THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2020-0049

APPEAL OF CONSERVATION LAW FOUNDATION

Appeal from Orders of the Waste Management Council Dated August 28, 2019 and December 27, 2019 Upholding DES's Issuance of Landfill Expansion Permit

WMC Docket No. 18-10 WMC

BRIEF OF WASTE MANAGEMENT OF NEW HAMPSHIRE, INC.

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QUESTIONS PRESENTED

1. Was it unreasonable, meaning arbitrary or capricious, for the Waste Management Council ("Council") to uphold the Department of Environmental Services's ("DES's") factual finding that Condition 21 of Waste Management of New Hampshire's (WMNH's") landfill expansion permit will assist the State in achieving the State's statutory solid waste goals?
2. Where DES is responsible to issue, administer and enforce solid waste facility permits, and where DES imposed conditions that set specific requirements for WMNH to demonstrate annually that its customers, in the aggregate, achieved a 30% diversion rate and to work with 15 generators annually to establish or improve waste diversion programs, did the Council act arbitrarily or capriciously, or unlawfully, by leaving implementation of these permit conditions to DES' post-issuance enforcement discretion in recognition of the fluidity of recycling markets and absence of mandatory recycling laws?
3. Where Condition 21 to WMNH's landfill expansion permit requires WMNH to collect and report solid waste diversion information to DES over the ten-year permit period, does DES have authority to review the information and determine compliance without further public comment or participation?

STATEMENT OF THE CASE

On May 24, 2017, Waste Management of New Hampshire, Inc. ("WMNH") filed a comprehensive, 2,100 page, Type I-A Permit

Modification application to expand the existing TLR-III Resource Disposal Facility (the "Facility" a/k/a the Turnkey Landfill) by 58.6 acres, increase its permitted capacity by 15,900,000 cubic yards, and increase its life expectancy by 10.6 years, from 2023 to 2034. CR at 66; Apx at 45.[1] The Facility accepts for disposal approximately 38% of municipal solid waste generated in New Hampshire. *See* Trans. 4/18/19 at 92; Apx. at 68. Without this expansion, WMNH expects the Facility to reach its capacity and close in 2023. *See* Trans. 4/19/19 at 215. Without this expansion, the State would experience a solid waste disposal capacity shortfall because other landfills lack capacity to accept the waste now disposed of at the Facility. Apx. at 77.

The Facility meets other statewide and community needs in addition to solid waste disposal. The Facility infrastructure includes: a dual stream materials recovery facility that services 35 N.H. communities; a trans-loading operation that collects and transports single steam recyclables for further processing at an affiliated facility in Billerica, Massachusetts (40% of all recyclables processed at Billerica are from New Hampshire); two gas recovery facilities which control landfill emissions, and create electricity to meet Facility needs and the electricity needs of NH residents. In 2007, WMNH and the University of New Hampshire partnered to construct a gas pipeline from the landfill to the UNH Durham campus to fuel over 75% of

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[1] The Certified Record is cited as "CR." The Appendix to this brief is cited as "Apx.", CLF's Appendix is cited as "CLF-Apx.", and the Appendix to the Notice of Appeal is cited as "NOA-Apx.". Citations to the hearing and deliberation transcripts will cite to the hearing date and page number. The transcripts are CR Tabs 69-74.

its heating, cooling and electrical needs. The Facility also developed a residential drop off center that acts as a convenience center for Rochester residents, a leaf and yard waste composting operation, Christmas tree farm, golf driving range, dog park, forest management area, and network of hiking and bike trails that attract thousands of users a year. *See* Trans. 4/19/19 at 127-132.

Following public hearings and written comment (CLF submitted written comments), on June 11, 2018, the Department of Environmental Services ("DES") issued the 28-page Record of Modification (the "Permit" document), including 22 conditions. (Apx. at 16). In addition to the Permit, the administrative record supporting DES's decision included a 31-page Permit Application Review Summary (Apx. at 44), a 7-page Public Benefit Determination (Apx. at 75), and a 37-page Response to Public Comments, including CLF's (Apx. at 82), all of which was submitted into evidence and discussed before the Council. The administrative record supporting DES' permit issuance included 3,974 pages. *See generally* DES Ex. 1 (CR tab 66).

As part of its approval, DES made a statutorily required finding that the requirements it imposed in Condition 21 will "assist" the State in pursuing the State's solid waste goals. Condition 21 requires WMNH to work with its customers to attain a minimum 30% diversion of their solid waste streams away from landfilling. If that percentage is not achieved, WMNH must explain why, and propose new measures to achieve that goal. It also requires WMNH to assist fifteen or more of its customers to establish or improve programs to help to meet waste diversion goals.

DES determined, as required, that the Permit will assist the State in achieving its aspirational, statewide, 40% waste diversion goal under RSA 149-M:2, I – a goal it recognized is affected by fluctuating market conditions and impeded by the lack of any State mandatory recycling law.

Appellant Conservation Law Foundation ("CLF") appealed to the Waste Management Council. The Council upheld DES' permit issuance after five days of evidentiary hearings involving 12 witnesses, approximately 82 exhibits and a full day of deliberations culminating in four specific votes. In three of the votes the majority of the Council voted to uphold DES's determinations, rejecting CLF's positions. One vote was a tie, meaning CLF did not satisfy its burden of proof.

The Council then issued a Final Order summarizing its conclusions. CLF moved for reconsideration, which the Council denied in its Rehearing Order by a vote of 5-0. This appeal followed.

STATEMENT OF FACTS

DES found that the expanded Facility will assist the State in achieving its waste diversion goal and disposal hierarchy.

To issue a solid waste facility permit, DES must find that the proposed facility will provide a "substantial public benefit" based upon 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, which capacity need shall be identified as provided in paragraph V.

(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.[2]

(c) The ability of the proposed facility to assist in achieving the goals of the state solid waste management plan, and one or more solid waste management plans submitted to and approved by DES under RSA 149-M:24 and RSA 149-M:25."

RSA 149-M:11, III (a-c). This appeal concerns only subpart (b).

The aspirational goal referred to in subpart (b) is as follows:

> "The general court declares 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."

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[2] The hierarchy is source reduction, recycling/reuse, composting, waste to energy technologies, incineration without recovery, and landfilling. RSA 149-M:3.

