. Other Provisions Related to Nonconforming Structures Do Not Limit the Department's Rulemaking Authority.

The Appellees' next argue that RSA 483-B:11, pertaining to nonconforming structures, does not reference "height" and, therefore, all nonconforming structures must be unregulated with respect to height. AB 31. Essentially, this creates a third category of structure in addition to, and completely distinct from, primary structures and accessory structures – namely; nonconforming structures. This new category allegedly wipes away all other regulation and restrictions other than whatever RSA 483-B:11 specifically addresses. The Dismissal Order soundly rejected this argument. Supp. 39 ("As a threshold matter, Appellants' boathouse meets the definition of an "accessory structure"). Even the Wetlands Council agreed.[13] Although the Wetlands Council initially overruled the Dismissal Order and created this third category, it later disavowed its discussion of this construct as "[inexact.]" Supp. 66. It found that "RSA 483-B defines structures as 'primary' or 'accessory' and either 'nonconforming' or not. The structure under consideration here is a nonconforming accessory

[13] Again, the Wetlands Council members should never have been pondering the meaning of B:11. The reference above merely re-enforces the procedural posture at this point; namely, that no one ever accepted the Appellees' argument.

structure." Supp. 66. In other words, a nonconforming structure is either a nonconforming primary structure or a nonconforming accessory structure.[14]

The Appellees' argument undermines the purpose and applicability of provisions related to nonconforming structures. Generally, a nonconforming structure cannot be altered or moved at all without losing its grandfathered status. *Cohen v. Town of Henniker*, 134 N.H. 425, 427 (1991) (stating: "the use [of a nonforming structure] cannot be changed or substantially expanded without being brought into compliance" (internal citations omitted)). RSA 483-B:11 merely creates small exceptions to this strict rule if the situation is materially improved, i.e., made more conforming. It does not obliterate all other rules and provide nonconforming structures a freedom unknown to any other kind of structure,[15] nor does it allow nonconforming structures to become even more nonconforming. Supp. 42-43.

The Appellees' reference to the Department's own rules related to nonconforming structures fares even worse. They claim that Env-Wq 1408.05 (pertaining to nonconforming structure alteration or expansion) does not include "height." AB 31. However, the Appellees have failed to

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[14] Apparently, the Appellees try to argue that the Department believed the structure to be something other than an accessory structure because it agreed with Appellees' counsel that "the boathouse was not a gazebo or shed." AB 30. First, no one argues the boathouse was a gazebo or shed, it is simply one of the types of structures considered to be "accessory." Second, the Department only admitted that the *new* structure was not a gazebo or shed. As found by both the Hearing Officer and the Council, the original structure was clearly an accessory structure, i.e., a small, dilapidated boathouse. If the Appellees successfully argue that the new structure is something other than an "accessory structure" they face a host of other issues, not the least of which is the statute's fifty-foot primary building setback.

[15] The Appellees assert that rules "applicable to primary structures would be enough to regulate larger accessory structures…" AB 10. In this way, the Appellees ask the Department to arbitrarily apply rules "applicable to primary structures" to "large" accessory structures, something that the law clearly prohibits.

consider the rule in its entirety. While Env-Wq 1408.05 does not reference height by name, it requires an applicant seeking an Env-Wq 1408.05 expansion to submit an application pursuant to Env-Wq 1406.06, which requires plans that conform to Env-Wq 1406.09. Env-Wq 1406.09 states, in part, that plans shall show "(g) [the] *dimensions* and locations of all existing and proposed structures, impervious areas, disturbed areas, areas to remain in an unaltered state, and all other relevant features necessary to clearly define both existing conditions and the proposed project." Env-Wq 1406.09(g) (emphasis added). Further, the very next rule after the rule the Appellees cite is Env-Wq 1408.06, entitled "Decision on Application that Includes Redevelopment or Expansion of Nonconforming Structures." It states, in part, that "(a) [the] department shall approve an application that includes the redevelopment or expansion of a nonconforming structure under RSA 483-B:11, I, upon finding that: (1) [the] requirements in Env-Wq 1406.01 through Env-Wq 1406.14 and *any applicable criteria specified in Env-Wq 1405.03 are met*." Env-Wq 1408.06(a) (emphasis added). As discussed in detail above, Env-Wq 1405.03 contains the height limitation. Therefore, the Appellees' attempt to claim the Department's own rules ignore the height of accessory structures is unavailing.

CONCLUSION

For these reasons, the State respectfully requests that the case be remanded to the Wetlands Council for further proceedings consistent with the Dismissal Order and the arguments of the State set forth herein, and that the Appellees' Rule 10 Petition for Cross-Appeal be dismissed, or in the alternative, denied.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL
SERVICES

By its attorney,

GORDON J. MACDONALD
ATTORNEY GENERAL

Date: July 17, 2019

/s/ K. Allen Brooks
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Certificate of Compliance

This brief complies with the word limitation set forth in Rule 16(11) and this Court's April 16, 2019 Order, by containing 8,348 words.

Certificate of Service

I hereby certify that a copy of the Answering Brief of New Hampshire Department of Environmental Services was sent by service through the New Hampshire Supreme Court's electronic filing system to Attorney John G. Cronin of Cronin, Bisson & Zalinsky, P.C.

Date: July 17, 2019

/s/ K. Allen Brooks
K. Allen Brooks

SUPPLEMENT

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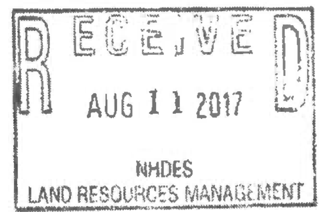

August 9, 2017

Collis G. Adams, CWS, CPESC
Administrator, Wetlands Bureau
Department of Environmental Services
29 Hazen Drive - PO Box 95
Concord, New Hampshire 03302-0095

Jay Aube, Compliance Inspector
Land Resources Management Program
Department of Environmental Services
29 Hazen Drive - PO Box 95
Concord, New Hampshire 03302

Re: Corr Residence

Dear Gentlemen:

I am writing to follow up on my letter of August 2, 2017.

