THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2022-0690

Appeal of New Hampshire Department of Environmental Services

Case No. 2022-0691

Appeal of North Country Environmental Services, Inc.

BRIEF OF APPELLEE
CONSERVATION LAW FOUNDATION

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QUESTION PRESENTED

Where RSA 149-M:11, III(a) and V require as a matter of law that a proposed landfill must provide a substantial public benefit by satisfying a New Hampshire need for New Hampshire waste disposal capacity, and where it is undisputed that New Hampshire has no need for additional waste disposal capacity until 2026, did the Waste Management Council correctly invalidate a permit for the construction and operation of a landfill expansion during a time when New Hampshire has no need for waste disposal capacity?

(Certified Record (hereinafter, "CR") 2524, Final Order, Addendum 57)

STATEMENT OF THE CASE AND OF FACTS

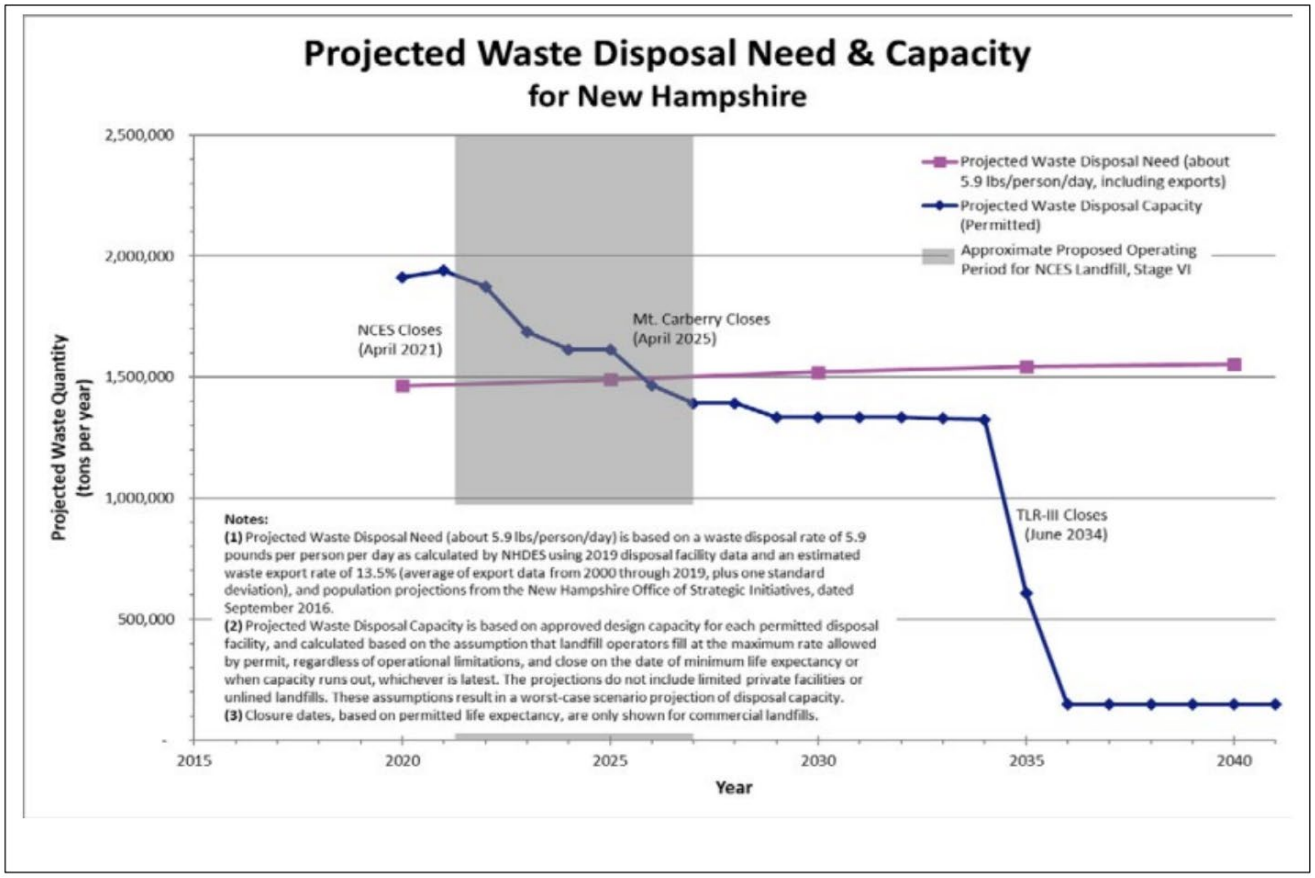
In January 2019, NCES filed an application with DES seeking a permit to expand its landfill in Bethlehem with additional disposal capacity to be known as Stage VI. NCES Br. at 12. In its application, NCES proposed to operate Stage VI for 2.3 years, until approximately 2023, and to add 1.22 million cubic yards of disposal capacity. CR 1025, 1055.