RSA 149-M:2,I. The statute explains that "diversion may be achieved through source reduction, recycling, reuse, and composting, or any combination of such methods" and that "[d]iversion shall be measured with respect to changes in waste generated and subsequently landfilled or incinerated in New Hampshire." Id.

DES described its substantial public benefit determination in its 7-page Public Benefit Determination. Apx. at 75.[3] Concerning subpart (b), DES determined that "the TLR-III Refuse Disposal Facility (landfill) provides disposal capacity which supports the goals and hierarchy under RSA 149-M:2 and RSA 149-M:3" and "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." Apx. at 79. [emphasis added].

DES Mandated Condition 21 to implement subpart (b)

In Permit Conditions 21(d) and (e), DES imposed specific, forward-looking requirements to ensure that the Facility continues to assist the State in meeting its diversion and waste hierarchy objectives:

21(d). The permittee shall, for each calendar year in which the facility operates:

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[3] Concerning subpart (a), DES determined a need for the Facility and set limitations so it will remain operational through 2034. Concerning subpart (c), DES determined that "[t]he continued operation of the [Facility], through the development of TLR-III South, will assist the State in meeting the goals of the State Solid Waste Management Plan." *See* Apx. at 78, 80-81.

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 waste diversion rate; and
    c. The practical 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 waste based upon a demonstration by the permittee that there are no environmentally safe or economically sound diversion alternatives to landfilling such waste.

21(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 22.

Condition 21(d) requires WMNH to take specific actions over the life of the permit to increase diversion of solid waste from landfills. It requires WMNH to go upstream into the recycling market to work with generators to achieve a minimum 30% diversion rate of solid waste from landfills. Apx. at 22. If WMNH is unable to demonstrate that its customers achieve, in aggregate, a 30% diversion rate, the condition requires WMNH to submit a report to DES evaluating why the 30% rate was not achieved and specifying the actions WMNH will take to improve its customers' diversion rates. Id.

In crafting the permit condition, DES[4] recognized that recycling markets, and WMNH's ability to influence generators' diversion, are affected by numerous external factors, including the recent China Sword restrictions on importation of recyclable materials. *See* Trans. 4/17/19 at 110-11 (Director Wimsatt explaining that there are "significant headwinds in recycling," that "China had already made movements to limit its recyclables" and "one of the considerations [DES] had to look at was recognizing that there are significant headwinds in recycling that are coming up on us."); Trans. 4/17/19 at 137 (Ms. Colby testifying "[t]here's chaos in the recycling market and part of the goal [of the condition] is to prevent it from dropping too low."). Condition 21 was necessarily and

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[4] All five DES officials involved in the review and approval of the Permit application testified as a panel. The DES witnesses were Michael Wimsatt, Director of the Waste Management Division; Jaime Colby, Civil Engineer V and lead permit reviewer and writer; Todd Moore, Administrator of the Solid Waste Management Bureau; Pamela Hoyt-Denison, Administrator of Waste Programs; and Paul Rydel, Hydrogeologist V.

intentionally drafted to be flexible, to allow WMNH and DES to implement diversion requirements over time in response to changing conditions in the market over the life of the Permit. *See* Apx. at 9 (Council noting DES testimony that condition is "intended to be flexible.").

Condition 21 also took into account New Hampshire's lack of a mandatory recycling law. DES recognized that neither it nor WMNH have legal authority to require that generators divert more waste. *See* Trans. 4/18/19 at 114-15 (Director Wimsatt testified that imposing mandatory recycling in the State must be done "legislatively" and that "[i]t's not something you can do unilaterally as an agency."). Indeed, to date, the State has not taken any action to impose a requirement that generators work to achieve the statutory diversion goal in RSA 149-M:2. Absent authority to require diversion as a matter of law, DES imposed Condition 21 as a means of improving diversion rates. *See* Trans. 4/18/19 at 144 (Director Wimsatt explaining that "[t]his is about ensuring that a significant landfiller in the state is working with its customers to identify what their diversion rates are and to try to improve them.").

The State's lack of mandatory recycling laws also complicates the State's diversion aspirations by limiting DES's authority to acquire data necessary to determine progress towards achieving the 40% goal. *See* Trans. 4/17/19 at 83 (Todd Moore testifying "[i]t's unclear" whether the State has ever achieved 40% diversion because DES "do[es]n't have the full amount of data to determine whether [the State] has reached it or not."). DES witnesses testified that Condition 21 assists the State by requiring WMNH to provide diversion data that DES cannot obtain. *See* Trans. 4/18/19 at 138-139.

DES also recognized that the 30% diversion goal in Condition 21 is categorically different from the 40% diversion goal in RSA 149-M:2. *See* Trans. 4/17/29 at 106-107 (Director Wimsatt testified that "the 40 percent diversion rate in the statute and the 30 percent referenced in the condition of this permit for this facility is an apples to oranges comparison. They're two different numbers that mean two different things."). Whereas the 40% goal applies to the entire universe of solid waste generated in New Hampshire in aggregate, the 30% permit requirement applies only to WMNH customers. Id.

The evidence before the Council supported DES's decision.

The testimony of all witnesses, including CLF's, supported DES's determination that Conditions 21(d) and (e) will assist the State in achieving the statutory diversion goal and waste hierarchy. CLF's witness, Kirsti Pecci, a CLF attorney and director of CLF's Zero Waste Project, which has a mission to "phase out" all landfills in New England,[5] testified that Condition 21 "definitely" would "assist the State in working towards the statutory 40 percent goal" and that DES "had a reasonable basis for imposing" the 30 percent diversion requirement in Condition 21. Trans. 4/18/19 at 307-08. Ms. Pecci testified twice that DES' inclusion of Condition 21 in the permit "is an excellent first step." Trans. 4/18/19 at 236, 307.

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[5] Ms. Pecci agreed on cross-examination that CLF is on a campaign and has a policy to close all landfills and incinerators across New England "over time," and conceded that she had previously published articles opining that all landfills are "evil." Trans. 4/18/19 at 274-76.