After careful consideration and much heartache, Mr. and Mrs. Corr have decided to pursue a challenge to the Department's authority to regulate the height of the boathouse structure. The decision to pursue the challenge is based on the significant investment made in reliance on the decision of the Town of Moultonborough. The challenge involves legal questions rather than matters of fact.

The questions are:

1. Is the boathouse, as improved, less non-conforming than the prior structure?
2. Is the DES rule regulating the height of accessory structures within the scope of the enabling authority provided by the legislature?
3. Does the height restriction rule on accessory structures violate the equal protection clauses of the United States and New Hampshire Constitutions?

As you may know, I am regularly on and around Lake Winnipesaukee. In recent weeks, I noticed the erection of a massive steel structure within the Lake (just south of the GIC bridge) that appears to be an accessory boathouse structure. The structure is tall. Although I know nothing about the history, I am puzzled how a structure of that size and scale is compliant?

Collis G. Adams, CWS, CPESC
Jay Aube, Compliance Inspector
August 9, 2017
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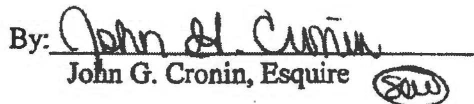
We appreciate your willingness to forbear from enforcement pending efforts to find an acceptable solution. In terms of procedure, my sense is these questions may be addressed best in a Declaratory Judgment action filed directly with the Superior Court. It will yield a quicker result and save time when compared with an enforcement action and appeal to the wetlands council. Do you agree that a Declaratory Judgment action is the best procedural course? If not, please let me know about the preferred procedural path for resolution.

Sincerely yours.
Cronin, Bisson & Zalinsky, P.C.

By: 
John G. Cronin, Esquire

JGC/sew
cc: Mr. Bryan Corr

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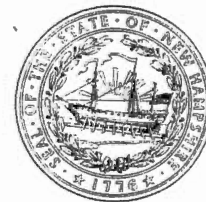
The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

Thomas S. Burack, Commissioner



April 6, 2010

The Honorable David Cote, Chairman
House Judiciary Committee
Legislative Office Building, Room 208
Concord, New Hampshire 03301

Re: SB 480, relative to appeals of decisions by the department of environmental services

Dear Chairman Cote and Members of the Committee:

Thank you for the opportunity to testify on SB 480, relative to appeals of decisions by the Department of Environmental Services (DES). Section 1 of the bill would authorize the Attorney General to appoint persons who are qualified to conduct administrative hearings to serve as hearing officers for administrative appeals of DES decisions. Sections 2 through 7 amend various provisions of RSA 21-O, the enabling legislation for DES and its related environmental appeals councils, to adjust the role of the councils in administrative appeals of DES decisions. DES supports this bill.

Under the current statute, four environmental councils hear appeals from DES's permitting decisions and administrative orders - the Wetlands Council, the Water Council, the Waste Management Council and the Air Resources Council. Members are appointed to represent state agencies, the public at large and particular industrial, academic, commercial, recreational, or conservation interests. A list of Council members and the interests they represent is attached. While the knowledge and experience of the members can be invaluable when considering substantive issues, for the most part council members are not well-versed or experienced in the conduct of adjudicative hearings pursuant to RSA 541-A, the Administrative Procedure Act, or in writing appeal decisions. While I believe that Council members generally make a good faith attempt to establish the facts and to apply the law in cases brought before them, I also believe it is fair to say that the DES environmental councils, taken as a whole, have not demonstrated a facility for processing the cases presented to them in a timely manner. As a result, many cases are not heard or decided within a reasonable period of time.

Case data for all four councils show that, of the 43 appeals that were filed in 2009, 4 cases were withdrawn, 5 cases are on hold at the request of the parties, 2 cases were dismissed for lack of standing, 4 were filed insufficiently, and 1 case was summarily denied, leaving 27 cases still active. Of those 27 cases, pre-hearing conferences have been held in 12 cases and have been scheduled but not yet held in 10 cases, and have not yet been scheduled in 5 cases. Of the 12 cases for which pre-hearing conferences have been held, a hearing on the merits has been completed in only one case and has been started, but not completed, in one more case. In the 27 active cases filed in 2009, only two decisions have been issued.

Under the proposed bill, the Councils would continue to hear all appeals and would retain the authority to decide all issues of fact, but the legal issues and the preparation of the actual decisions

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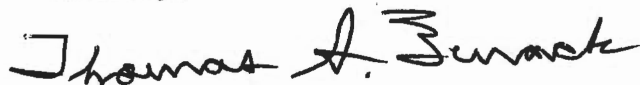
would be the responsibility of an Assistant Attorney General who is educated and trained to have such expertise. Thus, this bill would enable the Council members to do what they do best – to serve as a fact-finding body – while freeing them from addressing the procedural and legal issues that are best handled by trained professionals.

Thank you again for the opportunity to comment on this bill. If you have any questions, please call Assistant Commissioner Michael Walls at 271-8806, DES Legal Unit Coordinator Gretchen Hamel at 271-3137 or me at 271-2958.

Sincerely,



Thomas S. Burack
Commissioner

cc: Senator Merrill
Senator Cilley
Senator Laskey
Senator Bradley
Representative Kappler
Representative Spang
Deputy Attorney General Bud Fitch
Senior Assistant Attorney General Michael Brown