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

REPLY BRIEF OF CONSERVATION LAW FOUNDATION, INC.

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I. Appellee's Brief Incorrectly Presents the Questions Pending Before the Court and Asserts an Incorrect Standard of Review

The Court accepted this case on appeal to address whether the Waste Management Council ("Council") erred as a matter of law (1) by upholding the challenged permit despite having found a critical permit condition (Condition 21) to be vague and ambiguous, and (2) by allowing the permit's vagueness and ambiguity to be resolved in the future by the Department of Environmental Services ("DES") and Appellee Waste Management of New Hampshire, Inc. ("WMNH"), outside of the permit process. *See* Conservation Law Foundation's ("CLF") Notice of Appeal at 5-6; CLF Brief ("Br.") at 7.

WMNH attempts to dramatically recast the issues before the Court as involving questions of whether the Council acted arbitrarily and capriciously and, further, incorrectly claims that CLF's burden on appeal is to demonstrate "by a clear preponderance of the evidence" that the Council's decision is arbitrary and capricious or unlawful. WMNH Br. at 7, 28.

This appeal addresses questions of law; and contrary to WMNH's assertion, CLF's burden is not to establish that the Council decision is unlawful "by a clear preponderance of the evidence." Rather, the Court's review of issues of law is *de novo* and is not subject to a "clear preponderance of the evidence" standard. *See* CLF Br. at 18; *Working on Waste*, 133, N.H. 312, 316 (1990); *Appeal of Town of Lincoln*, 172 N.H. 244, 247 (2019).

II. The Council Determined, on the Totality of the Evidence Before It, That Condition 21 is Vague and Ambiguous; WMNH's Claim to the Contrary is Without Merit

The Council heard testimony from several witnesses regarding the permit at issue, including DES witnesses Michael Wimsatt, Todd Moore, Jaime Colby, and Pamela Hoyt Denison; CLF witness Kirstie Pecci; and WMNH witness Robert Magnusson. On the basis of that testimony and related exhibits, including the challenged permit, four Council members raised significant concerns with the vague and ambiguous nature of Condition 21.

More specifically, a majority of the Council failed to find Condition 21 reasonable: three out of six Council members voted that 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," with two of those Councilors repeatedly stating that Condition 21's language made it impossible to determine whether the permit satisfies the statutorily required substantial public benefit standard.[1] CLF Br. at 13-14, 27-28. And

[1] WMNH makes frequent reference to the tie, three-to-three vote as meaning CLF did not satisfy its burden. WMNH Br. at 10, 23, 32. It does so, however, without providing any authority for the notion that a majority of votes was required for CLF to prevail. *Id.* Of note, the rules of another DES body, the Water Council, provide that decisions are to be made by a majority of voting members. N.H. Admin. R. Env-WC 204.15(a). The Waste Management Council's rules, however, contain no such provision. Given the Council is part of DES and plays an integral role in the DES permitting process (*see* RSA Ch. 21-O, RSA 21-O:9), a tie vote, absent a rule to the contrary, should not dispositively result in affirmance of a permit which half of the Council determines to be unreasonable (and which a majority fails to find reasonable). In any event, the split vote, especially when combined with the express concerns of a fourth Councilor (discussed

in addition to those three Councilors who found the condition to be unreasonable, a fourth Councilor described Condition 21 as "murky" and "troublesome" and its failure to define diversion as "ill-advised." *See* CLF Br. 25, 28, n. 7.

Based on the foregoing, the Council, in its final order, specifically found:

> 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.*

CLF Br. Add. at 52 (emphases added). WMNH's contention that "[t]he condition terms are precise, not ambiguous," WMNH Br. at 26, and that the Council did not find Condition 21 to be ambiguous, flies in the face of the Council's decision and its interpretation of the evidence presented to it.

III. WMNH's Argument is Premised on the Unsupported Notion That DES Intentionally Crafted Condition 21 for "Flexibility"

WMNH contends that Condition 21 was intentionally drafted to be flexible to accommodate changing conditions in the recycling market. WMNH Br. at 33; *see also id.* at 14-15, 21-22, 39. There is simply no evidence to support this claim.