Michael Wimsatt, Director of the Waste Management Division, testified that Condition 21(d) is "a very progressive condition" and that "it's not something [DES] [has] done before." Trans. 4/17/19 at 108. Director Wimsatt explained that in this case DES went "a step further" to impose conditions that require "more active direct activity on the part of the Applicant or Permittee to actually go out and demonstrate that their work is actually having an effect to get the information we can't always get easily." Trans. 4/18/19 at 111. Director Wimsatt concluded that "having [WMNH] have a responsibility to demonstrate that 30 percent [diversion] we believe will result in significant improvements in the diversion rates of their customer base." Id. at 112. For all these reasons, Director Wimsatt testified that the Facility would "absolutely" assist the State in achieving the statutory diversion goal and hierarchy. Id. at 112-13.

Other DES witnesses echoed Director Wimsatt's testimony. Todd Moore testified that the statute only requires a finding that the Facility will "assist the State in achieving th[e] goal." Trans. 4/18/19 at 138. Critically, Mr. Moore elaborated on how Condition 21 will assist the State in meeting its diversion goal as follows:

> It's much more than just 30 percent. It's the first step of requiring them to go to their customers and obtain the data on what is being diverted before the remaining waste goes to the landfill, and then calculating it. And then if it's at 30 percent, they compile that 30 percent or more, they would compile that, send it to us. So that would be the data that we don't have right now. That would assist us in working towards that goal. If it were less than 30 percent and they have to then take another step and provide their opinion on why it's not 30 percent, and what could be done, and then submit that report to us, and that gives us an independent assessment and ideas

> on what more could be done. So in both of those situations that assists the State in achieving those goals.

Trans. 4/18/19 at 138-39.

DES witnesses also testified that Condition 21 was imposed in part to help address, and respond to, volatility in the recycling market. Mr. Moore testified that "[t]he recycling markets are constantly going through turmoil." Trans. 4/17/19 at 88. Ms. Colby testified that the recycling market is fluid and subject to change (Trans. 4/18/19 at 84), that "[t]here's chaos in the recycling market", and that "part of the goal is to prevent it from dropping too low." Trans. 4/17/19 at 137.

Building on Ms. Colby's testimony, Director Wimsatt testified that as a result of market disruptions "some towns are electing to dispose of all their recyclables rather than recycling them." Trans. 4/18/19 at 113. Given this volatility in recycling markets, Director Wimsatt explained that DES "felt that ... it really made sense to try to protect the floor … to say well, we want [WMNH] to demonstrate that [its] customers are achieving 30 percent. If [WMNH] do[es]n't do that, we really want you to tell us why that didn't happen and what you're going to do to fix it." Trans. 4/18/19 at 114.

Director Wimsatt also emphasized that there is no mandatory recycling law in New Hampshire and that each municipality or generator has the ability to "make its own determination about whether it's going to recycle or not." Trans. 4/18/19 at 114. He explained that DES does not have authority "to require municipalities to recycle." Id.

DES recognized that WMNH is well-situated to assist the State to increase diversion. *See* Trans. 4/18/19 at 144. (Director Wimsatt noting

that WMNH is a "significant landfiller" in the State that must now work with its customers to increase diversion). WMNH's Robert Magnusson testified that recycling is a core part of WMNH's current and prospective business model. Mr. Magnusson explained that WMNH's parent Waste Management, Inc., its subsidiaries and affiliates ("WMI"), handle "about 15 million tons a year of recyclables" and WMI is "if not the largest, one of the largest recycling companies in North America." Trans. 4/19/19 at 157. Mr. Magnusson further explained WMI has invested around $1 billion in recycling and recycling infrastructure over the past 30 years and planned to invest an additional $100,000,000 per year in 2018 and 2019. Id.

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.

Trans. 4/17/19 at 108.

Evidence concerning the enforcement of Condition 21 in the future

CLF did not offer evidence or testimony contradicting DES's factual finding that Condition 21(d) and (e) will assist the State in achieving its waste diversion goals. Rather, focusing instead on implementation of the condition, CLF argued that DES failed to specify in the Permit how WMNH will calculate diversion over its term. By not including these

specific details in its permit decision, CLF argued, Condition 21 was ambiguous.

WMNH demonstrated that it had been calculating diversion rates as part of annual reports required by its existing permit for years. Mr. Magnusson testified that WMNH historically has calculated diversion "using EPA's definition." Trans 4/19/19 at 171-172. In 2017, for example, WMNH documented a 35.8% diversion rate of MSW from the Facility. Apx. at 133. When asked whether DES accepts this methodology for calculating diversion, Ms. Colby agreed that "[i]t's one way to calculate the numbers." Trans. 4/17/19 at 144.

Despite potentially different ways to calculate diversion, Condition 21 requires WMNH to calculate diversion, DES to review it, and to require more information if it is unsatisfied with WMNH's explanation or the result. *See* Apx. at 22. Director Wimsatt explained that DES retains the authority to enforce the conditions of the permit. *See* Trans. 4/17/19 at 130-31. Further, both DES and WMNH witnesses explained that they would communicate in the future about how Condition 21 should be addressed, and to develop consistency in reports in future years. Ms. Colby stated that one purpose of Condition 21 "is to create consistency in recording how the [diversion] numbers are evaluated." Trans. 4/17/19 at 144-45. Mr. Magnusson agreed, stating that WMNH "expect[s] to work with DES on what the various inputs are, what are the measurements, how do we make the measurements, and how do we consistently communicate

and report" to DES (Trans. 4/19/19 at 39)[6], "much like other permit conditions we regularly deal with." Trans. 5/2/19 at 11.

CLF failed to get the votes it needed to prevail following the Council's deliberations.

After five days of hearings, the Council deliberated in public for one day before voting that CLF had failed to meet its burden of proof on each issue raised in its appeal.[7] *See* Trans. 5/7/19 at 177, 209-211, 253-255, 255-256. The Council deliberated extensively about Condition 21, including its future implementation, before voting to deny CLF's assertion that the lack of specific details of how diversion would be calculated rendered the permit issuance unreasonable, meaning arbitrary and capricious. Id. at 255.

During their deliberations, the Councilors disagreed over the alleged ambiguity in the condition. For example, on multiple occasions, Councilor Sweet opined that he viewed Condition 21 "as a flexible permit condition." Trans. 5/7/19 at 62. He stated "[w]e heard the term 'ambiguity' being used. That's a matter of interpretation. I also think that could be interpreted as 'flexibility' which is very important in terms of how permits are written and regulated and complied with because today's market is not going to be, as you know, we all know, is not going to be the same five or ten years from

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[6] In fact, Mr. Moore stated that DES intended to use Condition 21 as a model for other solid waste facility permits in the State. Trans. 4/17/19 at 119.

