THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0049

APPEAL OF CONSERVATION LAW FOUNDATION

IN RE: TYPE I-A PERMIT MODIFICATION FOR EXPANSION OF WASTE MANAGEMENT OF NEW HAMPSHIRE, INC.'S TLR-III REFUSE DISPOSAL FACILITY (TURNKEY LANDFILL)

Waste Management Council

Docket No. 18-10 WMC

BRIEF OF CONSERVATION LAW FOUNDATION, INC.

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QUESTIONS PRESENTED

1. Where New Hampshire's solid waste management statute requires a proposed solid waste facility to provide a substantial public benefit by advancing the state's waste diversion goal and solid waste management hierarchy, and where the Waste Management Council ("Council") determined the permit's substantial-public-benefit condition to be vague and ambiguous, did the Council err as a matter of law in upholding the permit as lawful and reasonable?

This issue was raised in Appellant Conservation Law Foundation's ("CLF") motion for rehearing and reconsideration filed with the Council and in its reply to Appellee Waste Management of New Hampshire, Inc.'s ("WMNH") objection to rehearing and reconsideration. Appendix ("Apx.") at 152-154, 162.

2. Where post hoc resolution of a permit condition's vagueness and ambiguity evades public review and the opportunity for appeal, did the Council err as a matter of law by upholding the permit on the ground that the Department of Environmental Services ("DES") will clarify and refine its meaning and application in the future in coordination with WMNH?

This issue was raised in CLF's motion for rehearing and reconsideration filed with the Council and in its reply to WMNH's objection to rehearing and reconsideration. Apx. at 152-154, 162.

STATUTORY AND REGULATORY PROVISIONS

Statutory Provisions

The statutes involved in this case, RSA 21-O:14, RSA 149-M:2, RSA 149-M:3, RSA 149-M:9, RSA 149-M:11, RSA 149-M:12, and RSA 541-A:31, are set forth in the Appendix to this Brief at pages 3-16.

Rules

The rules involved in this case, N.H. Admin. R. Env-Sw 304.08, N.H. Admin. R. Env-Sw 305.03(b), and N.H. Admin. R. Env-WMC 205.07(h), are set forth in the Appendix at pages 17-23.

STATEMENT OF THE CASE AND FACTS

This appeal addresses the statutory requirement that the expansion of waste facilities provide a substantial public benefit to the citizens of New Hampshire, and whether a permit may lawfully satisfy such requirement on the basis of a permit condition found to be vague and ambiguous.

The Facility and the Permit

The permit at issue in this appeal authorizes the expansion of Waste Management of New Hampshire, Inc.'s ("WMNH") TLR-III Refuse Disposal Facility, part of the facility known as the Turnkey landfill. Already one of the largest landfills in New England, and with a previously permitted footprint of 318 acres, the Turnkey landfill currently accepts more than 60 percent of its waste from sources outside of New Hampshire, with the percentage of out-of-state waste increasing substantially.[1] *See* Addendum ("Add.") at 49; Apx. at 66-67. The permit authorizes the landfill to expand by an additional 58.6 acres and to accept an additional 15,900,000 cubic yards of waste (equivalent to approximately 13 million tons) through the year 2034. Apx. at 25; *id.* at 64-65.

New Hampshire's solid waste management statute, RSA Chapter 149-M, requires that proposed solid waste facilities provide a "substantial public benefit" to the citizens of New Hampshire. RSA 149-M:11, I, II, II. *See also* RSA 149-M:4, XVII ("'Public benefit' means the protection of the health, economy and natural environment of the state of New Hampshire

[1] In the fourth quarter of 2018, waste imported to the landfill from out-of-state increased by 36 percent compared to the fourth quarter of 2017. Apx. at 66-67. Waste from within New Hampshire increased by 5.7 percent during the same time. *Id.* at 67.

consistent with RSA 149-M:11."). As part of its permit decision, DES was therefore required as a matter of law to determine whether the landfill expansion proposed by WMNH "provides a substantial public benefit" to the citizens of New Hampshire. RSA 149-M:11, III. In rendering its substantial-public-benefit determination, DES was required to assess specific criteria enumerated in RSA 149-M:11, III, including: "The ability of the proposed facility to assist the state in achieving the implementation of the [waste management] hierarchy and [waste reduction] goals under RSA 149-M:2 and RSA 149-M:3." RSA 149-M:11, III(b).

Enacted in 1996, RSA 149-M:2 establishes the state's goal, by the year 2000, "to achieve a 40 percent minimum weight diversion of solid waste landfilled or incinerated on a per capita basis" through source reduction, recycling, reuse, and composting "or any combination of such methods." RSA 149-M:2, I (hereinafter "waste reduction goal"). Also enacted in 1996, RSA 149-M:3 further establishes a solid waste management hierarchy which favors source reduction, recycling, reuse, and composting over disposal methods, and which ranks landfilling as the least favorable method for managing solid waste. RSA 149-M:3 (hereinafter "waste management hierarchy"). Despite the fact that, according to DES, up to 80 percent of solid waste is recyclable, Apx. at 137, New Hampshire still has not achieved its waste reduction goal of achieving a minimum 40 percent waste diversion, and it still relies heavily on the least preferred waste management method – landfilling. *Id.*; Add. at 51.[2]

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[2] *See also* Apx. at 68-69 (testimony of DES Solid Waste Management Bureau Director Todd Moore that over the previous ten years, the state

DES concluded that the landfill expansion proposed by WMNH would meet the various public benefit criteria set forth in RSA 149-M:11, III. Apx. at 44-50. With respect to the facility's ability to help the state achieve its waste reduction goals and waste management hierarchy, DES's determination relied heavily on a permit condition – Condition 21(d) – establishing a waste diversion requirement for WMNH's operation of the landfill, stating: "NHDES has placed conditions in the facility's permit to ensure that the landfill continues to assist the state in achieving the implementation of the hierarchy and goals under RSA 149-M:2 and RSA 149-M:3." *Id.* at 48. The permit's Condition 21, titled "Determination of Public Benefit," requires WMNH to demonstrate, for each year of operation, "that the sources, in aggregate, from which the permittee accepted municipal solid waste (MSW) and/or construction and demolition (C&D) debris for disposal achieved a minimum 30 percent waste diversion rate to more preferred methods than landfilling . . . ." Apx. at 61. It includes reporting requirements in the event the minimum 30 percent waste diversion rate is not achieved in a given year and requires WMNH to assist fifteen or more solid waste generators per year "with establishing or improving programs that assist in the implementation of the goals and hierarchy under RSA 149-M:2 and RSA 149-M:3, respectively." *Id.*

<u>CLF's Appeal to the Waste Management Council</u>

CLF appealed DES's permit issuance on the grounds that, *inter alia*, the permit fails to comply with the substantial-public-benefit requirement

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averaged over 31 percent diversion based on data reported to it by solid waste facilities).

of RSA 149-M:11, III as it pertains to the state's minimum 40 percent waste reduction goal and waste management hierarchy. Certified Record ("CR") at Tab 1.[3] Starting on April 17, 2019 and spanning five days, the Council held a hearing on the merits, during which it heard evidence and argument regarding, among other issues, the meaning of Condition 21 and the manner in which it will be implemented for purposes of achieving waste reduction through the diversion of waste to methods other than disposal.

The evidence demonstrated that several questions remain about the meaning of Condition 21 and how it will be implemented. Such evidence included yet-to-be-answered questions about what portions of the waste stream WMNH may or may not include in its waste diversion calculations within the meaning of Condition 21(d), including: wastes that WMNH is not authorized to accept at the Turnkey landfill, but which in the past it has included in diversion calculations provided to DES (Add. at 51; Apx. at 81-82); materials that are collected for recycling but which, as a result of contamination, are ultimately disposed of (Apx. at 96-97); and recyclable waste collected by Waste Management, Inc. which, if not recycled, would be destined for disposal facilities *other than* the Turnkey landfill. *Id.* at 84-90. The evidence also demonstrated that no criteria have been established for selecting the fifteen waste generators WMNH will work with pursuant to Condition 21(e). *Id.* at 98-99.

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[3] Because, as a result of the COVID-19 pandemic, CLF has not had access to the certified record and therefore cannot ensure the accuracy of citations to the certified record by page, its citations to the record are based on the "Tabs" set forth in the certified record's table of contents provided by the DES appeals clerk.

During the hearing, DES admitted that Condition 21 is not clear on its face as to what it means and how it will be implemented, and DES and WMNH both testified that determining the manner in which Condition 21 will be implemented would be the subject of future discussion between them. Apx. at 73 (testimony of DES Waste Management Division Director Michael Wimsatt: "I will tell you it's not uncommon for us to talk to and converse with applicants during the permit review process about conditions because some of these conditions, *and this would be one of them*, are complex. They're *not obvious on their face exactly what they mean and how they can be implemented*. . . .") (emphasis added); *id.* at 76 (testimony of DES Solid Waste Management Bureau Permitting and Design Review Section Supervisor Jaime Colby: "We anticipate and have verbally agreed with Waste Management that before this condition takes effect that we would have a discussion about how this would be implemented."); *id.* at 79 (testimony of Robert Magnusson, WMNH: diversion accounting mechanisms to be the subject of further discussion).