DES reviewed NCES's permit application and determined that because New Hampshire had no need for additional landfill capacity until 2026, it could not, under RSA 149-M:11, V(d), issue a permit for Stage VI. CR 1055-1056, DES First Application Review Summary. DES informed NCES that it would be denying the application because the landfill would not operate during a time of capacity shortfall and thus would not satisfy a capacity need. NCES Br. at 13; *see also* CR 1023. NCES withdrew its first Stage VI application. NCES Br. at 14.

In March 2020, NCES submitted another Stage VI permit application. *Id.* This time, NCES proposed the same landfill expansion in terms of size and disposal capacity, but with an adjusted fill rate that would slow down and extend operations into 2026, the first year DES indicated a capacity need for New Hampshire waste. *Id.*

On October 9, 2020, DES issued the permit at issue in this appeal authorizing the Stage VI landfill expansion. CR 8, Permit No. DES-SW-SP-03-002 (the "Permit"). As part of the Permit, DES again determined that New Hampshire will not have a need for disposal capacity until 2026. CR 211, DES Application Review Summary. DES documented this lack of

disposal capacity need in the following chart included in an Application Review Summary that accompanied the Permit:



Id. The Permit authorized Stage VI operations to commence in 2021 and required operations to continue until December 31, 2026, CR 15 (Permit Condition 27(b)), creating five years of excess disposal capacity (i.e., disposal capacity not needed to accommodate New Hampshire waste) and providing one year of operation during a disposal capacity need. CR 211, DES Application Review Summary.

On November 9, 2020, CLF initiated an appeal before the Waste Management Council challenging the Stage VI expansion permit on the

ground that, *inter alia*, it was unlawful because it did not provide a substantial public benefit pursuant to RSA 149-M:11, III(a), the disposal capacity need provision. CR 1, Notice of Appeal.

For more than a year following the commencement of CLF's appeal, NCES, DES and CLF engaged in prehearing motion practice and discovery, during which the Council issued several orders, including two orders establishing CLF's standing to bring the appeal. CR 137, Order on Motion to Dismiss; CR 168; Order on Motion for Reconsideration.

On May 11, 2022, following a hearing on February 18 and 22, 2022, the Council issued its Final Order on Appeal, determining in relevant part that DES acted unlawfully in determining there existed sufficient capacity need under RSA 149-M:11, III(a) to justify the Permit. CR 2529, Final Order at 6, Addendum 62.

On May 31, 2022, DES filed a motion for reconsideration, CR 2551, and on June 10, 2022, NCES filed a motion for rehearing, CR 2568. CLF objected to both motions on June 24, 2022. CR 2714, CR 2750.

On November 3, 2022, the Council issued orders denying DES's and NCES's motions for reconsideration and rehearing. The Council reaffirmed its prior determination that DES acted unlawfully in granting the permit despite a lack of disposal capacity need until 2026. *See* CR 3009, Order on Motion for Reconsideration, Addendum 77; CR 3032, Order on Motion for Reconsideration, Addendum 90.

SUMMARY OF THE ARGUMENT

New Hampshire's solid waste management statute was enacted to protect resources critical to New Hampshire: the state's people and environment. RSA 149-M:1. To accomplish this purpose, the legislature mandated that the state issue permits for landfills only if they provide a substantial public benefit by, *inter alia*, satisfying a New Hampshire need for waste disposal capacity. RSA 149-M:11, I(b); RSA 149-M:11, III, RSA 149-M:11, V.

The Council correctly determined that, as a matter of law, the plain language of New Hampshire's solid waste management statute authorizes a proposed waste facility only when it will satisfy a New Hampshire need for waste disposal capacity. Based on the undisputed fact that New Hampshire has no need for additional waste disposal capacity until 2026, the Council correctly ruled that the Permit at issue – authorizing operation of a landfill expansion from 2021 through 2026 – is unlawful. It did so on the basis of the unambiguous plain meaning of the statute and undisputed facts.