[7] The Council rejected each of CLF's other allegations by votes of 5-0 (with one abstention), 4-2, and 6-0, respectively.

now…" Id. at 36. He emphasized that permittees "need flexibility in these permits, especially with a facility that's as complex as a regulated landfill." Id. at 220. Ultimately, just prior to his vote, Councilor Sweet summarized his position about Condition 21 as follows: "So do I find it unreasonable or unlawful that [diversion] is not defined inside the permit? Heck, no, I do not. Not one bit. There is not one thread of me that finds this anywhere near unreasonable because I think it's necessary as a permit." Trans. 5/7/19 at 220.

Councilor Sweet also emphasized that DES retained the authority to enforce the permit conditions. He stated "if there were cause for disagreement, you know, DES still has the say to bring on enforcement actions if they disagree with how the certain permit conditions are being managed or maintained or reported on" and that "flexibility I think is pretty important in how this is being done." Trans. 5/7/19 at 36-37. He cautioned against attempting to define diversion in a single permit. *See* Trans. 5/7/19 at 219.

Councilor Gomez disagreed with Councilor Sweet's position yet recognized it as a "good point." Trans. 5/7/19 at 100. He stated "I know Councilor Sweet made a good point earlier that sometimes ambiguity is a good thing. It's actually a proxy for flexibility. And especially when you're granting a permit over many years, you want to have some degree of flexibility in there to account for changes in the landscape." Trans. 5/7/19 at 99-100.

In preparing for his vote on the issue, Councilor Gomez suggested the Council vote to remand the permit "saying that the public benefit requirement around achieving waste reduction goals was ambiguous or

insufficiently addressed." Trans. 5/7/19 at 250. The Hearing Officer reframed the motion as follows: Whether the "Department acted unreasonably in failing to provide a definition of the 30 percent diversion rate contained in Condition 21(d) of the public benefit requirement."[8] Trans. 5/7/19 at 253. Before the vote, Councilor Kinner reminded the Council of its standard of review. She stated: "I have to vote on whether it's unreasonable or unlawful or arbitrary and capricious." Trans. 5/7/19 at 252-53.

Councilor Kinner, who requested the last vote, voted against CLF's position. The Council split its vote 3-3, Councilors Kinner, Sweet, and Crean voting no, meaning DES did not act unreasonably, and Councilors Durfor, Bazelmans, and Gomez voting yes. Trans. 5/7/19 at 253-54. As a result of the vote, the Hearing Officer concluded that CLF had failed to meet its burden of proof to demonstrate that DES acted unreasonably in not specifying how diversion would be calculated in the Permit. Trans. 5/7/19 at 254-55.

The Council's Final Order is reaffirmed 5-0 in the Rehearing Order

The Council issued its written order (the "Final Order") upholding DES's issuance of the Permit on August 28, 2019. The Council found that

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[8] There was lots of colloquy about this particular motion leading up to the vote itself with the Hearing Officer repeating the motion several times; however, each articulation of the motion included the same standard and substance: whether it was unreasonable for DES not to define how diversion will be calculated. *See* Trans. 5/17/19 at 251, 252.

CLF "failed to meet its burden to prove that the DES decision was unlawful or unreasonable in any respect." Apx. at 12.

Regarding Condition 21, the Council found that CLF "failed to meet its burden" to demonstrate that "DES acted unreasonably in failing to provide a definition of the Permit's 30% diversion rate…" Apx. at 9. The Final Order noted that certain council members had "misgivings … that Permit Condition 21(d) was vague in several respects" but that the condition "is intended to be flexible." Apx. at 9.

CLF moved for reconsideration. NOA-Apx. at 24-26. By a vote of 5-0, the Council again rejected CLF's argument that granting the permit without specific instructions to calculate diversion was unreasonable. Despite acknowledging that some members of the Council "agreed with CLF that Condition 21 contained terms and conditions that lacked specificity," the Council disagreed that the lack of specificity in implementing the condition rendered the permit issuance unlawful or unreasonable. *See* Apx. at 14. The Council explained that "DES and the Permittee would be engaged in further discussion regarding the specifics pertaining to this definition" and found that "this administrative flexibility" was a "reasonable means of implementing Condition 21." Id. The Council also noted that "CLF did not cite any case law, statute or rule supporting its argument that such subsequent administrative action" was unlawful. Id. In denying CLF's motion for rehearing and reconsideration, the Council repeated the Final Order's conclusion that "CLF failed to prove that the DES decision was unlawful or unreasonable in any respect." Apx. at 12

SUMMARY OF ARGUMENT

CLF has failed to establish that the Council committed an error of law or fact when it upheld DES's issuance of the permit authorizing expansion of the Turnkey Landfill. DES made the statutorily required finding that the Facility would assist the State in achieving its aspirational waste diversion and disposal hierarchy goals. CLF pointed to no statute, rule or caselaw before the Council to show that DES's determination was unlawful. It again fails to do so before this Court. CLF further failed to convince the Council that its public benefit determination was unreasonable, meaning arbitrary and capricious. In fact, CLF's own witness testified that the permit would assist the State in achieving its aspirational goals. In this Court too, CLF fails to show that the Council's decision was clearly unreasonable, meaning arbitrary and capricious.

Faced with a paucity of law[9] and evidence to support its assertions, CLF is left to argue that the permit is impermissibly ambiguous because it leaves to DES's discretion how to determine whether compliance with the permit has been achieved. Yet, CLF's allegations of ambiguity, and emphasis on how DES will enforce Condition 21 in the future, are misplaced. Condition 21 sets forth specific actions WMNH must take (working with its customers), specifies an annual number of customers (15

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[9] CLF does not argue that the statutory requirement that the permit "assist" the State in achieving its goals is ambiguous. Neither does CLF argue that the term" diversion" is ambiguous. The plain meaning of these words is obvious, even in the solid waste disposal context. *See also* RSA 149-M:2 (defining diversion).

or more) to try to persuade to reduce their landfilled waste, and sets a specific target (30%) for diversion. If WMNH fails to show, to DES's satisfaction, that its customers achieved a 30% diversion of waste, WMNH is required to suggest additional measures to reach this goal. All of these specified actions occur in a dynamic recycling market in a state that does not mandate recycling.