On May 7, 2019, the six-member Council engaged in public deliberations during which several Council members characterized Condition 21 as vague and ambiguous, with two councilors specifically stating that in light of the condition's lack of clarity, it is not possible to determine that the permit provides a substantial public benefit. *See* Apx. at 105-129. Councilor Durfor, for example, stated during deliberations:

> We're being asked to rule on whether or not 21 – specifically as [Councilor Gomez] indicated, 21(d) and (e) meet . . . the bar for being a substantial public benefit. If we can't tell what it is, it can't meet any bar if we can't measure it. If we can't say, yes, this

> diversion rate meets that requirement of the permit. In order for the permit to be issued, there has to be a substantial public benefit. DES and Waste Management agreed on this language that said this represents substantial public benefit. It may or may not. We can't tell as we sit here today.

Id. at 122-123.

Council Member Gomez similarly explained: "[Condition] 21(d), as I've stated, I don't know what it means. There's apparently not an agreed-upon formula for calculating the diversion rate. . . . I just don't know how it addresses the public benefit requirement." *Id.* at 117. *See also id.* at 105-106 (Councilor Kinner: "But they don't have an idea, the State, I mean, of how they're going to require this diversion rate [to] be assessed, and so I think that may be unreasonable to set a – something that you're going to figure out later how you assess it."). Ultimately, on the question whether DES acted unreasonably by failing to provide a definition of the diversion rate for purposes of satisfying the statutory public benefit requirement, the Council's vote resulted in a three-to-three tie. *Id.* at 128.

On August 18, 2019, the Council issued a final order memorializing its decision and denying CLF's appeal. Add. at 46. There, the Council found, in pertinent part, that "DES staff testified that the condition is ambiguous in some respects," that "DES intends to work with the Permittee to clarify the definition of 'diversion' as part of ongoing communication with the Permittee," and that:

> [t]he Council had misgivings about the fact that given the hearing testimony, *it was clear the Permit Condition (21) was vague in several respects, and would require flexibility and refinement in*

> *coming to an agreed definition of 'diversion' for this provision to be enforceable*.

Add. at 52 (emphasis added). Despite these findings, the final order reaffirmed the Council's three-to-three vote relative to Condition 21, failing to provide a majority either upholding or invalidating the reasonableness of the permit condition, and denied CLF's appeal. *Id.*

On September 27, 2019, CLF filed a timely motion for rehearing and reconsideration of the Council's final order arguing, *inter alia*, that the Council's finding that Condition 21 is vague and ambiguous requires a determination that the permit is deficient as a matter of law. Apx. at 145. On December 27, 2019, following the exchange of further pleadings by WMNH and CLF, the Council issued a decision denying such motion. Add. at 56.

SUMMARY OF ARGUMENT

Under the state's solid waste management statute, DES must, as a matter of law, determine whether a proposed solid waste facility will provide a substantial public benefit for the citizens of New Hampshire. In doing so, DES must specifically assess the facility's ability to help the state achieve (1) its waste reduction goal, which includes achieving a 40 percent minimum weight diversion away from landfilling and incineration, and which the state still has not achieved, and (2) its waste management hierarchy, which ranks landfilling as the least preferred method of waste management.

In granting the challenged permit, DES determined that WMNH's proposed landfill expansion – to accommodate 15,900,000 cubic yards of waste, the majority likely to come from out-of-state – will provide a substantial public benefit. DES based its determination in large part on a permit condition – Condition 21– requiring WMNH to engage in certain activities to divert waste away from landfilling, and to assist generators in waste reduction efforts.

On appeal, and based on extensive evidence about the meaning of Condition 21 and how it will be applied, the Waste Management Council deadlocked, by a 3-to-3 vote, on the reasonableness of Condition 21 supporting DES's substantial-public-benefit determination. In its final decision, the Council found Condition 21 to be "vague in several respects" and ambiguous. Despite the condition's lack of clarity, however, the Council nonetheless upheld the permit based DES's intent to clarify and refine Condition 21's meaning in the future, and in coordination with WMNH.

The Council erred as a matter of law by upholding the permit despite its vagueness and ambiguities. Because Condition 21 is vague and ambiguous, it is simply not possible to assess how it will be implemented, what it will achieve in terms of waste reduction, and therefore whether, as required by law, the proposed facility will provide a substantial public benefit to the citizens of New Hampshire. The vague and ambiguous nature of Condition 21 also erroneously deprived the Council – and now deprives this Court – of the ability to review a clear, unambiguous permit.

The Council also erred by upholding the permit on the basis that DES can cure the permit's deficiencies post hoc. The Council's approach flies in the face of fundamental principles of administrative law: the need for agencies to render informed decisions; the requirement that appeals from agency decisions are to be premised on evidence *in the record*; and statutory and due process rights of the public to appeal, and be heard on, *final* agency decisions.

The Council's erroneous decision has troubling ramifications not only for the state's ability to achieve statutory waste management objectives, but also for the integrity and transparency of New Hampshire's regulatory permitting processes. Having found the permit to be vague and ambiguous, the Council should have remanded the matter to DES for further resolution; it should *not* have relied on future, post hoc actions by DES that will occur outside of the permitting process, shielded from public review and the right to be heard on appeal. The Court should reverse the Council's decision pertaining to Condition 21 and the state's substantial-public-benefit requirement and should remand the matter to DES to address the matter as part of the permitting process.

ARGUMENT

I. Standard of Review

Appeals from decisions of the Waste Management Council are governed by RSA chapter 541. RSA 21-O:14, III. Pursuant to RSA 541:13, an appellant from a decision or order of the Council bears the burden of showing that the decision or order is unlawful, or is by a clear preponderance of the evidence unjust or unreasonable. RSA 541:13. *See also Working on Waste*, 133 N.H. 312, 316 (1990) ("'The administrative action must be affirmed unless it rests upon an error of law or unless the plaintiff carries [its] burden to demonstrate 'by a clear preponderance' that the Board's resolution of an essential issue of fact was unreasonable.'") (*quoting Appeal of Cheney*, 130 N.H. 589, 592 (1988)); *Appeal of Town of Lincoln*, 172 N.H. 244, 247 (2019). While "'[a]ll findings of the Council upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable,'" the Court "review[s] the Council's rulings on issues of law *de novo*." *Appeal of Town of Lincoln*, 172 N.H. at 247 (*quoting* and *citing* RSA 541:13 and *citing Appeal of Cook*, 170 N.H. 746, 749 (2018)).

II. The Council's Decision is Erroneous as a Matter of Law Because DES's Substantial-Public-Benefit Determination is Premised on an Ambiguous Permit Condition.

A. Under RSA chapter 149-M, a permit may issue *only* if a facility will provide a substantial public benefit to the citizens of New Hampshire by assisting the state in achieving implementation of its waste reduction goal and waste management hierarchy.

New Hampshire's solid waste management statute prohibits the construction or operation of a waste facility absent a permit, RSA 149-M:9, I, and provides: "The department shall approve an application for a permit *only* if it determines that the facility or activity for which the permit is sought will: (a) Comply with this chapter and all rules adopted under it. . ." RSA 149-M:12, I(a) (emphasis added). Among the determinations DES must make in rendering a permit decision is whether the proposed facility provides a "substantial public benefit" to the citizens of New Hampshire based on certain enumerated criteria. RSA 149-M:11, III. Those criteria specifically include:

> **(1) the facility's ability to assist the state in achieving the implementation of the state's waste reduction goal under RSA 149-M:2**, which explicitly acknowledges "that there are environmental and economic issues pertaining to the disposal of solid waste in landfills and incinerators;" states that "it is important to reserve landfill and incinerator capacity for solid wastes which cannot be reduced, reused, recycled or composted;" "discourages the disposal of recyclable materials in landfills;" and establishes that "the goal of the state, by the year 2000, is to achieve a 40 percent minimum weight diversion of solid waste landfilled or incinerated on a per capita basis;" and
>
> **(2) the facility's ability to assist the state in achieving the implementation of the state's solid waste management hierarchy under RSA 149-M:3**, which endorses a specific order of preference for waste management methods, ranking landfilling last among such

methods and establishing a preference for source reduction, recycling and reuse, and composting over waste disposal.

RSA 149-M:11, III(b); RSA 149-M:2, I; RSA 149-M:3.

In addition serving as specific criteria for DES's statutorily required substantial-public-benefit determination, achievement of the state's waste reduction goal and waste management hierarchy is meant to permeate all DES's actions taken under the solid waste management statute: "In exercising any and all powers conferred upon the department under this chapter, the department shall use and consider criteria relevant to the waste reduction goal and disposal hierarchy established in RSA 149-M:2 and 149-M:3." RSA 149-M:2, II. Absent a valid substantial-public-benefit determination based on the waste reduction and hierarchy criteria, a permit for a new or expanded waste facility cannot lawfully issue. RSA 149-M:11, III; RSA 149-M:12, I(a).

B. The Council determined that a key element of DES's statutorily required substantial-public-benefit determination – Condition 21 of the challenged permit – is vague and ambiguous.