NCES's arguments that the administrative gloss doctrine warrants a different result, and that the statute, as interpreted by the Council, violates the dormant commerce clause, were not developed and litigated before the Council and are therefore not properly before the Court. The arguments also fail on the merits: the administrative gloss doctrine does not apply where, as here, a statute is unambiguous; and as DES agrees, the statute does not discriminate against interstate commerce. arguments before the Council.

NCES's argument that CLF lacks standing also is without merit. CLF has members who provided sworn statements about, *inter alia*, regularly experiencing adverse noise, odor, and view impacts from the landfill on their property. Consistent with New Hampshire case law, the Council's rules, and the Council's past practices (and consistent with the fact that DES, at no time, challenged CLF's standing), the Council correctly rejected novel, unsupported standing arguments raised by NCES.

ARGUMENT

New Hampshire's solid waste management statute, RSA Chapter 149-M, establishes a clear purpose: "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:1. In furtherance of this purpose, the legislature has "declare[d] its concern that there are environmental and economic issues pertaining to the disposal of solid waste in landfills and incinerators," RSA 149-M:2, I, and established a solid waste management hierarchy that ranks landfilling as the least favorable of six waste management activities. RSA 149-M:3.

Consistent with its purpose and solid waste management hierarchy, New Hampshire's solid waste management law allows the Department of Environmental Services ("DES") to grant a waste facility permit only if a proposed facility will have "a substantial public benefit." RSA 149-M:11, III. A "public benefit," which must be "substantial," is defined as "the protection of the health, economy, and natural environment of the state of New Hampshire consistent with RSA 149-M:11." RSA 149-M:4, XVIII.

To determine that a facility has a substantial public benefit, RSA 149-M:11, III requires DES to determine, *inter alia*, the *need* for the proposed facility "to provide capacity to accommodate solid waste generated within the borders of New Hampshire." RSA 149-M:11, III(a). The statute specifically prescribes the manner in which New Hampshire's capacity need is to be determined. RSA 149-M:11, III(a), V.

As discussed *infra*, the Council correctly determined, on the basis of undisputed facts, that NCES's proposed landfill expansion does not satisfy a disposal capacity need for New Hampshire and, therefore, as a matter of law does not satisfy New Hampshire's statutory "substantial public benefit" requirement.

I. The Council correctly determined that RSA 149-M:11 requires a proposed facility to operate only when New Hampshire has a need for disposal capacity.

A. The Council's determination is based on, and consistent with, the plain and ordinary meaning of the statute.

The Council correctly determined that a plain reading of RSA 149-M:11, III and V requires that a proposed facility, to provide a substantial public benefit, must operate only when New Hampshire has a need for waste disposal capacity. *See, e.g.*, CR 2535, Final Order at 12, Addendum 68; CR 3037, Order on Reconsideration at 6, Addendum 95. The relevant statutory provisions state:

> RSA 149-M:11 Public Benefit Requirement.
>
> . . . .
>
> III. The department shall determine whether a proposed solid waste facility provides a substantial public benefit based upon the following 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.
>
> . . . .

V. In order to determine the state's solid waste capacity need, the department shall:

(a) Project, as necessary, the amount of solid waste which will be generated within the borders of New Hampshire for a 20-year planning period. In making these projections the department shall assume that all unlined landfill capacity within the state is no longer available to receive solid waste.

(b) Identify the types of solid waste which can be managed according to each of the methods listed under RSA 149-M:3 and determine which such types will be received by the proposed facility.

(c) Identify, according to type of solid waste received, all permitted facilities operating in the state on the date a determination is made under this section.

(d) Identify any shortfall in the capacity of existing facilities to accommodate the type of solid waste to be received at the proposed facility for 20 years from the date a determination is made under this section. If such a shortfall is identified, a capacity need for the proposed type of facility shall be deemed to exist to the extent that the proposed facility satisfies that need.

RSA 149-M:11, III(a), V.

Crucially, the final provision above, RSA 149-M:11, V(d), mandates that DES make two determinations: first, whether there will be any shortfall in capacity over the twenty-year planning period; second, if there is such a shortfall, *the extent to which the proposed facility satisfies that need*. This second determination – whether, and the extent to which, a facility satisfies a capacity need – is the heart of this matter.