The condition terms are precise, not ambiguous. That the future enforcement of this permit is left to DES's discretion does not render the permit unlawful; rather, it simply allows the agency with the most expertise to determine whether the permittee met its obligations. This Court has held that interested parties have no legal right to comment on or participate in the implementation of permit conditions taking place after the permit has been issued. Such administrative authority is settled law in this State, and in federal and state jurisdictions throughout the country. CLF's position that the permit must include more information is simply an effort to legislate, through litigation, requirements that neither the solid waste statutes nor this Court's decisions require.

Further, CLF's appeal is predicated on a mistaken assertion. The Council did not find Condition 21 to be ambiguous. That some Councilors would have liked more specificity did not equate to a finding that Condition 21 is ambiguous. Their concerns did not alter the result of their tie vote, the Final Order, or Rehearing Order.

Even if the permit is considered ambiguous, which it is not, prevailing case law requires this Court to defer to the expertise of the agency charged with enforcing the solid waste laws. Agencies are given substantial leeway to fill in the interstices of statutory language, and to

effectuate the purposes of the statute. Here, the statute leaves to the agency's discretion to define how a permittee will assist the State in achieving its waste diversion goals and disposal hierarchy. DES's consideration of WMNH's efforts with its customers to divert waste, the waste streams to be counted, the manner of counting, and whether the company has complied with its permit are subjects for the future that fit within the agency's expertise, and are not subject to review and comment by CLF.

WMNH requests that the Court affirm the Council's decision.

ARGUMENT

I. This Court defers to the Council's findings of fact.

Under this Court's standard of review in RSA 541:13, the Court deems the Council's findings of fact "to be prima facie lawful and reasonable." RSA 541:13; *see also* In re Town of Bethlehem, 154 N.H. 314, 318 (2006). In reviewing the Council's factual findings, the Court's "task is not to determine whether [it] would have found differently or to reweigh the evidence." Appeal of Mary Allen, 170 N.H. 754, 758 (2018). Rather, the Court's task is to "determine whether the findings are supported by competent evidence in the record." Id. CLF has the burden of demonstrating that the Council's decision was "unlawful", meaning contrary to statute, rule, or caselaw, or "clearly unreasonable," meaning arbitrary or capricious. Id.; *see* Appeal of Courville, 139 N.H. 119, 123 (1994) (Denying appeal and holding that the standard of review under RSA 541:13 is "essentially the same" as the arbitrary or capricious standard.) Thus, CLF must demonstrate, by a clear preponderance of the evidence, that the Council's decision was "arbitrary or capricious or not made in compliance with applicable law." Appeal of Courville, 139 N.H. at 123; *see also* In re St. Joseph Hospital, 152 N.H. 741, 744 (2005) (Rejecting appeal under arbitrary or capricious standard under RSA 541:13); s*ee* RSA 541:13. CLF has failed to sustain this burden.

II. The undisputed evidence supported DES's determination that the Facility will assist the State in achieving its statewide, aspirational, solid waste diversion goals and disposal hierarchy.

The Council considered testimony from five DES witnesses responsible for reviewing, issuing, and, later, implementing the permit, as well as witnesses for both WMNH and CLF before voting to uphold the Permit. All witnesses testified that Condition 21 will assist that State in achieving the solid waste diversion goal in RSA 149-M:2. *See, e.g.* Trans. 4/17/19 at 109 (Director Wimsatt: Condition 21 "imposes concrete realistic direct actions that the permittee would need to do that would absolutely directly assist us with reaching the hierarchy and goals set out in the statute."); Trans. 4/18/19 at 118-19 (Ms. Colby agreeing Condition 21 "would assist the State in achieving the recycling goals and hierarchy"). CLF's own witness testified that Condition 21 "definitely" would "assist the State in working towards the statutory 40 percent goal" and that DES "had a reasonable basis for imposing" the 30 percent diversion requirement in Condition 21. Trans. 4/18/19 at 307-08. Ms. Pecci also testified twice that DES's inclusion of Condition 21 in the permit "is an excellent first step." Trans. 4/18/19 at 236, 307. CLF did not meet its burden before the Council to show that DES acted unlawfully or unreasonably (meaning arbitrarily and capriciously) when it concluded Condition 21 would assist DES in achieving the State's recycling goals and waste management hierarchy. The record amply supports the Council's decision upholding DES' determination.

III. CLF's appeal relies on the erroneous premise that the Council made a factual finding that Condition 21 was ambiguous; the Council made no such finding, rendering the appeal fatally flawed

Contrary to CLF's arguments, the Council made no finding that Condition 21 was ambiguous. Simply, CLF was unable to convince a majority (four) of Councilors that DES acted unlawfully or unreasonably by not including more information detailing how WMNH would calculate diversion of its customers' waste streams. The 3-3 vote on whether CLF had met its burden to prove "that DES acted unreasonably in granting this permit without a full definition of the concept of diversion used within [Condition] 21(d)" did not use the word ambiguous or ambiguity.[10] The only question raised was what components of the solid waste stream would count towards the 30% diversion goal.

There was no doubt about what it meant to divert solid waste. The statute, and hearing testimony, make clear that diversion "may be achieved through source reduction, recycling, reuse, and composting, or any combination of such methods" and that diversion "shall be measured with respect to changes in waste generated and subsequently landfilled or incinerated." RSA 149-M:2, I; *see also* Apx. at .4; *see also* Trans. 4/17/19 at 114 (Todd Moore testifying that "anything higher on the [waste] hierarchy than landfilling would count towards that 30 percent [diversion]."). That the Permit did not include precise details of how

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[10] CLF did not object to the vote language at the time or on reconsideration, nor did CLF request that a vote be taken using the word ambiguous.

diversion would be calculated in the future is not ambiguity; rather, it is a necessary recognition of the reality and fluidity of the marketplace in which WMNH operates. Regardless, the 3-3 vote means that the Council did not reach a conclusion that Condition 21 was ambiguous.