More than twenty years since the enactment of RSA 149-M:2 and M:3, the state still has not achieved its waste reduction goal and still relies heavily on landfilling, the least preferred method of waste management under New Hampshire's hierarchy. In determining that it would grant a permit for the Turnkey landfill (already the state's largest landfill) to expand an additional 58.6 acres and accommodate the disposal of approximately 15,900,000 cubic yards of solid waste through the year 2034, DES developed and relied heavily on Condition 21 of the permit,

titled “Determination of Public Benefit.” The condition states in pertinent part:

> (d) The permittee shall, for each calendar year in which the facility operates:
>
> 1. Demonstrate that the sources, in aggregate, from which the permittee accepted municipal solid waste (MSW) and/or construction and demolition (C&D) debris for disposal achieved a minimum 30 percent waste diversion rate to more preferred methods than landfilling as outlined in the hierarchy in RSA 149-M:3. If a minimum 30 percent diversion rate cannot be demonstrated, then the permittee shall submit to NHDES by July 1 of the following year a waste diversion report which presents the permittee’s evaluation of:
>
>   a. The actual MSW and C&D debris waste diversion rate achieved;
>
>   b. The primary factors affecting that diversion rate; and
>
>   c. The practicable measures that the permittee will undertake to improve the diversion rate and an implementation schedule for doing so.
>
> 2. The demonstration under Condition (21)(d)1 above shall not be required to include certain sub-types of MSW and C&D debris waste based upon a demonstration by the permittee that there are no environmentally safe or economically sound diversion alternatives to landfilling such wastes.
>
> (e) The permittee shall assist 15 or more New Hampshire solid waste generators per year with establishing or improving programs that assist in the implementation of the goals and hierarchy under RSA 149-M:2 and RSA 149-M:3, respectively.

Apx. at 61.

During its hearing, the Council heard significant evidence about Condition 21's inherent lack of clarity, especially regarding what wastes would qualify for purposes of "diversion." Testifying for WMNH, Robert Magnusson stated that in calculating its waste diversion rates, WMNH claims "diversion" credit for materials that it is not authorized to accept for disposal at the Turnkey landfill, such as tires.[4] It also claims diversion credit for materials initially collected for recycling that, as a result of contamination, are ultimately disposed. *See* Apx. at 96-97. On this latter point, Mr. Magnusson (WMNH) conceded that "up to 25 percent of the recycling stream can be contaminated," that the contaminated portion of the recycling stream is ultimately disposed of, and that some portion of what WMNH accounts for as diversion could be disposed in a landfill. *Id.* He also testified that WMNH counts for diversion purposes recyclable materials that, if not recycled, would have been destined for disposal facilities *other than* the Turnkey landfill, but that WMNH has nonetheless claimed as diversion for the Turnkey landfill based on waste hauled by

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[4]Apx. at 81-82:

> Q. And your methodology includes claiming credit for diversion, solid waste you're not allowed to accept at the landfill; is that correct?
> A. Correct.
> . . . .
> Q. Okay. So you would – for purposes of calculating a diversion rate for condition 21, you would take – you would estimate the amount of – the tonnage of tires in your service areas that cannot come to your landfill and you'd claim that as part of your diversion rate?
> A. Yes.

WMI NEMA hauling divisions. *Id.* at 84-90 (testimony of Mr. Magnusson), 139-144 (CLF Exhibits 12, 13).

DES itself admitted during the hearing that Condition 21 is not clear on its face as to what it means and how it will be implemented. *See id.* at 73 (testimony of Michael Wimsatt: "I will tell you it's not uncommon for us to talk to and converse with applicants during the permit review process about conditions because some of these conditions, *and this would be one of them*, are complex. They're *not obvious on their face exactly what they mean and how they can be implemented*. . . ." (Emphases added)).

There was also testimony showing disagreement between DES and WMNH on a key aspect of Condition 21: whether it will require that generators demonstrate what they have done to limit the amount of waste they are sending for disposal (i.e., through diversion methods such as recycling) in order to send waste to the Turnkey landfill. In discussing Condition 21, Todd Moore (DES) stated: "Up until this point someone could contract with Waste Management for whatever waste they have with no accountability or even any thought to divert some of it that they would normally send to the landfill, so now *in order to send something to the landfill* they're going to have to show Waste Management what they've done, if anything, to limit the amount that's going into the landfill." Apx. at 70 (emphasis added). To the contrary, asked whether WMNH will be requiring customers who send waste to the landfill to show what they have done with respect to waste diversion, Robert Magnusson responded: "No, I don't see us doing that."[5]

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[5] *See* Apx. at 101-103: (continued on next page)

DES and WMNH both testified that determining the meaning of Condition 21 and how it will be implemented will require further discussion between them, to occur at some point in the future. For example,

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> Q. With respect to condition 21 and obligations it imposes, do you interpret condition 21 as providing that in order to send something to the landfill, customers are going to have to show Waste Management what they've done, if anything, to limit the amount of what's going into the landfill?
> A. Well, we're going to have to try to find that information, to the extent that we can. There are sources, we've talked a lot about them previously and the inherent issues with collecting that information, but that will be part of – that will be part of our exercise.
> *Q. Will you be requiring customers who send waste to the landfill to provide that information, and absent such information not allow them to send waste to the –*
> *A. No, I don't see us doing that. No.*
> Q. Thank you.
> A. They may be actually – if I can expand on that to add a little more clarity to that. I mean, there may be – there are many instances where we may have a customer that's bringing us a particular material and doing other activities, and it could be business confidential to them.
> There are solid waste transporter reports that solid waste transporters are obligated to submit in the State of New Hampshire. That's a data source that we expect to utilize to try to bring some more clarity and more information to this, but there may be instances where that information is not available.
> And I don't believe it would be business prudent for us to say we would not take them if they wouldn't provide that information, because we could be at a competitive disadvantage at that point. And like I mentioned in the previous testimony, this could actually have a negative effect, because we could actually have people that if they feel we're not going to service them may go somewhere else, and there may not be any change to what's going on in the marketplace.

(Emphasis added).

in response to a question about the accounting method or procedure for WMNH customers providing information to WMNH, Jaime Colby stated for DES: "That's something we intend to work on with Waste Management. We anticipate and have verbally agreed with Waste Management that before this condition takes effect that we would have a discussion about how this would be implemented." Apx. at 76.[6]

In light of the evidence, and as shown in the following exchange, several Council members expressed strong concerns that Condition 21 is vague and ambiguous in a number of respects, including concerns that they could not, in light of the condition's lack of clarity, determine the validity of DES's substantial-public-benefit determination:

> MS. KINNER: So I think, [Councilor Durfor], the question really, to me, is this: I think everybody agrees – well, I don't know. From what I hear people saying, most people at this table think, except for . . . [Councilor] Crean, that this is murky. This diversion number is murky and it's troublesome.
>
> The question that I think I'm wrestling with is it enough to remand it? That's the question. Is it enough to remand it and say you've got to go back and re-do – re-examine or whatever it is – the permit. And that's – is it unreasonable? And therefore it has to go back. And that's where the question lies. And here he comes.

---

[6] Mr. Magnusson (WMNH) similarly testified that WMNH expected to have future discussions with DES about how Condition 21 would be implemented, stating with respect to the diversion rate in Condition 21: "the methodology for calculating this is something we're going to have to further review and work with the Department on." Apx. at 79. *See also* Testimony of Mr. Magnusson, *id.* at 94 (confirming that "there are things to be worked out with DES with respect to how this condition will work."); *id.* at 99-100 (discussing his expectation to work out with DES the criteria or parameters to select the fifteen generators required under Condition 21(e)).

MR. GOMEZ: I was just going to say that probably next to Councilor Durfor, although I'm not certain, I probably have the next most experience dealing with diversion rates, and I can tell you this is extremely murky. There's –

MR. SWEET: What's murky?

MR. GOMEZ: What goes in, what's counted, what's not.

MR. SWEET: Meaning what actually goes into a diversion rate or whatever –

MR. GOMEZ: Yeah.

MS. KINNER: How it's calculated?

MR. GOMEZ: How it's calculated.

MR. SWEET: Case by case.

MR. GOMEZ: So I mean, just as an example, we had discussion here about yard waste, right? Is it part of diversion? Is it not? Oftentimes it is. Yard waste is not considered a solid waste in the State of New Hampshire, so maybe it is. Maybe it isn't. Alternative daily cover.

MS. KINNER: That's –

MR. GOMEZ: Are you really diverting material? I think that's – a lot of people make that argument. It boosts diversion rate numbers. I don't think you're diverting materials. Material that's going to the landfill is still going in the landfill. What you're doing is not putting other material in the landfill so you're extending the life of the landfill but you're not diverting anything.

But you know, those are just – those are two big examples. But there's other murkiness as well. I mean, you could claim, for example, that you have a customer who's got a 10 percent diversion rate because they chose not to buy something in the first place.