Statutory interpretation is a question of law, and the Court is the final arbiter of the intent of the legislature, as expressed in the words of the statute considered as a whole. *Polonsky v. Town of Bedford*, 171 N.H. 89, 93 (2018) (citing *Petition of Carrier*, 165 N.H. 719, 721 (2013)). To interpret a statute, the Court first looks to the language of the statute itself and, if possible, construes that language according to its plain and ordinary meaning. *Bisceglia v. Secretary of State*, 175 N.H. 69, 71 (2022). The Court will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* at 71-72. All parts of the statute are construed together to effectuate its overall purpose, and words or phrases are not considered in isolation. *Polonsky*, 165 N.H. at 721. Every statutory word must be given its full effect. *Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009) (citing *Town of Amherst v. Gilroy*, 157 N.H. 275, 279 (2008)). Absent ambiguity, the Court will not look beyond the words of the statute to discern legislative intent. *Polonsky*, 171 N.H. at 93 (citing *segTEL v. City of Nashua*, 170 N.H. 118, 120 (2017)).

The Council correctly determined that the statutory language is unambiguous (noting, in fact, that over the course of the appeal no party argued to the contrary). CR 3035-3036, Order on Reconsideration at 4-5, Addendum 93-94.[1]

Applying the ordinary meaning of the statute, the Council determined that RSA 149-M:11, III(a) requires DES to determine if there is

[1] Indeed, NCES specifically stated that the statute is unambiguous. CR 2588, NCES Motion for Rehearing at 20 ("The hearing officer erred by embarking on the detailed statutory analysis set forth in his order, *as the statute was unambiguous in the first place*.") (emphasis added).

a short- and long-term capacity need for the facility, and requires that capacity need to be identified according to RSA 149-M:11, V. CR 2531-2532, Final Order at 8-9, Addendum 64-65 (citing RSA 149-M:11, III(a)).

RSA 149-M:11, V, in turn, provides the formula for calculating capacity need, and subsection V(d) instructs DES on how to determine if a proposed facility satisfies that need. RSA 149-M:11, V. Specifically, it requires DES to make two determinations: (1) if there will be a shortfall in capacity over a twenty-year planning period, and (2) if there is a capacity shortfall, the extent to which the proposed facility satisfies that capacity need. *Id.* If a facility operates during a time of excess capacity, it does not satisfy a New Hampshire capacity need. *See id.*

Applying the "extent" language, the Council correctly determined that the term "to the extent that the proposed facility satisfies that need" means that a proposed facility must operate when there is a disposal capacity need for New Hampshire waste. CR 3037, Order on Reconsideration at 6, Addendum 95 ("It is the Council's opinion that a proposed facility must be projected to operate during a period of capacity need/shortfall for NHDES to approve said facility in compliance with the statute: the 'extent' language in RSA § 149-M:11, V requires as much."). Because the facility must "satisfy" the capacity need, the Council correctly determined that a present-action relationship must exist between the capacity need and the proposed facility. CR 2533, Final Order at 10, Addendum 66.

The Council's determination is consistent with DES's prior interpretation of the statute. When DES reviewed NCES's first permit application for Stage VI, DES determined that the facility would not satisfy

a capacity need, because the facility operations would not occur contemporaneously with a capacity need. As DES stated:

> Therefore, in conclusion pursuant to RSA 149-M:11, V(d), no capacity need is deemed to exist for the proposed type of facility (i.e., landfill), because such need shall be deemed to exist '. . . to the extent the proposed facility satisfies that need.' The proposed facility cannot satisfy a need for disposal capacity when that need does not exist during the time the proposed facility would be accepting solid waste for landfilling.

CR 1056, DES First Application Review Summary at 33; *see also* CR 2530, Final Order at 7, Addendum 63.

A facility can satisfy a capacity need in the future, but the facility operations and the capacity need must occur at the same time. Using what the Council describes as a "plain reading of the word 'satisfies'" the Council reasoned:

> In the context of the statute, the language 'to the extent that the proposed facility satisfies that [capacity] need' ties a finding of capacity need to a finding of shortfall, subject to the degree a proposed facility resolves said capacity need. . . . it is readily apparent that a finding of capacity need is limited in scope based on a proposed facility's ability to 'resolve' said capacity need.