While DES staff did testify about challenges in the recycling market, they discussed these challenges in the context of describing the intended effect of Condition 21's 30 percent waste diversion rate, including their

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below), speaks loudly to the permit's significant deficiency in its substantial-public-benefit determination and the Council's finding (also discussed below) that Condition 21 is vague and ambiguous.

justification for selecting a 30 percent waste diversion rate for Condition 21 as opposed to adopting the 40 percent waste diversion rate in the state's waste diversion goal set forth in RSA 149-M:2. *See*, *e.g.*, Apr. 17, 2019 Transcript ("Tr.") (Certified Record ("CR") Tab 69) at 103-114, 122-137. They also discussed the fluidity of the recycling market within the context of considering landfill capacity needs. Apr. 18, 2019 Tr. (CR Tab 70) at 84-85. It was in addressing these issues – *not* the issue of how waste diversion will be defined and calculated under Condition 21 – that DES staff discussed challenges in the recycling market. Apr. 17, 2019 Tr. (CR Tab 69) at 113-114, 137; Apr. 18, 2019 Tr. (CR Tab 70) at 84. Simply at no time during their testimony did DES staff reference challenging or changing conditions in the recycling market as a justification for making Condition 21 "flexible" in its application, nor did they reference any intent to craft Condition 21 to be flexible. *See* Testimony of DES Staff (Apr. 17, 2019 Tr. (CR Tab 69) at 44 - 244; Apr. 18, 2019 Tr. (CR Tab 70) at 7 - 216, 330 - 334).

Quite to the contrary of WMNH's "flexibility" claim, testimony by DES staff demonstrated a clear intent for Condition 21 to provide *consistency* over time in the way waste diversion would be calculated and measured. As WMNH states in its brief, DES staff testified that one of the purposes of Condition 21 "'is to create consistency in recording how the [diversion] numbers are evaluated.'" WMNH Br. at 20 (*quoting* DES witness Jaime Colby). Even WMNH's own witness, Robert Magnusson, testified that a purpose of Condition 21 is to promote consistency in the manner in which WMNH reports the diversion data required by Condition 21. *See* Apr. 19, 2019 Hearing Transcript at 39.

It goes without saying that DES could not have intended Condition 21 to simultaneously fulfill two conflicting purposes: consistency and flexibility. Regardless, there is simply no evidence that DES intentionally crafted Condition 21, as it relates to which waste will be counted for diversion purposes, to allow flexibility for changing recycling markets. *See* Testimony of DES Staff (Apr. 17, 2019 Tr. (CR Tab 69) at 44 -244; Apr. 18, 2019 Tr. (CR Tab 70) at 7- 216, 330 – 334). Moreover, even if there *were* evidence of this "flexibility" intent, Condition 21's vagueness and ambiguity nonetheless renders the permit unlawful for the reasons set forth in CLF's Brief: it cannot support a valid substantial-public-benefit determination; it fails to provide a clear, unambiguous decision for appellate review; and it relies on future determinations outside of the permit process, threatening the integrity of New Hampshire's regulatory process. *See* CLF's Br. at 29-42.

IV. Evidence Relied Upon By WMNH Reinforces the Unlawfulness of the Council's Decision to Uphold the Permit

In discussing Condition 21, WMNH states in its brief: "[DES Waste Division] Director Wimsatt summarized DES's intent in imposing these requirements as follows: 'We thought really hard about this and we wanted to do something that we thought would be *measurable*, that would be something that would really help to *ensure* that the permittee was working hard to *increase and improve the diversion rates* for its customers.'" WMNH Br. at 19 (*quoting* 4/17/19 Tr. (CR Tab 69) at 108) (emphases added). WMNH repeatedly acknowledges the intent of Condition 21 to *ensure* that the landfill assist the state in achieving implementation of the

state's waste reduction goal and waste management hierarchy. WMNH Br. at 12, 15, 37.

CLF agrees that the intent of Condition 21 is to provide a *measurable* approach to *ensure* that WMNH works to *increase and improve diversion rates* to assist in achieving implementation of the state's critically important waste reduction goal and waste management hierarchy.[2] However, because Condition 21 fails to define how waste diversion is to be calculated (*e.g.*, fails to establish whether WMNH can claim diversion credit for waste that it is not even authorized to accept, or for waste that was never destined for its landfill in the first place, or for contaminated recyclables that are ultimately disposed of), it utterly fails to establish a

[2] WMNH's repeated reference to the state's waste diversion goal as "aspirational" belies the importance of the goal and its integral role in permitting and all of DES's activities related to solid waste management. RSA 149-M:2, which sets forth the state's waste reduction goal, explicitly states: "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 (emphasis added). The waste reduction goal also is a critical element of the state solid waste management plan mandated by RSA 149-M:29, which requires, *inter alia*: "At least every October 1 of every odd-numbered year, the department shall prepare a report on the level of achievement in reaching the 40 percent diversion goal established in RSA 149-M:2 and on proposed strategies for achieving the goal and any proposed changes to the goal." RSA 149-M:29, II. As is evident from this case, of course, the state's waste reduction goal also is an essential element of the statutory substantial-public-benefit requirement. RSA 149-M:11, III.