So I just think if they're going to go this route to try to address the public benefit requirement for waste reduction, it's a reasonable way to do it. There are probably other ways to do it that don't have diversion rates that aren't numerical, but if they're going to go this

> route, there has to be some agreement on the basic definitions and what goes into the formula and what doesn't. I don't see that here. And that ambiguity or murkiness to me is -- it renders the permit insufficiently responsive to the public benefit requirement.
>
> MR. CONLEY: Okay.
>
> MR. DURFOR: To follow up on his example, if I don't buy it, does that mean it was diverted? I think we heard testimony that one methodology included tires as part of the diversion rate, even when tires weren't accepted at the site. So does that count towards your diversion rate? It really doesn't have anything to do with the site. It has to do [with] the upstream generator that you're trying to find out how many tires did they have to start with, how many did they dispose of in some kind of a recycling process and how many they just bury?
>
> I think it comes down to, Nancy, you hit on it. We're being asked to rule on whether or not 21 – specifically as [Councilor Gomez] indicated, 21(d) and (e) meet or – yeah, meet the bar for being a substantial public benefit. If we can't tell what it is, it can't meet any bar if we can't measure it. If we can't say, yes, this diversion rate meets that requirement of the permit. In order for the permit to be issued, there has to be a substantial public benefit. DES and Waste Management agreed on this language that said this represents substantial public benefit. It may or may not. We can't tell as we sit here today.
>
> So for that – that's one reason, but the other one is – I keep coming back to it. I want to make sure DES and Waste Management understand what they're signing off on. Rather than leave it to a hail Mary later on five years down the road or whenever they start collecting data, we're asked to rule on whether or not this meets the bar. And going back to [Councilor Gomez's] point, if it's ambiguous and you can't tell what it really represents, there's no way to say you can rely upon it, and those sections in my mind come right out of the permit altogether, for sure.

Apx. at 119-123. *See also id.* at 124-125 (Councilor Gomez: "I'm not sure that I know exactly what should be in this permit myself. I just know that

what I'm reading right now, I don't know what it means, and for that reason alone it's insufficient."); *supra* at 13-14.

Following this discussion, the Council deadlocked 3-to-3 on whether DES acted unreasonably "in failing to provide a definition of the 30 percent diversion rate contained in paragraph 21(d) of the public benefit requirement." Apx. at 127.[7] As a result, just as a majority of the Council was unable to conclude that the permit was unreasonable, a majority of the Council was unable to conclude that it was reasonable for purposes of satisfying the substantial-public-benefit requirement.

The Council issued a final order re-affirming the Council's 3-to-3 vote on the question and finding that "DES staff testified that the condition is ambiguous in some respects" and that:

> The Council had misgivings about the fact that given the hearing testimony, *it was clear the Permit Condition (21) was vague in several respects, and would require flexibility and refinement in coming to an agreed definition of 'diversion' for this provision to be enforceable."*

Id. (emphasis added). Despite these findings of vagueness and ambiguity, and on the basis of its 3-to-3 vote, the Council nonetheless upheld the permit as valid.

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[7] It is worth noting that although Councilor Kinner was one of the three Council members who voted to uphold the permit, she affirmatively stated her view that the permit's failure to define diversion for purposes of Condition 21 "was ill-advised." Apx. at 127.

C. The Council erred by upholding the permit despite Condition 21's ambiguity.

The Council's decision to uphold the permit despite having found its critically important Condition 21 to be vague and ambiguous is erroneous for the following reasons, which, individually and collectively, constitute legal error warranting reversal and a remand to DES.

i. Condition 21 cannot lawfully support DES's substantial-public-benefit determination.

As discussed *supra* at 18-20, DES cannot lawfully grant a permit for a waste facility without determining that such facility will provide a substantial public benefit to the citizens of New Hampshire by helping to achieve the state's waste reduction goal under RSA 149-M:2 and the state's waste management hierarchy, which disfavors landfilling, under RSA 149-M:3. Yet here, DES premised its substantial-public-benefit determination on a critically important permit condition – Condition 21 – *which the Council found to be vague and ambiguous* (and for which no majority of Council members could be established to support its validity).

Based on the vague and ambiguous nature of that condition, and as specifically acknowledged by members of the Council, it is simply not possible to assess what effect Condition 21 will have in diverting waste away from the landfill. For example, will WMNH be allowed to claim as "diversion" waste that it is not allowed to permit for disposal, resulting in no associated waste reduction? Will it be allowed to claim as "diversion" waste collected for recycling but, as a result of contamination, ultimately disposed? Will it be allowed to claim as "diversion" waste collected by its haulers and sent to *other* disposal facilities? And for purposes of Condition

21(e), will it be allowed to limit its efforts to small waste generators, resulting in relatively little waste reduction?

As a result of its vagueness and ambiguity, it is simply impossible to know the effectiveness of Condition 21 and whether the landfill's 15,900,000 cubic-yard expansion of disposal capacity will assist – or hinder – achieving the state's waste reduction goal and waste management hierarchy and, therefore, whether the landfill expansion will provide a substantial public benefit. RSA 149-M:11, III(b). Accordingly, the Council erred as a matter of law in upholding the permit despite finding the permit's critically important Condition 21 to be vague and ambiguous. *See* RSA 149-M:12, I(a); RSA 149-M:11, III. *See also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1250-51 (9th Cir. 2001) (invalidating condition in Incidental Take Statement ("ITS") under the Endangered Species Act on ground, *inter alia*, of condition's "vagueness" and failure to provide "clear standard" for determining exceedance of authorized level of take); *Ctr. For Biolog. Diversity v. Bureau of Land Mgt.*, 422 F.Supp.2d 1115, 1140 (N.D. Cal. 2006) (invalidating ITS, stating: "It is too vague and confusing to act as any meaningful standard upon which compliance with the ITS can be measured."); *Delaware Dept. of Nat. Res. & Envt'l Control v. Delaware Solid Waste Auth.*, 2020 WL 495210 at 7-8 (Del. Super. Ct. 2020) (holding permit condition relative to waste haulers unconstitutionally void for vagueness for failing to give notice of prohibited conduct and lending itself to "arbitrary or erratic enforcement."); *United Disposal of Bradley, Inc. v. Pollution Control Bd.*, 842 N.E.2d 1161, 1162 (Ill. App. Ct. 3d Dist. 2006) (assessing validity of

permit condition and stating: "A regulation is unconstitutionally vague and violates due process if it leaves the community regulated unsure of what conduct is prohibited or fails to provide adequate guidelines to the administered body charged with its enforcement.") (*citing Smith v. Goguen*, 415 U.S. 566 (1974)).

It is worth noting that DES's own rules governing the permitting process for solid waste facilities *require* the denial of a requested approval if, among other things, a permit application

> provides insufficient or ambiguous information that precludes a determination that the proposed approval will comply with RSA 149-M and the applicable requirements of the solid waste rules, and the deficiencies are so substantial as to not be remedied by subjecting the approval to compensating terms and conditions.

N.H. Admin. R. Env-Sw 305.03(b)(2). Just as permit applicants are required to provide clear, unambiguous information to support a permit application, so too should DES be required to ensure that the terms of a final permit are clear and unambiguous and will satisfy the state's solid waste management laws, including the substantial public benefit requirements of RSA 149-M:11, III.

ii. The permit violates the requirement that appellate bodies be provided clear, unambiguous agency decisions for review.

Appellate bodies – in this case the Waste Management Council, and now the Court – serve a critically important role in ensuring the integrity of the regulatory process, including the evaluation of factors that underlie an agency's decision. *See Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989) (courts must "ensure that agency decisions are founded on a

reasoned evaluation 'of the relevant factors.'"). This Court has recognized the importance of meaningful judicial review by requiring agencies to provide a clear factual basis for their decisions.

In *Society for the Protection of New Hampshire Forests v. Site Evaluation Committee*, 115 N.H. 163 (1975), for example, the Court, in reviewing a decision of the Site Evaluation Committee, explained:

> Both the state and federal courts have been uniform in recognizing the importance of findings in facilitating judicial review, preserving agency prerogatives and encouraging deliberate decisions. *Hampton Nat'l Bank v. State*, 114 N.H. 38, 45, 314 A.2d 668, 674 (1974); 2 K. Davis, Administrative Law Treatise s. 16.05, at 444 (1958) (Supp. 1970, at 573); *see* RSA 162-F:8, I (Supp. 1973); 5 U.S.C. s. 557(c)(A); Model State Administrative Procedure Act s. 12 (1961). A reviewing court needs basic facts *to understand administrative actions and to ascertain whether the facts and issues considered sustain the ultimate result reached*. K. Davis, Administrative Law Text s. 16.04 (1972); *see Wood County Bank v. Camp*, 348 F.Supp. 1321, 1324 (D.D.C. 1972); *California Motor Transp. Co. v. Public Utilities Comm'n*, 59 Cal.2d 270, 274, 28 Cal.Rptr. 868, 871, 379 P.2d 324, 327 (1963).