CR 2532, Final Order at 9, Addendum 65. Because the word "satisfies" is a present-tense verb, the facility must have a present effect on capacity need. CR 2533, Final Order at 10, Addendum 66. In other words, the capacity need and facility operations must occur at the same time. *See id.*; *see also* CR 2534-2535, Final Order at 11-12, Addendum 67-68. ("As the only way a proposed facility can satisfy a need is by operating, a proposed facility

can only provide for a capacity need during the breadth of its lifetime."). The legislature's choice of verb tense – "satisfies," as opposed to "will satisfy" – must be given its full effect. *See City of Providence v. Barr*, 954 F.3d 23, 33 (1st Cir. 2020) ("we must give effect to the verb tense that Congress has chosen to employ.").

In short, the Council's statutory interpretation is quite simple and is correct: a facility can only satisfy a need when a need exists.

B. Because the statute is unambiguous, the Court should not look to legislative history, prior agency action, or policy to interpret the statute.

DES and NCES urge the Court to consider legislative history, prior DES permitting decisions, and overall waste management policy to interpret RSA 149-M:11. *See* DES Br. at 25-26, 29-30, 31, 32, 33; NCES Br. at 28-34. These arguments are misplaced: where a statute is unambiguous, as here, the Court looks to the plain and ordinary meaning of the words chosen by the legislature. *See, e.g., Petition of Carrier*, 165 N.H. at 721. The Court does not look to legislative history unless a statute is ambiguous. *Garand*, 159 N.H. at 143. Policy judgments are to be decided by the legislature, not the Court. *Polonsky*, 171 NH at 97. Courts may defer to an agency's interpretation of a statute, but will not do so in the face of plain statutory language to the contrary. *Appeal of Morrissey*, 165 N.H. 87, 91 (2013); *see also Petition of Carrier*, 165 N.H. at 724 (courts not bound by an agency's interpretation of a statute).

Because RSA 149-M:11, III is unambiguous, as conceded by NCES and correctly determined by the Council, *see supra* at 18, n. 1, the Court

should not consider DES's and NCES's arguments invoking legislative history, DES's statutory interpretation, and considerations of public policy.

C. DES asks the Court to ignore statutory provisions and incorrectly asserts that the statute permits DES to determine capacity need at DES's discretion in contradiction of the explicit language in RSA 149-M:11.

DES argues that, contrary to the plain wording of the statute, DES may determine at its discretion if a landfill satisfies a capacity need. *See* DES Br. at 37. Importantly, DES admits that, to support its position, the Court would need to discount statutory words. As DES states: "The Department's method admittedly gives minimal emphasis to the phrase 'to the extent' and the word 'satisfies' in paragraph V(d)." DES Br. at 32. This approach violates norms of statutory construction. *See, e.g., Town of Amherst*, 157 N.H. at 279.

DES's position on the plain meaning of the statute, and when a facility can operate to satisfy a capacity need, is not entirely clear.[2] Rather, over time DES has held different positions, variously asserting:

[2] DES erroneously describes the Council's ruling as requiring that the proposed capacity "must equal, both in time and amount, the projected capacity shortfall." DES Br. at 28 (emphasis omitted). This is an overstatement of the Council's order. The Council determined that a facility can satisfy a capacity need by operating only when a need exists, not that a facility must continue to operate until a shortfall ends, or that a facility must address all of the state's waste needs during that time. *See, e.g.*, CR 2533, Final Order at 10, Addendum 66.

(1) that a landfill does not satisfy a capacity need if the facility operations do not occur during a time of capacity need, CR 1055-1056, DES First Application Review Summary at 32-33;

(2) that a landfill can satisfy a capacity need by operating predominantly during a time of excess capacity and for just one year of capacity need, CR 211-212, DES Application Review Summary at 43-44;

(3) that the statute requires DES to consider many factors to "determine whether there exists a short- and long-term nexus between the proposed facility . . . and the shortfall within the 20 year planning period," CR 727, DES Prehearing Brief at 6;

(4) that a proposed facility may satisfy a capacity shortfall that occurs after a facility's lifespan, CR 2554-2555, DES Motion for Reconsideration at 3-4; and

(5) that the statute does not contemplate "a strict temporal relationship" between facility operations and capacity need. DES Rule 10 Appeal (Dec. 5, 2022) at 12.

See also CR 3011-3013, Order Reconsideration at 3-5, Addendum 79-81 (Council documenting DES's changing interpretation of RSA 149-M:11, III over the course of the appeal).