"measurable" approach that "ensures" WMNH will "increase and improve the diversion rates for its customers" and satisfy the statutory substantial-public-benefit requirement.

Indeed, WMNH's own brief states that by one method of measuring diversion – a method that WMNH has used in the past – in 2017 WMNH documented a diversion rate of 35.8 percent from the landfill. It is significant to note that WMNH's methodology for calculating waste diversion includes waste that WMNH is not authorized to accept at the landfill. WMNH Br. App. at 132-133. It is also significant to note that the 35.8 percent waste diversion rate highlighted by WMNH in its brief *exceeds* the 30 percent diversion rate established in Condition 21. Accordingly, using the diversion methodology and resulting rate described by WMNH in its brief, Condition 21 would not require WMNH to "increase and improve the diversion rates for its customers" (Apr. 17, 2019 Tr. (CR Tab 69) at 108) and would even allow slippage – down to 30 percent – in WMNH's waste reduction efforts.

As a result of its vagueness and ambiguity, Condition 21 fails to establish a *measurable* approach (because it is unclear what will be measured) that will *ensure* that the permit will cause WMNH to increase and improve diversion rates and provide a substantial public benefit.

V. WMNH's Legal Argument About Post-Permit Conditions Ignores the Key Element of this Case: Condition 21's Vagueness and Ambiguity

WMNH devotes much of its brief to the argument that administrative agencies have authority to implement permit conditions after a permit has been issued. WMNH Br. at 34-39. Its argument misses the mark.

This appeal does not involve the question whether agencies may issue permits with conditions that will be implemented subsequent to permit issuance. Indeed, the permit at issue in this appeal contains numerous conditions that are to be implemented after DES's permit issuance, including conditions requiring WMNH to provide DES design details for the landfill expansion demonstrating compliance with various standards, which CLF has not challenged. *See* CLF Br. Apx. 55 – 57.

Rather, this appeal addresses a permit condition *determined to be vague and ambiguous* and the lawfulness of allowing DES to rely on that vague and ambiguous condition as the basis of its statutorily required substantial-public-benefit determination and then resolve the permit's vagueness and ambiguity in the future, outside of the permitting process. Simply none of the cases cited by WMNH involve post-permit implementation of conditions that were determined (or even alleged) to be vague and ambiguous. As such, they are wholly inapposite to this appeal.

With specific regard to WMNH's reliance on the New Hampshire Superior Court decision *Blakeney v. City of Concord*, 2004 WL 830637, the case is distinguishable not only because it does not address a permit condition determined to be vague and ambiguous, but also because the

condition at issue in that case (the requirement that the permittee prepare a mitigation plan pertaining to wetlands) was not statutorily required.[3] Here, by contrast, the permit condition relates to, and was intended to be the basis of, a statutorily required substantial-public-benefit determination. *See* RSA 149-M:11, III; RSA 149-M:12, I(a).

The Council erred as a matter of law by determining Condition 21 – an essential element of DES's substantial-public-benefit determination – to be vague and ambiguous, yet nonetheless upholding the permit based on the notion that DES and the permittee could resolve such ambiguity and vagueness in the future. *See* CLF Br. at 29-42. WMNH has provided no authority to the contrary.

[3] According to the City of Concord's Brief in *Blakeney v. City of Concord*: "The (*sic.*) time of review of the permit application, DES had not finalized its regulations on mitigation and so no requirements for mitigation existed." *See Blakeney v. City of Concord*, No. 2004-0438, Brief for the Defendant – Appellee City of Concord (March 1, 2005) at 31 (provided in Appendix to CLF's Objection to WMNH's Motion for Summary Affirmance (Feb. 27, 2020) at 14, 16).

CONCLUSION

For the reasons set forth herein and in CLF's opening brief, 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.

Dated: October 6, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2020 this Reply 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 Reply Brief contains 2,398 words, exclusive of the cover page, table of contents, table of authorities, signature block, certificate of service, and certificate of word count.

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