Society for Prot. of N.H. Forests, 115 N.H. at 172-173 (emphasis added). The Court has noted that in addition to aiding judicial review, basic findings in agency decisions serve the purposes of "preventing judicial usurpation of administrative functions, and protecting against careless or arbitrary action by an agency." *Hampton Nat'l Bank*, 114 N.H. at 45 (*citing* K. Davis, Administrative Law Text s 16.03 (3d ed. 1972)) (overruled on other grounds by *Appeal of Portsmouth Trust Co.*, 120 N.H. 753, 759-760 (1980)).[8]

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[8] *See Appeal of Portsmouth Trust Co.*, 120 N.H. at 759-760, stating:

While *Society for the Protection of New Hampshire Forests* and *Hampton National Bank* address the need for agencies to provide written findings in their decisions, the underlying concerns in those cases – the needs to aid judicial review, to ascertain whether the facts and issues considered by the agency support its decision, to avoid usurpation of agency functions, and to prevent careless or arbitrary agency action – all apply with equal force to decisions lacking in clarity. As the U.S. Supreme Court stated in its seminal decision *SEC v. Chenery Corp.*, 332 U.S. 194 (1947):

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

> The findings do not disclose the basis for the board's decision and so are not helpful. *See Scarborough v. Arnold* [117 N.H. 803,] 806 [1977] . . . . It is not this court's function to comb lengthy and detailed administrative records in search of evidence which would support an administrative finding. *See Vickerry Realty Trust Co. v. City of Nashua*, 116 N.H. 536, 540 . . . (1976). Rather, the administrative agency must include specific, although not excessively detailed, basic findings in support of the ultimate conclusions which in turn support the action of the administrative agency. *See Colburn v. Personnel Commission*, [118 N.H. 60,] 65 [1978] . . . . We note that in *Hampton Nat'l Bank v. State*, 114 N.H. 38, 44 . . . (1974), we stated that the mere fact that the board's findings were couched in terms of the statute did not "affect their character as basic findings." We today withdraw from that position.

SEC v. Chenery Corp., 332 U.S. at 196-197 (*quoting U.S. v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935)).

Here, the vague and ambiguous nature of Condition 21 undermined the ability of the Council – and now undermines the ability of the Court – to ascertain what, if anything, the condition will achieve for purposes of reducing waste and assisting in achievement of the state's waste management hierarchy and, therefore, to ascertain whether the facility will provide the substantial public benefit mandated by RSA 149-M:11, III. Again, for purposes of meeting Condition 21(d)'s diversion requirement, will WMNH be allowed to claim waste that it is not even authorized to accept at the landfill as diverted waste? Will it be allowed to include the 25 percent of waste collected for recycling which, as a result of contamination, are disposed? Will it be allowed to claim as "diversion" waste collected by its haulers and sent to *other* disposal facilities? And for complying with Condition 21(e), can WMNH select *any* generators of its choosing, regardless of how much or how little waste they generate (and, by extension, how much diversion may be achieved through them)? Absent clarification of Condition 21's meaning and application, it is impossible to know whether DES's substantial-public-benefit determination is valid. Indeed, Council members expressed frustration with their inability to assess the meaning and effect of Condition 21 and whether the condition actually supports DES's finding of substantial public benefit. *See supra* at 13-14, 27-28.

The vague and ambiguous nature of Condition 21 deprived the Council – and it now deprives this Court – of the right and ability to assess

a clear, unambiguous permit for purposes of reviewing whether the proposed facility will, as required by RSA 149-M:11, III, provide a substantial public benefit by helping achieve the state's waste reduction goal and waste management hierarchy. The Council's decision to uphold the permit despite the requirement that agency permits be clear and unambiguous to enable meaningful appellate review – and to guard against "careless or arbitrary" agency actions and other adverse ramifications, *Hampton Nat'l Bank*, 114 N.H. at 45 – is erroneous as a matter of law.

III. The Council's Decision is Erroneous as a Matter of Law Because it Relies on Future, Post-Permit Determinations of Condition 21's Meaning and Implementation.

The Council determined that Condition 21 is vague and ambiguous, yet upheld DES's permit on the basis that the condition – particularly its use of the critically important term "diversion" – would be subject to future clarification and refinement by DES in coordination with WMNH. Add. at 52. But by relying on future agency determinations to be made outside the permitting process, the Council's decision endorses an approach that threatens the integrity of New Hampshire's regulatory process – allowing agencies to issue permits based on vague notions of what critical permit terms mean, and to clarify and refine such terms post hoc, outside the public permitting process, in concert with regulated entities. The Council's decision allowing DES to clarify and refine the meaning and application of Condition 21 is erroneous for the following reasons, which – individually and collectively – necessitate reversal of the Council's decision and a remand to DES.

A. The Council's decision erroneously relies on a yet-to-be determined meaning of Condition 21 that should have been known *at the time of permit issuance.*

It is axiomatic that permit processes are to be based on adequate information leading to well informed permit decisions. *See, e.g.,* N.H. Admin. R. Env-Sw 305.03(b)(2) (requiring DES to deny requested approval if, *inter alia*, permit application "provides insufficient or ambiguous information that precludes a determination that the proposed approval will comply with RSA 149-M and the applicable requirements of the solid waste rules . . . ."); N.H. Admin. R. Chapter Env-Wt 300, relative to wetlands permits, including N.H. Admin. R. 313.01(d) ("The department shall deny an application if it is unable to determine that the criteria for issuing a permit . . . have been met."); *Hanrahan v. City of Portsmouth*, 119 N.H. 944, 949 (1979) (remanding decision of historic district commission because commission "did not have before it sufficient information to enable it to reach reasoned decisions with regard to the enumerated purposes and factors that it must consider."). The Council erred as a matter of law by upholding a permit that, *at the time of its issuance*, included a critically important condition found by the Council to be vague in several respects and subject to future clarification and refinement.

Recently, in *Appeal of Fournier*, No. 2018-0617, 2019 WL 6040519 (N.H. S.Ct. Nov. 14, 2019), this Court reversed, in part, a decision of the Water Council upholding DES's issuance of an alteration of terrain permit to the Town of Milford to conduct a gravel mining operation on property known to provide habitat for certain threatened and endangered species. The Court reached its decision on the basis that DES erroneously applied a

"minimization of impacts" standard as opposed to the requisite "no adverse impact" standard in rendering its decision to grant a permit. *Appeal of Fournier*, No. 2018-0617 at 5, 2019 WL 6040519 at *4. Rejecting DES's argument that the permit would not absolve the Town from post-permit implementation activities resulting in "takes" of protected species, the Court held: "Because neither DES nor Fish & Game applied the more demanding standard . . . *when issuing* the Town's permit, the order of the Water Council upholding the issuance of the permit is unlawful." *Id.*, No. 2018-0617 at 5-6, 2019 WL 6040519 at *4 (emphasis added). *See also id.*, No. 2018-0617 at 7, 2019 WL 6040519 at *5 (Hantz Marconi, J., concurring in the result and stating: "[G]iven the lack of studies conducted *prior* to the issuance of the permit there is insufficient evidence that the project was designed to meet either standard.") (emphasis added).

Appeal of Fournier makes clear that an agency's review and decision-making *at the time of permit issuance* is what matters for purposes of complying with permitting standards. Here, as in *Appeal of Fournier*, DES was required to apply proper legal standards at the time of permitting (i.e., a determination of "substantial public benefit" based on statutorily enumerated criteria) and to do so on the basis of meaningful information. DES cannot lawfully rely on post-permit determinations of what Condition 21 means and post-permit determinations of how Condition 21 will be applied to support its permit decision. Such post hoc activities simply cannot cure the lack of information and clarity needed to support DES's substantial public benefit requirement at the time it rendered its permit decision. The Council erred as a matter of law by upholding the permit despite Condition 21's ambiguities on the theory that DES would engage in

future, post-permit clarification and refinement of the condition's meaning and implementation.

B. The Council's decision is premised on extra-record facts in violation of the Administrative Procedures Act and the Council's rules.

Appeals to the Council, and Council decisions on such appeals, are to be based on the administrative record, together with evidence presented by the parties. RSA 541-A:31 ("Findings of fact shall be based *exclusively on the evidence* . . . .") (emphasis added); RSA 21-O:14, I-a (a) (Supp. 2019) ("[T]he council shall determine whether the department decision was unlawful or unreasonable by reviewing the administrative record together with any evidence and testimony the parties to the appeal may present"); *Appeal of Old Dutch Mustard*, 166 N.H. 501, 514 (2014) (holding it was proper for Council "to analyze the totality of the evidence—including the new evidence presented at the hearing—to determine whether the decision to grant a waiver was lawful and reasonable").[9]

Here, following five days of hearing, the Council found Condition 21 of the permit to be vague and ambiguous, yet it proceeded to uphold the permit based on DES's intent to clarify and refine that condition – particularly the condition's use of the essential term "diversion." Add. at 52. In doing so, the Council relied on critically important, yet-to-be developed information – the meaning to be ascribed to Condition 21, the

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[9] *See also* Rule Env-WMC 205.07(h) ("[N]o information shall be considered as evidence or made part of the record in any proceeding before the [waste management] council that is not introduced as evidence in accordance with this part.").

manner in which it will be implemented, and its potential for waste reduction – outside the administrative record and the evidence presented to it. Accordingly, the Council's decision is erroneous as a matter of law.

C. The Council's decision is erroneous as a matter of law because it violates the statutory right of appeal and due process.