Now, DES argues that the statute does not impose a formula for determining capacity need, but instead allows DES to use its expertise and discretion to determine if a proposed facility satisfies a need.[3] *See* DES Br.

[3] Applying the statute as written does not eliminate DES's discretion and expertise from the permitting process. There are many aspects of the

at 37 ("In this case, no rule of grammar requires that operation of a facility and a projected capacity shortfall must be completely contemporaneous. Instead, the language indicates that the Department should use its expertise to determine if the proposed facility 'satisfies' a 'need'."); *see also* DES Br. at 31. Notably, the statute contains *no* provision stating that DES may determine if a facility satisfies a capacity need at its discretion in lieu of applying the formula in RSA 149-M:11, V.

DES's current interpretation is contradicted by the plain words of the statute and basic rules of statutory interpretation. DES concedes that its approach does not give full effect to the words "to the extent" and "satisfies" in RSA 149-M, 11, III(V)(d). DES Br. at 32. Disregarding those phrases is essential to DES's position, because, as DES admits, "the phrase 'to the extent' normally establishes a relationship between the subjects being compared," and "[t]his relationship usually occurs as a ratio or

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capacity analysis alone that rely on DES's expertise and discretion, including projecting New Hampshire's expected solid waste generation over a twenty year period, identifying the types of waste that will be managed at the proposed facility or could otherwise be disposed of according to the State's waste management hierarchy, identifying all permitted waste facilities and assessing the types of waste, annual disposal rates, and expected life expectancy of each facility, and projecting when a statewide capacity shortfall may occur. *See, e.g.* CR 204-212, excerpt of DES's Application Review Summary (documenting DES's process of completing each of those analyses for the Stage VI permit); *see also* RSA 149-M:11, III(a); RSA 149-M:11, V. Additionally, capacity need is just one element that DES must address in issuing a landfill permit. *See generally* RSA 149-M:11. Here, contrary to DES's assertion, no party recreated DES's capacity analysis. *See* DES Br. at 15-16. Rather, the parties accepted and utilized the in-depth capacity analysis DES created in the Application Review Summary as the uncontested factual foundation for this matter.

proportion." *Id.* at 32-33. DES further concedes that "the word 'satisfies' also means something akin to 'resolves.'" *Id*. Nevertheless, DES suggests not giving full effect to those phrases in favor of DES's discretion, even though the statute contains no language permitting DES to exercise its discretion to determine capacity need.

DES's approach ignores certain statutory phrases and adds language the legislature did not see fit to include, violating norms of statutory construction. *See, e.g.*, *Bisceglia*, 175 N.H. 71; *Town of Amherst*, 157 N.H. at 279. If the legislature intended to give DES discretion to determine capacity need, it would have clearly said so in the statute. *See City of Providence*, 954 F.3d at 41 ("If Congress meant to give the Assistant AG the wide-ranging discretionary authority envisioned by the DOJ, we think it would have done so in clearer terms and in a more prominent place in the statute.") The legislature could have included explicit language giving DES discretion to determine if a facility satisfies a capacity need, yet it did not. *See id.* (providing examples of explicit language conveying discretion).

DES's position – that the statute should be interpreted as granting discretion to DES to determine capacity need, despite statutory words to the contrary – conflicts with the statute and violates norms of statutory construction.

D. NCES's argument, that DES must determine only if a capacity need exists within the twenty-year planning period, and not consider a facility's operating life, is incorrect.

NCES concedes that statutory interpretation begins with the plain and ordinary meaning of a statute's language, yet it skips an analysis of the

statute's plain and ordinary meaning entirely. *See* NCES Br. at 29. Instead of examining the words in the statute, NCES instead discusses isolated instances of past landfill permitting by DES, *id.* at 30-31, and invokes administrative gloss, a doctrine of limited application that is simply inapplicable here. *See infra*, at 32.

NCES has previously argued that a facility can satisfy a capacity need if there is a capacity shortfall at *any* point during the twenty-year planning period, even if the shortfall does not occur when the facility is operating. *See e.g.*, NCES Appeal (Dec. 5, 2022) at 15. NCES's position would have DES ignore *when* a landfill will operate, and thus ignore if a landfill *satisfies* a capacity need. *See, e.g.*, NCES Br. at 33. As the Council correctly explained, this position ignores the plain meaning of the "extent" language in the statute. *See* CR 3037, Order on Reconsideration at 6, Addendum 95.