To circumvent the tie vote, CLF's brief cherry-picks select excerpts of the hearing testimony and deliberations. CLF asserts that, "[i]n 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." CLF's Brief at 25 [emphasis supplied]. This argument is to no avail. Expressions of concern do not equate to a finding, a vote in CLF's favor, or satisfaction of CLF's burden of proof. Further, one Council member CLF quotes, Councilor Kinner, voted against CLF's position.

CLF's brief omits that Councilors disagreed as to whether Condition 21 was ambiguous. *See, e.g.* Trans. 5/7/19 at 35 (Councilor Sweet stating that he interpreted the condition as being flexible not ambiguous.). Councilor Sweet rejected CLF's position, concluding: "[s]o do I find it unreasonable or unlawful that [diversion] is not defined inside the permit? Heck, no, I do not. Not one bit." Id. at 220.

CLF also points to language in the Final Order to assert that the Council found Condition 21 ambiguous, and tries to shift its burden of proof to DES or WMNH (Claiming a majority did not find Condition 21 "reasonable," CLF Brief at 28, and asserting that "no majority of Council members could be established to support its validity." CLF Brief at 29). One tie vote and three majority votes on the other allegations in favor of DES do not support CLF's claims. CLF's argument is wrong as a matter of

law. CLF had the burden to demonstrate to the Council's satisfaction that Condition 21 was unlawful or unreasonable. The 3-3 vote demonstrates CLF's failure of evidence and persuasion.

The Final Order's references to the Council's "misgivings" do not negate the Council's vote that CLF failed to meet its burden of proof. The Council was not to substitute its judgment for DES's, or to decide whether it could have written a better permit than DES chose to write. As Councilor Kinner stated, their role was to assess whether DES acted unlawfully or unreasonably. Trans. 5/7/19 at 252-53. As a result, she and two others voted that CLF had not met its burden to show that DES's permit was unlawful or unreasonable.

The Council's deliberations, vote, and two orders show that the Council considered whether the language of Condition 21(d) was ambiguous yet were not persuaded of its unlawfulness or unreasonableness, despite any "misgivings" they had, or desire some had for more specificity. CLF's appeal rests on an erroneous premise, and, for that reason, fails.

IV. Condition 21 simply is a permit requirement that WMNH must implement in the future in a dynamic marketplace and DES must oversee as part of standard administrative compliance.

Condition 21 requires WMNH to take specific actions, with numerical targets, over the life of the Permit, to assist solid waste generators to increase diversion of solid waste, thereby assisting to achieve the State's aspirational waste diversion goal and disposal hierarchy. Conditions 21(d) and (e) impose upon WMNH a DES first: the requirement to work actively with upstream generators to achieve, in aggregate, a

minimum 30 percent waste diversion rate to disposal methods other than landfilling. *See* Apx. at 22. They also require WMNH to submit annual reports to DES documenting its compliance with these conditions over the life of the Permit, to 2034. Id.

Condition 21 is informed by statutory definitions. Diversion means "source reduction, recycling, reuse, and composting, or any combination of such methods;" further, diversion "shall be measured with respect to changes in waste generated and subsequently landfilled or incinerated in New Hampshire." RSA 149-M:2. CLF's argument that Condition 21 is ambiguous for lack of more specific measurement methodologies ignores these statutory provisions.

Further, the condition is intentionally flexible, to allow consideration of changing market conditions. The Council recognized that such administrative flexibility is reasonable. Apx. at 14. The condition recognizes that recycling markets, and WMNH's ability to influence generators' diversion, are affected by numerous external factors, including the China Sword restrictions on importation of recyclable materials from the United States. *See* Trans. 4/17/19 at 110-111 (Director Wimsatt explaining that there are "significant headwinds in recycling"); Trans. 4/17/19 at 137 (Ms. Colby testifying "[t]here's chaos in the recycling market and part of the goal [of the condition] is to prevent it from dropping too low.").

The volatility of recycling markets is compounded by the lack of a mandatory recycling law in New Hampshire. Neither the State, nor WMNH, have legal authority to require that generators divert any waste that may be lawfully disposed in the landfill. *See* Trans. 4/18/19 at 114-15

(Director Wimsatt testifying that imposing mandatory recycling in the State must be done "legislatively" and that "[i]t's not something you can do unilaterally as an agency.").

In every regard, the implementation and enforcement of Condition 21 is standard practice in environmental permitting and administrative law. That DES will determine how its permittee complies with a condition after the permit goes into effect does not violate any statute, rule or caselaw, nor is it arbitrary or capricious.

A. The authority of administrative agencies and permittees to implement permit conditions after a permit has been issued is settled law.

This Court and courts in numerous jurisdictions recognize that agencies implement and enforce permit conditions after a permit has been issued without public input. For example, this Court has held that a petitioner does not have a right to comment on permit conditions imposed after the permit deliberative process ended. In re Londonderry Neighborhood Coalition, 145 N.H. 201, 204 (2000). In that case, a petitioner before the New Hampshire Site Evaluation Committee ("SEC") claimed a right to comment on new permit conditions the SEC imposed following an adjudicatory hearing. This Court held that there was no error of law where the SEC denied parties the opportunity to comment on numerous conditions it imposed on the permit after its deliberative process had completed. Id.

At the Superior Court level, in Blakeney v. City of Concord, the court upheld an alteration of terrain permit conditioned on DES's approval

of a final mitigation plan that would be submitted to and approved by DES after the permit was issued. *See* Blakeney v. City of Concord, 2004 WL 840637 (N.H. Super. Apr. 15, 2004). The petitioners argued, like CLF does here, that such a condition was unlawful because DES's review and approval of the final mitigation plan after the permit was issued would deprive the public of the ability to comment on the plan. Id. at *7. The court disagreed, holding that the petitioners had "cited no authority for the proposition that DES is precluded from issuing a permit until after it has approved a final mitigation plan." Id. The court further noted that the controlling statute authorized DES "to attach conditions to a permit" and that "[t]here is no requirement that the public be given an opportunity to comment on these conditions subsequent." Id.

Elsewhere, the First Circuit Court of Appeals found that the Environmental Protection Agency did not err in imposing a permit condition that required a full impact analysis of sulfur dioxide emissions to be conducted after the issuance of an air permit. Sur Contra La Contaminacion v. E.P.A., 202 F.3d 443, 448 (1st Cir. 2000). The court rejected the petitioner's argument that such analysis must be done before issuance of the permit. It held instead that E.P.A. is authorized to require post-operation modelling. Id. The Court also rejected the petitioner's argument that post-issuance analysis denied them a right to comment on the modelling analysis, finding that "there is no legal requirement that there be public comment for a post-permit analysis." Id.