Under the solid waste management statute and DES's rules, the public has a right to review and be heard on permit applications for the expansion of waste facilities not deemed "to have an insignificant effect on environmental quality." RSA 149-M:9, VIII (Supp. 2019); Admin. R. Env-Sw 304.08 ("Public Hearing"). Any person aggrieved of a decision granting or denying a permit for such a facility has a right to appeal the decision to the Waste Management Council. RSA 21-O:14, I-a (Supp. 2019); RSA 21-O:9, V.

Here, CLF exercised its right of public review and comment as well as its right of appeal, challenging a permit with an essential condition determined by the Council to be vague and ambiguous, but which the Council nonetheless upheld on the ground that DES would clarify and refine the condition's meaning in the future. The Council erred as a matter of law by allowing DES to cure deficiencies in its permit post hoc, outside the permitting process, in a manner that evades public review and the right of CLF or other aggrieved parties to be heard on appeal.

In *Sklar Realty Inc. v. Town of Merrimack*, 125 N.H. 321 (1984), this Court addressed whether an abutter to a proposed project had been unlawfully deprived of a right to be heard on the applicant's claimed satisfaction of conditions precedent. There, the plaintiff (abutter) had the

opportunity to participate in two public hearings on the applicant's proposal but was *not* provided the opportunity to be heard on information subsequently provided by the applicant to the planning board regarding the applicant's satisfaction of conditions precedent. *Sklar Realty*, 125 N.H. at 324-326. In holding that plaintiff had been unlawfully deprived of a right to be heard, the Court explained:

> In a functional sense, when an applicant claims to have fulfilled a condition attached to an application, that condition has become part of the application itself. An opportunity to testify on the applicant's fulfillment of such a condition is in reality, then, an opportunity to testify on the factual basis for the application as it must finally be approved or denied. Without that opportunity the statutory right to be heard would be limited indeed.

Id. at 328. *See also id.* at 329 ("The plaintiff's statutory right to a hearing before the board was not worth much under these circumstances, and judicial resources were not well used."). Importantly, although the master assigned by the superior court had upheld the planning board's approval of conditions precedent, the Court concluded that the planning board "should have heard the plaintiff's witnesses before making its findings" and went on to state:

> We hold that the failure to allow testimony from the plaintiff on this issue was a 'serious impairment of opportunity for participation,' under RSA 36:23, IV (Supp. 1983), for which reversal is the only effective remedy. . . . The board's approval must be vacated and the case remanded for a compliance hearing.

Id. at 329.

Here, as in *Sklar Realty*, CLF and the public have been deprived of important process – namely, the statutory right of appeal under RSA 21-

O:14, I-a (a), which secures the right of aggrieved persons to appeal DES decisions to the Council. By finding Condition 21 to be ambiguous, yet subject to post-permit clarification and refinement of its meaning and what it will achieve, the Council "in a functional sense" determined the permit to be incomplete and a work in progress, depriving CLF of the right to review, and the right to be heard on, a *complete* permit. *See Sklar Realty*, 125 N.H. at 328. The Council erred as a matter of law by not remanding the permit to DES to enable refinement of Condition 21 *within, and as part of, the permit process*, *see Sklar Realty*, 125 N.H. at 329, instead placing DES's final clarifications and refinements of Condition 21 – and what Condition 21 will or will not achieve in terms of waste reduction – beyond the statutory review and appeals process.

Finally, in addition to depriving CLF of its statutory right of appeal, the Council's decision deprived CLF of its due process rights. As this Court has made clear: "The fundamental requisite of due process is the right to be heard at a meaningful time and in a meaningful manner." *Appeal of Portsmouth Tr. Co.*, 120 N.H. 753, 758 (1980). Here, CLF was provided the opportunity to review, appeal, and be heard on a permit that has been found to be vague and ambiguous and that will be subject to future, post-permit clarifications and refinements. The approach endorsed by the Council's order places beyond the permitting process, and beyond CLF's ability to be heard on appeal, the question whether the permit, as further clarified and refined by DES in the future, will satisfy the substantial public benefit standard, thereby depriving CLF of its due process right "to be heard at a meaningful time and in a meaningful manner." *Id.* The Court should cure this violation of due process by remanding the matter for

further resolution of Condition 21 as part of the permitting process and subject to CLF's and the public's rights of review and appeal.

CONCLUSION

The Court should reverse the Council's decision and remand this matter to DES, as part of the permitting process, to resolve deficiencies in Condition 21 and its substantial-public-benefit determination.

ORAL ARGUMENT

CLF respectfully requests oral argument.

APPEALED DECISIONS

Undersigned counsel hereby certifies that the written decisions of the Council, to which this appeal pertains, are provided as the first two items in the addendum to this brief.

Dated: July 31, 2020

Respectfully submitted,

Conservation Law Foundation, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2020 this Brief will be sent electronically, as required by the Rules of the Supreme Court, through the court's electronic filing system to all attorneys who have entered electronic service contacts (email addresses) in this case. Copies will be sent by U.S. Mail to parties who have not entered electronic service contacts.

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CERTIFICATE OF WORD COUNT

As required by the Rules of the Supreme Court, I hereby certify that this Brief contains 9,442 words, exclusive of the cover page, table of contents, table of authorities, statutory provisions and rules section, signature block, certificate of service, certificate of word count, and addendum.

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ADDENDUM

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STATE OF NEW HAMPSHIRE

WASTE MANAGEMENT COUNCIL

DOCKET NO. 18-10 WMC

RE: CONSERVATION LAW FOUNDATION APPEAL.
("APPELLANT")

FINAL ORDER ON PETITION FOR APPEAL

ORDER: APPEAL DENIED

BACKGROUND

On July 11, 2018, the Appellant timely filed with the Waste Management Council ("Council") its Notice of Appeal ("Appeal") of the Department of Environmental Services ("DES") June 11, 2018, Decision ("Decision") to issue a Type I-A Permit Modification ("Permit") for Expansion of the Waste Management of New Hampshire, Inc. ("Permittee") TLR-III Refuse Disposal Facility, known as the Turnkey Landfill, ("Facility") located in Rochester, NH.

Following prehearing rulings, Appellant's issues remaining on Appeal arise under RSA 149-M:11, the Public Benefit Requirement of the state's Solid Waste Management law, Chapter 149-M. *Decision and Order on Permittee's Motion to Dismiss*, dated 2/6/19. They are discussed below.

The Council heard testimony regarding the Appeal from witnesses called by Appellant and Permittee on April 17, 18 and 19; and May 2 and 3, 2019. Deliberations were held on May 7, 2019.

DISCUSSION

Council jurisdiction to hear administrative appeals is set by statute. RSA 21-O:9, V provides that the Council is authorized to hear administrative appeals from DES decisions relating to the waste management division. RSA 21:O-14 defines a DES

"decision" as meaning a permitting decision, enforcement decision or other decision that by statute is appealable to the Council. The DES Decision falls within that definition. RSA 21-O:14, I (a). Appellant may only prevail in this Appeal upon showing by a preponderance of the evidence that the Decision to issue the Permit was "unlawful or unreasonable". RSA 21-O:14, I-a. (Env-WMC 205.14 describes the burden as "contrary to case law, statute, or rules; or arbitrary and capricious". As the rule predates the statute, the latter formulation will be used here.)

RSA 149-M:1 provides that the purpose of the solid waste management rules is to "protect human health, to preserve the natural environment, and to conserve precious and dwindling natural resources through the proper and integrated management of solid waste."

RSA 149-M:2, I states that given environmental and economic issues associated with disposing of solid waste in landfills or incinerators, landfill and incinerator capacity should be reserved for solid wastes "that cannot be reduced, reused, recycled or composted." Thus, the statute provides that the "goal of the state, by the year 2000, is to achieve a 40 percent minimum weight diversion of solid waste landfilled or incinerated on a per capita basis. Diversion shall be measured with respect to changes in waste generated and subsequently landfilled or incinerated in New Hampshire....[and] may be achieved through source reduction, recycling, reuse, and composting...."

RSA 149-M:3 endorses a hierarchy of six waste management methods intended to help achieve the goals of RSA 149-M:2, in order of preference: source reduction, recycling and reuse, composting, waste-to-energy technologies including incineration, incineration without resource recovery, and lastly, landfilling.

The state must provide for the solid waste management needs of its citizens as a public benefit under the terms of RSA 149-M:11. That statutory provision imposes on the state the obligation to "ensure that adequate capacity exists within the state to accommodate the solid waste generated within the borders of the state....[and] facilities necessary to meet state solid waste capacity needs must be designed and operated in a

manner which will protect the public health and the state's natural environment." RSA 149-M:11, I (a), (b) and (c); RSA 149-M:11, II (the purpose of the solid waste rules to "ensure benefit to the citizens of New Hampshire by providing for solid waste management options which will meet the capacity needs of the state while minimizing adverse environmental, public health and long-term economic impacts.")

RSA 149-M:11, III states that DES shall determine whether a particular proposed solid waste facility provides a "substantial public benefit" by analyzing three criteria:

(a) The short- and long-term need for a solid waste facility of the proposed type, size and location to provide capacity to accommodate solid waste generated within the borders of New Hampshire…
(b) The ability of the proposed facility to assist the state in achieving the implementation of the hierarchy and goals under RSA 149-M:2 and RSA 149-M:3.
(c) The ability of the proposed facility to assist in achieving the goals of the state solid waste management plan [under RSA 149-M:29]….