If the legislature intended for a facility to satisfy a capacity need in the event that any capacity shortfall would occur in the twenty-year planning period, regardless of a facility's operating timeframe, the legislature would have clearly said so in the statute. NCES's position – that facility operations and capacity need do not need to occur at the same time – ignores the statutory words "to the extent that the proposed facility satisfies that need." *See* RSA 149-M:11, V(d). NCES goes so far as to argue that the "extent" language could mean that the statute "simply prohibits approvals of new capacity 'to the extent' it would be provided outside of the planning period." NCES Br. at 33. NCES cannot replace the legislature's words ("to the extent that the proposed facility satisfies that need") with words of NCES's choosing ("'to the extent' it would be

provided outside of the planning period."). *Compare* RSA 149-M:11, V(d), *with* NCES Br. at 33. The statute's words must be given their full effect. *Garand*, 159 N.H. at 14. NCES's position contradicts plain statutory language.

Finally, in addition to contradicting the plain language of RSA 149-M:11, V(d), NCES's interpretation would greatly undermine the purpose of New Hampshire's solid waste management statute, including the statute's ranking of landfills as the least favorable of all solid waste management activities, and the clear intent to protect the interests of New Hampshire's citizens and natural resources. RSA 149-M:1-3, 9. NCES's interpretation would result in the siting and operation of new landfills during times when New Hampshire has no landfill capacity shortfall, failing to provide a substantial public benefit and creating excess capacity that will simply be filled by waste from other states.[4]

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[4] New Hampshire's 2003 State Solid Waste Plan described the impacts of importing solid waste from other states as follows:

> Imports of solid waste can have more than just a physical and environmental effect on a state or community. Imported trash creates a feeling of resentment among people in the receiving location. People do not think it is fair to suffer the increased truck traffic and noise or that they should have to be the 'dumping ground' for waste from another state. Further, there is a demoralizing effect on recycling efforts when people wonder why they are working so hard to save disposal capacity that is only used up by waste from another location or another state. Finally, there is an additional cost to the host state for permitting and regulating landfills and incinerators that is borne by the citizens of that state, unless there is a fee

II. The Hearing Officer properly rendered a determination of law based on undisputed facts.

Contrary to DES's argument (DES Br. at 16), the Council's Final Order and Orders on Reconsideration, as related to invalidating the Permit, are premised on a pure question of law – the plain and unambiguous meaning of RSA 149-M:11 as it relates to the need for disposal capacity – which the Hearing Officer was fully authorized to determine. *See* RSA 21-M:3, IX ("[T]he hearing officer shall: . . . (e) Decide all questions of law presented during the pendency of the appeal . . . .").

Importantly, in determining the permit to be unlawful, the Hearing Officer applied the undisputed fact that, as determined by DES, there is not a need for disposal capacity in New Hampshire until 2026. As the Council stated:

> The Council did not, however, need to decide any factual questions regarding what actions NHDES had taken regarding the Permit because NHDES's actions regarding the permit were undisputed. Neither CLF, NCES, or NHDES argued that NHDES did not act as the record reflected when it issued the Permit: the record showed that NHDES issued the Permit for a five-year period where there was no present capacity need/shortfall followed by a one-year period where there was capacity need/shortfall.

CR 3040, Order on Reconsideration at 9, Addendum 98 (internal citations and footnote omitted). Where, as here, the facts are undisputed, the

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> that reimburses the State for its costs. New Hampshire does not have such a fee.

CR 912, 2003 State Solid Waste Plan at 10.

question becomes one of law. *See, e.g.*, *American Emps. Ins. Co. v. Sterling*, 101 N.H. 434, 437 (1958), *Hazelton v. First Nat. Stores*, 88 N.H. 409 (1937); *see also* CR 3041, Order on Reconsideration at 10, Addendum 99.

The Council's capacity need determination was premised purely on statutory interpretation, applying undisputed facts, and did not involve any questions of fact or mixed questions of law and fact.

III. NCES failed to preserve, and waived, its administrative gloss claim, a theory correctly rejected by the Council.

A. NCES failed to preserve, and waived, its administrative gloss theory when it chose not to develop the theory during the Council's hearing.

NCES's appeal relies heavily on the theory of administrative gloss. However, NCES failed to develop and litigate this theory before the Council. Accordingly, it failed to preserve the issue for judicial review and has waived its ability to raise it before the Court.