Similarly, in Arkansas v. Oklahoma, the United States Supreme Court upheld the E.P.A.'s issuance of a National Pollutant Discharge Elimination ("NPDES") permit that included a condition stating that "if a

study then underway indicated that more stringent limitations were necessary to ensure compliance with Oklahoma's water quality standards, the permit would be modified to incorporate those limits." Arkansas v. Oklahoma, 503 U.S. 91(1992).

Other state courts are in accord. In Upper Missouri Waterkeeper v. Montana Dep't of Envtl. Quality, the Montana Supreme Court upheld the Montana Department of Environmental Quality's ("DEQ") issuance of a water discharge permit that imposed a condition allowing the permittee to select which best management practices to follow when implementing their Stormwater Management Plan after the permit had been issued. *See* Upper Missouri Waterkeeper v. Montana Dep't of Envtl. Quality, 395 Mont. 263, 271-272 (2019). The Court found that choosing which BMPs to implement after the permit was issued "does not alter the essential terms of the [permit]" and that "[i]t is not unlawful, arbitrary, or capricious for DEQ to use this intentional flexibility when issuing MPDES permits." Id.

The above summary is a mere snapshot of the extensive caselaw affirming the authority of administrative agencies to review new information from permittees and to implement permit conditions after a permit has been issued.[11] The Council's decision upholding Condition

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[11] *See also, for example,* Sierra Club v. U.S. Army Corps of Engineers, 464 F. Supp.2d 1171, 1211 (M.D. Fla. 2006), aff'd, 508 F.3d 1332 (11th Cir. 2007) (A Florida District Court finding that the Army Corps of Engineers did not violate the Clean Water Act, or act arbitrarily or capriciously, in "utilizing 'post-issuance' (post-permit) conditions, including mitigation, to make its 'pre-issuance' (pre-permit) 'minimal adverse environmental effects' determination" when granting a federal wetlands permit.).

21's requirements supervised by DES is no different. CLF has cited to no persuasive authority to the contrary. Moreover, as shown above, courts have made clear that post-permit implementation of conditions, including submission and review of new or additional information, do not constitute extra-record facts or information, as CLF erroneously suggests. CLF Brief at 35-38.

Moreover, CLF's ambiguity argument completely overlooks the deference this Court shows to an agency's interpretation of the statutes it is charged with administering. This Court's cases demonstrate such deference, especially where, as here, the agency has given careful attention to the statutory requirement of whether the permit will assist the State in meeting its goals, and imposed requirements to ensure that assistance is met. See Appeal of Old Dutch Mustard Co., Inc., 166 N.H. 501, 506 (2014) (Holding "an interpretation of a statute by the agency charged with its administration is entitled to deference" and, using deferential standard, ruling that DES's interpretation of "facility" under RSA 149-M:4 was not unreasonable or unlawful.").[12]

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[12] Federal courts apply a similarly deferential standard of judicial review to agency decisions in the rulemaking context. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (Supreme Court established a two-part test to determine whether to afford deference to an agency's interpretation of law it administers. Courts first ascertain whether a statute is clear in its meaning. If a statute is not clear in its meaning, courts will defer to agency's interpretation "if it is based on a permissible construction of the statute."); *see also* United States v. Mead Corp., 533 U.S. 218, 229 (2001). (Court explaining that such deference is afforded even where "[t]he agency's chosen resolution seems unwise.); *see also* N.H. Hosp. Ass'n v. Burwell, 2017 WL 822094, at *21-29 (D.N.H. Mar. 2, 2017) (summarizing Chevron, Mead, and Skidmore deference law).

Here, the legislature delegated to DES the determination of whether to issue a permit at all, and whether the permit assists the State in achieving its statutory goals. The statute does not define the nature and scope of that assistance. DES determined that Condition 21 would so assist by imposing requirements in the exercise of its discretion under the statute. That DES did not exercise its discretion differently is not a basis to overturn the Permit.

CLF also wrongly equates alleged ambiguity in permit language with the requirement that agencies explain their decisions with factual findings sufficient to enable judicial review. CLF Brief at 31-35. Each of the cases CLF cited stand for the proposition that an administrative agency's decisions be sufficiently explained and supported by the record to enable judicial review. *See, e.g.*, Society for the Prot. of N.H. Forests v. Site Evaluation Comm., 115 N.H. 163, 173 (1975); Hampton Nat Bank v. State, 114 N.H. 38, 45 (1974). The Supreme Court's Chenery Corp. decision does not help CLF. There, the Court held "we are free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation." SEC v. Chenery Corp., 332 U.S. 194, 207 (1947). The Supreme Court upheld the SEC's decision because "the Commission has made a thorough examination of the problem, utilizing statutory standards and its own accumulated experience." Id. Similarly, here, DES extensively explained and documented its Permit review process, including its analysis and findings supporting the statutorily required public benefit determination. *See* Apx. at 44, 75, 82. The Council considered this and other evidence. Its public deliberations, votes and two orders identify the testimony, evidence and burden of proof supporting its decision.

The Council's decision is supported by clear (and overwhelming) evidence in the record.

B. CLF failed to identify any persuasive legal authority limiting DES's authority to implement permit conditions

In contrast to the multitude of state and federal cases upholding post-permit implementation of permit conditions, CLF has failed to identify any persuasive legal authority challenging DES's authority to implement conditions or the Council's finding that leaving the implementation of Condition 21 to DES's "administrative flexibility" was a reasonable approach. Apx. at 14.

CLF's reliance on Appeal of Fournier is inapposite. It did not involve permit conditions at all. Rather, the case involved whether DES applied an incorrect regulatory standard to assess a proposed project's impact on threatened or endangered species when it granted an alteration of terrain permit. *See* Appeal of Fournier, 2019 WL 6040519 (2019) at *1. This Court found, as a matter of law, that DES had applied the wrong *legal standard*; the decision of the New Hampshire Water Council to uphold that permit using that same incorrect standard also was unlawful. Id. at *4.