RSA 149-M:29 imposes on DES the requirement to prepare and update every six years a state "solid waste plan" and report on the level of achievement in reaching the 40% waste reduction goal of RSA 149-M:2 and setting out information pertaining to, among other indicia, solid waste generation in the state, disposal patterns as they relate to the six-point hierarchy, and future capacity needs.

As part of the permitting process for the Facility, DES made a determination of fact that operation of the facility would provide a substantial public benefit and included that finding, subject to five operating conditions, in para. 21, p. 7, of the Permit. (Jt. Ex. C, pg. 147, 153)

Appellant challenges this determination on several grounds.

I. Three Criteria – RSA 149-M:11, III

With respect to the three enumerated criteria of RSA 149-M:11, III that DES is required to assess in connection with its review of Permittee's permit application, Appellant asserts first that DES failed to adequately provide conditions in the Permit to assure that expansion of the landfill will provide sufficient capacity to accommodate

solid waste generated by New Hampshire sources through the term of the Permit. RSA 149-M:11, III (a).

Appellant did not ultimately contest the Decision's finding that Permittee established a "need" for this expansion, as DES explains in its 06\11\18 "Review Summary, Attachment A, Public Benefit Determination" Jt. Ex. D, pg. 197 ("Without the proposed expansion of TLR III, NHDES projects a shortfall in disposal capacity starting in 2020.")

Permit Para. 21(a) and (b) limit the annual amount of the expanded landfill space consumed by landfilling solid waste to 1.55 million cubic yards averaged over a rolling three-year period. And the facility is required to be operated through at least 2034. Para. 21(c) says that the Permittee "shall make available disposal capacity for New Hampshire generated solid waste for the entire operating life of the facility." The Permit does not provide any other conditions tending to address this capacity issue.

Appellant introduced "Waste Receipts By State of Origin" reports prepared by Permittee and submitted to DES indicating that in 2018 New Hampshire source waste amounted to approximately 37% of the total landfilled at the facility while Massachusetts' share of the total was approximately 58%, with the balance coming from the other New England states. CLF Ex. 5, pg156. The percentage share of out-of-state waste appears to be increasing year after year. CLF Ex. 61, pg.2. Given this evidence of the in-state vs. out-of-state imbalance in waste landfilled at the facility, and that the ratio is increasing from year-to-year, Appellant asserts that the Permit conditions are deficient and unreasonable. DES should have given further study to the question whether additional conditions should have been included in the Permit to address capacity concerns. Appellant suggested including in the Permit concepts such as limiting the amount of out-of-state waste received by the facility, setting a threshold amount of New Hampshire waste that must be accepted before other states are given access to the facility, reducing the ten-year term of the Permit or by adding a "reopener clause" to the Permit that would allow DES to review this imbalance in the future should conditions warrant.

Appellant also argued that DES has not updated its solid waste plan since 2003, Jt. Ex G, despite the statutory requirement to update the plan at the six-year intervals by RSA 149-M:29. It follows that DES lacked required information on which to base its decisions regarding capacity needs of the state. Testimony from the DES panel stated that a lack of updated plans is due to budget constraints within the agency.

The Council reviewed this evidence and testimony, as well as that submitted by both the Permittee and DES supporting the existing Permit conditions and a majority determined that DES did not act unreasonably in finding that the Permit conditions addressing the capacity needs of the state were sufficient to satisfy the public benefit requirement of RSA 149-M:11, III (a) and remand to DES to reconsider this issue was not warranted. (Council members did offer critical comment regarding the lack of an updated solid waste management plan but did not find that that issue merited a remand.)

II. Hierarchy and goals of RSA 149-M:2 and RSA 149-M:3

Appellant's second argument is that in terms of a public benefit analysis, the Permit fails to adequately address the ability of the proposed facility to assist the state in achieving implementation of the hierarchy and goals of RSA 149-M:2 and RSA 149-M:3 as required by RSA 149-M:11, III (b).

In that regard, Permit Condition 21(d) 1. provides that for each year the facility operates, the Permittee is required to demonstrate that "that the sources, in the aggregate, from which the permittee accepted municipal solid waste (MSW) and\or construction and demolition (C&D) debris for disposal achieved a minimum 30 percent waste diversion rate to more preferred methods than landfilling as outlined in the hierarchy in RSA 149-M:3." If that rate cannot be demonstrated, then the Permittee is required to prepare a report explaining what the actual diversion rate was, what factors affected that diversion rate, and measures the Permittee will undertake to improve the diversion rate. Condition 21(d) 1. a, b, and c. (Jt. Ex. C, pg. 153.)

Moreover, Condition 21 (e) provides that the Permittee is to assist "15 or more New Hampshire solid waste generators per year with establishing or improving programs that assist in the implementation of the goals and hierarchy" under RSA 149-M:2 and :3. (*Id.*)

DES staff testified that this provision appears for the first time in the subject Permit and was the subject of preapproval negotiations between DES and the Permittee. It is now being incorporated in subsequent waste management permits. Its purpose is to impose on the Permittee a responsibility to work with its customers to divert solid waste from the landfill and attain the 40% diversion rate of RSA 149-M:2, which was supposed to be demonstrated with respect to New Hampshire sources by the year 2000. (Testimony, DES panel, day one.) According to the evidence, DES believes that approximately 30-35% of MSW and C&D debris is currently being diverted for purposes of this statute. *See*, *e.g.*, CLF Ex. 3, pg. 23-24; Ex. 4, pg.43.

Appellant argues that this provision does not satisfy the public benefit requirement in several respects. For example, as noted above, DES maintains that the state is already diverting more than 30% of its solid waste subject to diversion. In response, a DES panel member testified, however, that the 30% Permit condition was not supposed to supplant the 40% statutory requirement, but instead was intended to set "a floor" on the amount of diversion attained. Appellant argues that this testimony raises a question whether the 30% condition does anything to advance the goal of a 40% rate reduction.

Furthermore, the term "diversion" is not further defined in Condition 21(d). It is, therefore, unclear whether certain materials are validly included in the definition given their particular characteristics. Appellant pointed to the fact that the Permittee has included certain MSW materials in calculations of diversion within its service area that are not currently allowed to be landfilled at the facility. *See*, *e.g.*, CLF Ex. 5, pg.162-163 (yard waste, among others). Appellant also notes that special waste known as "alternative daily cover", which is composed of landfilled products including C&D debris may be counted as a diverted product even though it exists in that form for only one day.

Other ambiguities include the fact that the 40% diversion calculation of RSA 149-M:2 addresses only New Hampshire-generated solid waste, while Condition 21(d) references solid waste generated from all of Permittee's sources, which include non-New Hampshire customers such as those in Massachusetts. With respect to Condition 21(e), there are no requirements describing the makeup of the class of generators chosen, or what protocol is to be used in determining compliance with the condition. In short, Appellant argues that too many details regarding this newly formed condition have been left for future development, and in its present form, does not support a finding of a significant public benefit for the project.

DES staff testified that the condition is ambiguous in some respects, but that it is intended to be flexible and subject to further discussion with Permittee. Thus, DES intends to work with the Permittee to clarify the definition of "diversion" as part of ongoing communication with the Permittee. They noted, for example, that yard waste will likely not be eligible for inclusion in the diverted material calculation.

The Council had misgivings about the fact that given the hearing testimony, it was clear that Permit Condition 21(d) was vague in several respects, and would require flexibility and refinement in coming to an agreed definition of "diversion" for this provision to be enforceable. On motion to find that DES acted unreasonably in failing to provide a definition of the Permit's 30% diversion rate, rendering the public benefit requirement unmet, the Council of six split their vote, three in favor and three against the motion. As a result, Appellant failed to meet its burden with respect to this issue.

III. PFAS Testing

The third issue raised by the Appellant concerns the Permit's failure to address the fact that even though leachate collected at the facility's leachate collection system and in certain monitoring wells has tested positive for the presence of PFAS compounds, including PFOA and PFOS. *See, e.g.*, CLF Ex. 34, pg. 753, et. seq. (10\04\18 Eurofins "Analysis Report" prepared at DES's request); *and* CLF Ex. 33, pg. 725, et. seq. (01\15\19 Sanborn, Head and Assoc. "PFAS Corrective Action Plan Initial Findings Report" prepared at Permittee's request.)

DES acknowledges that the presence of PFOA and PFOS chemicals in the state's water resources raises significant human health and environmental concerns because of their known or suspected toxicity, persistence in the environment, and fact that they do not appear to break down over time into less harmful substances. *See, e.g.*, CLF Ex. 26, pg.641, *et. seq*. (08\16\18 DES presentation to the Council entitled "Update on Per- and Polyfluoroalkyl Substances (PFAS) Investigations in New Hampshire"). Experts for both Permittee and Appellant agree that these compounds constitute "contaminates of emerging concern" as so categorized by the US EPA.

Despite these concerns, at the time the Permit was granted, there were no state or federal permit requirements for PFAS testing or treatment of leachate to be undertaken either at the facility, or at the wastewater treatment plants in Rochester, NH, Lowell, MA, or Madison, ME even though those plants discharge this leachate directly into local rivers without PFAS treatment. CLF Ex. 41, pg. 826. Moreover, it appears that the treatment plants are not requiring this testing before accepting leachate from the facility. CLF Ex. 42, pg. 877. Appellant acknowledges that the Permit does not require PFAS tests or treatment of leachate generated at the facility, but an expert for Appellant gave his opinion that protection of human health and the environment requires that Permittee should test and treat its leachate for PFAS contaminants before the leachate leaves the facility, regardless of any legal requirement to do so.

Appellant argues that DES is well aware of the PFAS contamination in the state and is currently conducting various studies of the issue. As a result, it should not have approved the Permit without completing these studies. To do so violates the statutory requirement that the facility "must be designed and operated in a manner which will protect the public health and the state's natural environment." RSA 149-M:11, I (c). Appellant notes that no assessment has been made by DES of cumulative life cycle impacts PFAS contamination may have on the environment, including a buildup in river sediments, which may cause harm to aquatic life. DES could impose new testing requirements that would advise the local wastewater treatment plants of any PFAS-

related data from the facility that would result in a possible need for additional treatment options.

The Permittee observed that the Permit does not eliminate the need for future compliance with new laws and regulations that may address these PFAS issues. Permit, para. VI, last sentence. Jt. Ex. C, pg. 147.

The Council discussed the fact that no current testing or treatment requirements exist for PFAS compounds found at the facility and that are then discharged to other facilities. Moreover, the science and regulation of PFAS chemicals is evolving and it is likely that new laws and regulations will be issued in the future to address these contaminants. As a result, a majority of the members determined that it was not unlawful or unreasonable for DES to grant the Permit without requiring that such testing be undertaken before its issuance.

IV. Methane Gas Emissions

Appellant's final argument is that the Permit should have addressed the issue of methane gas emissions potentially being disbursed into the air and through the soil from the facility.

The DES panel testified that under DES's solid waste rules, the facility is required to maintain a landfill gas collection system and a series of soil gas probes to monitor and control the generation of methane and other hazardous or explosive gases as part of its operating permit. Env-Sw 1005.01; Env-Sw 806.07.

DES's June 11, 2018, "Response to Public Comment" addresses concerns expressed by CLF and others that current operations may be emitting landfill gases that are dangerous to human health and the environment and the facility, as expanded, will be emitting even greater amounts of dangerous landfill gases including methane. The Response states that DES requires that the "landfill gas collection system will be expanded as required to accommodate the expansion and maintain compliance with solid waste and air regulations." Jt. Ex. F, pg. 235.

The Response also observes that toxic air emissions from the landfill are regulated by the DES's Air Resources Division through a Title V Operating Permit issued by that division and that under that permit air emissions are regularly evaluated. Those reports indicate that air emissions from the existing landfill have shown that no ambient air quality limits set by DES are being exceeded. Jt. Ex. F, pg. 236. Furthermore, "prior to expansion of the landfill...[the Permittee] will be required to demonstrate that emissions from the expanded landfill will remain compliant with air emissions regulations...and obtain a Temporary Permit from NHDES Air Resources Division." *Id.*

Permittee argued that in fact its landfill gas collection system is operating at about a 90% collection efficiency. *See* WMNH Ex. 13, pg.220.

The Council reviewed this testimony and evidence and in a unanimous vote determined that DES did not act unlawfully or unreasonably in failing to provide conditions in the Permit to address Appellant's methane emissions issue.

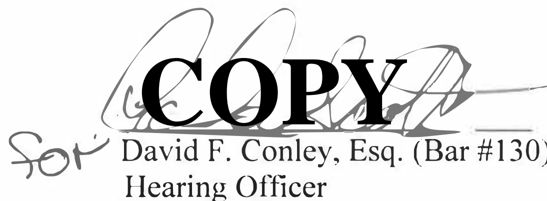
CONCLUSION AND ORDER

Consistent with the above Discussion, Appellant has failed to meet its burden to prove that the DES Decision was unlawful or unreasonable in any respect.

Appeal Denied.

For the Council

8/28/19
Date



for David F. Conley, Esq. (Bar #130)
Hearing Officer

Pursuant to RSA 541, any party whose rights are directly and adversely affected by this decision may file a motion for reconsideration with the Council within 30 days of the date of the decision.

STATE OF NEW HAMPSHIRE

WASTE MANAGEMENT COUNCIL

DOCKET NO. 18-10 WMC

RE: CONSERVATION LAW FOUNDATION APPEAL. ("APPELLANT")

DECISION AND ORDER ON APPELLANT'S MOTION FOR REHEARING AND RECONSIDERATION

ORDER: **MOTION DENIED.**

Pursuant to Env-WMC 205.16, and on September 27, 2019, Appellant timely filed its Motion for Rehearing and Reconsideration of the Council's Final Order denying Appellant's Petition for Appeal, dated August 28, 2019. The Appeal challenged a DES decision to issue a Type I-A permit modification to Waste Management of New Hampshire, Inc. ("Permittee") for a proposed landfill expansion in Rochester, NH. The Council conducted deliberations regarding the Motion at its meeting on November 21, 2019.

In summary, Appellant's Motion raises five assignments of error regarding the Council's legal conclusions or findings of fact made in the Final Order. The issues pertain to the "public benefit" requirements of RSA 149-M:11 and Condition 21 of the Permit, which DES included in the Permit to address the public benefit requirement.

The Hearing Officer decides all questions of law raised during an appeal, and the Hearing Officer and the Council deliberate before reaching conclusions of mixed questions of law and fact. The Council determines all questions of fact except to the extent a finding is without evidentiary support in the record. RSA 21-M:3, IX (c), (d) and (e).

First, Appellant argues that the Council committed an error of law to the extent the Council found that Condition 21, particularly the 30% diversion provisions, satisfies the public benefit requirement even though it is ambiguous, and leaves to future negotiation between DES and the Permittee, certain important criteria and elements concerning implementation of the Permit. *E.g.*, *Motion*, para. 23. The Council agreed with Appellant that Condition 21 contained terms and conditions that lacked specificity. However, DES witnesses testified at the hearing that these issues were to be clarified through further discussion with the Permittee regarding implementation of the Permit. Appellant did not cite any case law, statute or rule supporting its argument that such subsequent administrative action refining the terms of Condition 21 was unlawful. Moreover, the record was clear that Appellant's due process rights have been protected throughout the permitting procedure, in which Appellant participated, and through this Appeal. The Council and the Hearing Officer concluded that under the circumstances the decision was not unlawful.

Appellant's second assignment of error concerns the Council's determination that Condition 21's ambiguity with respect to the definition of diversion did not render DES's decision unreasonable. *Motion*, para. 24. The Council did not agree because they understood from the record that DES and the Permittee would be engaged in further discussion regarding the specifics pertaining to this definition. It found this administrative flexibility to be a reasonable means of implementing Condition 21.

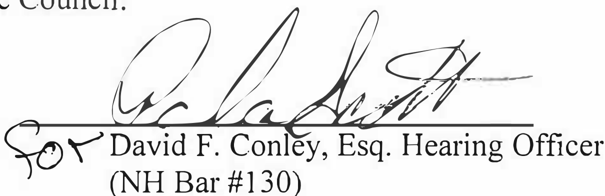
Third, Appellant argues that the Council should have found that Condition 21's adoption of a 30% diversion rate target is unlawful or unreasonable because it fails to assist the state in achieving its statutory 40% diversion goal established by RSA 149-M:2 and incorporated in the public benefit requirements of RSA 149-M:11, III. The 30% diversion rate provision relates to diversion by Permittee's customers while the statutory 40% diversion goal pertains to the entire population of the state. The record indicates that DES intended the Permit's 30% target to set a floor for diversion by Permittee's customers. The Motion does not provide either statutory, regulatory or judicial authority for the proposition that including this provision in the Permit is unlawful. Nor did the Council agree that it was unreasonable under the circumstances.

Appellant next argues that the Council should have found that the Permit's failure to set any parameters or criteria for Permittee's selection of 15 or more solid waste generators to work with to achieve improved waste diversion from the landfill was unlawful or unreasonable in terms of satisfying the public benefit requirement. *Motion*, paras. 32, 33. Again, no substantial legal authority was cited for this proposition and a majority of the Council and the Hearing Officer did not agree with Appellant that failing to provide specific parameters regarding the selection of 15 customers as set out in the Permit was unlawful or unreasonable under the circumstances.

Finally, Appellant argues that a rehearing should be ordered because in its view the Council did not specifically address issues other than diversion ambiguity that might have rendered unlawful or unreasonable DES's decision finding that the Permit established a substantial public benefit. CLF *Reply to Permittee's Objection to Motion*, para. 12. The Order did conclude that Appellant failed to prove that the DES decision was unlawful or unreasonable in any respect, *Order*, p.10, and the Council did not agree to conduct a rehearing on this motion.

Consistent with the above analysis, Appellant's Motion for Rehearing and Reconsideration is DENIED.

For the Council:



for David F. Conley, Esq. Hearing Officer
(NH Bar #130)

12/27/19 Date

Any party aggrieved by this decision may file a petition of appeal to the Supreme Court within 30 days of the date thereof in accordance with NH RSA 541:6.