CLF has not alleged that DES or the Council applied the wrong standard. There is no dispute that DES correctly applied the enumerated criteria in RSA 149-M:11, III and found that the Facility would provide a substantial public benefit, including assisting the State. Appeal of Fournier simply does not apply here at all.

CLF's reliance on N.H. Admin. R. Env-Sw 305.03(b)(2) is also unpersuasive, and actually supports WMNH's position. That rule

authorizes DES to deny a permit *application* if it "provides insufficient or ambiguous information that precludes a determination that the proposed approval will comply with RSA 149-M…" N.H. Admin. R. Env-Sw 305.03(b)(2). CLF did not allege that the information provided in WMNH's permit application was inadequate or ambiguous (nor did DES).

Moreover, CLF ignores the component of that rule authorizing DES to cure deficiencies in a permit application by imposing conditions on the permit. Env-Sw 305.03(b)(2) provides as follows:

> A requested approval shall be denied if one or more of the following conditions applies: … (2) The 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) [emphasis supplied]. The bolded portion of the rule above evidences DES's broad authority to cure deficiencies in permit applications by imposing conditions.

CLF's reliance on Hanrahan v. City of Portsmouth to support the general proposition that "permit processes are to be based on adequate information" is similarly misplaced. CLF's Brief at 36. In Hanrahan, this Court assessed whether the City of Portsmouth Historic Commission had sufficient evidence to properly apply statutory factors and concluded it did not. *See* Hanrahan v. City of Portsmouth, 119 N.H. 944, 949 (1979). This Court concluded that because "the commission appears to have had before it little more than the unsubstantiated opinions of the permit applicant in favor of demolition," the 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." Id. at 949.

In contrast to Hanrahan, this appeal is not a sufficiency of the evidence case. Rather, the Council heard from witnesses for DES, WMNH and CLF. All testified that Condition 21 will meet the statutory criteria of assisting the State in achieving its recycling goals and waste disposal hierarchy. It also considered 82 exhibits, including DES' Public Benefit Determination (Apx. at 75), WMNH's Public Benefit Statement (CR Tab 59, circa 649), and WMNH's annual facility reports which specified how WMNH had calculated diversion. *See* Apx. at 119, 135. After all of that, CLF could not meet its burden of proof to show that Condition 21 was unlawful or unreasonable, meaning arbitrary and capricious.

C. CLF's reliance on planning and zoning cases provides no basis to overturn the Council's decision.

CLF erroneously relies on Sklar Realty Inc. v. Town of Merrimack, 125 N.H. 321 (1984) to assert that the Council violated its appellate rights under RSA 21-O:14, I-a. CLF Brief at 39-41. CLF ignores that Sklar involved conditions precedent, which this Court has made clear are different in purpose and effect from conditions that pertain to future compliance and are implemented after a permit has been issued. In Sklar, the Town of Merrimack Planning Board issued a permit with a number of conditions that had to be met *before construction* could commence. Id. at 325. The Court in Sklar held that an abutter had a right to be heard on whether the applicant had complied with conditions that were required before the permit could became effective. Id. at 329.

Moreover, CLF's brief ignores Nestor v. Town of Meredith, which addressed requirements that go into effect after a permit has been issued and apply to future compliance. In Nestor, the appellants, like CLF here, relied on Sklar to claim a right to comment on conditions imposed by a Zoning Board of Adjustment. This Court rejected the appellants' position, holding that their:

> [r]eliance on Sklar Realty for their contention that they had a right to comment on the conditions imposed by the ZBA is misplaced. Sklar Realty recognized the right of abutters to be heard on an applicant's compliance with conditions precedent to approval of an application. *It did not, however, grant abutters input on conditions subsequent to approval, imposed by the ZBA to ensure the project will be in harmony with the orderly development of the District*.

Nestor v. Town of Meredith, 138 N.H.632, 635 (1994). [Emphasis supplied].

The Court held that the abutters to a proposed development did not have a right to comment on conditions imposed by a Zoning Board of Adjustment subsequent to approval of the application. Id.; *see also* In re Londonderry Neighborhood Coalition, *supra* at 30.

Condition 21 is not a condition precedent; it is a requirement that goes into effect after the permit has been issued. Both Nestor and In re Londonderry make clear that this structure is permissible and that petitioners, like CLF, do not have a right to participate in that implementation process. CLF has not shown, and cannot show, that it has a legal right to comment on, or otherwise involve itself in, the post-permit implementation of conditions. That authority resides solely with DES.

V. The Council's decision to uphold the permit issuance did not violate CLF's due process rights.

There can be no serious dispute that CLF was afforded a meaningful opportunity to be heard during the permit application review – in fact, DES accommodated the requests of CLF and others for additional time for written comment – and permit appeal process on every aspect of the Permit, including Condition 21. *See* Apx. at 14 ("[t]he record was clear that CLF's due process rights have been protected through the permitting procedure, in which CLF participated, and through this Appeal."); *see* Society for Protection of N.H. Forests v. Site Evaluation Comm., 115 N.H. 163, 168 (1975) (Petitioner's due process rights were not violated where agency's decision reflects petitioner's comments and input.). As demonstrated in caselaw above, CLF's right to comment on the permit conditions terminated when the Council rendered its decision.

CLF has not identified any information or evidence it wished to submit but was denied an opportunity to offer or that the Council failed to consider in rendering its decision. Nor did CLF provide any testimony or evidence supporting the position it first raised on rehearing that Condition 21was unlawful. CLF's argument that the Council's decision violates due process of law is entirely without merit.

CONCLUSION

WMNH requests that this Court hold the CLF has failed to meet its burden of showing that the Council's orders were clearly unlawful or unreasonable, meaning arbitrary or capricious. WMNH requests that this Court affirm the Council's decisions in all respects.

Respectfully submitted,

WASTE MANAGEMENT OF NEW HAMPSHIRE, INC.

By Its Attorneys,

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Dated: September 16, 2020

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REQUEST FOR ORAL ARGUMENT

WMNH requests oral argument. Mr. Rouvalis will argue.

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

WMNH certifies that this brief complies with Supreme Court Rule 16(11). This brief contains 9,434 words.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2020, I served the foregoing BRIEF of WMNH through the Court's electronic filing system upon all counsel of record.

/s/ Mark C. Rouvalis_____
Mark C. Rouvalis