Claims that are raised at the trial forum, but are not fully advanced there, are not preserved for judicial review on appeal. *See Appeal of Bosselait*, 130 N.H. 604, 607 (1988). When a claim is not developed at the trial level, there is an insufficient record for the Court to consider on appeal. *See id.* (belated attempts to inject issues into an appeal "run afoul of our rule that issues must be raised at the earliest possible time . . . unless a claim is raised in the trial forum, there is no opportunity for a party to develop a factual record supporting his theory of relief, or to make an offer of proof sufficient to justify a demand to introduce relevant evidence and

preserve an issue for appeal.") (internal citation omitted). *See also In re Olympic Mills Corp.*, 477 F.3d 1, 17 (1st Cir. 2007) (party's claim deemed waived because, as presented to the district court below, it was "fatally undeveloped"); *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991) ("Arguments raised in the District Court in a perfunctory and underdeveloped manner are waived on appeal.") (quoting *Kensington Rock Island Ltd. P'ship v. American Eagle Historic Partners*, 921 F.2d 122, 124-25 (7th Cir. 1990).

Moreover, a party cannot make passing reference to undeveloped arguments in the trial forum to hedge their bets in case they are unsuccessful at the trial level and hope to try a new argument on appeal. *McCoy*, 950 F.2d at 22. The First Circuit explained: "a party has a duty to spell out its arguments squarely and distinctly rather than being allowed to defeat the system by seeding the record with mysterious references hoping to set the stage for an ambush should the ensuring ruling fail to suit." *Id.* (internal quotations and citations omitted).

Here, NCES was aware of its administrative gloss theory from the beginning and made a strategic decision not to develop the theory before the Council. NCES's theory asserts that DES's capacity analysis for NCES's Stage VI permit is inconsistent with DES's prior capacity determinations. NCES Br. at 28-34. This is a theme NCES mentioned early in the appeal but did not pursue. *See* CR 188-189, NCES Motion to Dismiss at n. 6. Indeed, in a footnote attached to an early motion to dismiss, NCES documented its strategic decision not to pursue its administrative gloss theory at that time:

> Before it decided to deny NCES's original Stage VI application, NHDES had never construed its rules to include a requirement that an applicant show a capacity shortfall during the lifespan of the proposed facility to establish public benefit. Rather, NHDES had applied the statutory language as written: if there was a shortfall in capacity over the twenty-year planning period and the proposed facility would be accepting waste during that period it was deemed to meet the capacity-need element. While this motion to dismiss does not challenge the lawfulness of this change in the construction of the statute, NCES reserves the right to do so if this motion is not granted.

Id. As the appeal progressed, NCES chose not to seek discovery, develop a record, or engage in motion practice regarding administrative gloss. NCES mentioned the theory in its prehearing brief, CR 742-743, NCES Prehearing Brief at 5-6, but chose not to present evidence or testimony at the hearing regarding administrative gloss. Only after receiving an unfavorable decision from the Council did NCES belatedly attempt to develop administrative gloss in a motion for rehearing. Its creative attempt to position itself as a "newly aggrieved party" to somehow excuse its failure to develop its argument before the Council is simply without merit and unsupported by any authority.[5]

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[5] *See also* CR 2683-2684, DES Objection to NCES Motion for Rehearing at 1-2 ("To the extent NCES is claiming that NHDES acted unlawfully in any respect with regard to the October 9, 2020 permit decision or that any statute is unlawful or unconstitutional with regard to the Permit decision . . . NCES is precluded from raising any challenge at this time because NCES did not timely appeal the NHDES Permit decision to this council; instead NCES accepted the NHDES Permit and began operating pursuant to it. . . . If NCES felt that it was aggrieved by the NHDES Permit issuance due to either an alleged departure from a long-standing interpretation or because

Because NCES made a strategic decision not to develop its administrative gloss theory before the Council, NCES has waived the argument and not preserved it for the Court's review.

B. Even if the Court were to consider administrative gloss, the doctrine of administrative gloss does not apply.

Even if the Court were to consider NCES's administrative gloss argument, as a matter of law the doctrine simply does not apply. As a threshold matter, the doctrine of administrative gloss is a rule of statutory construction employed when a statutory clause is ambiguous. *Anderson v. Motorsports Holdings, LLC*, 155 N.H. 491, 501-02 (2007). Where there is no ambiguity, the doctrine does not apply. *DHB, Inc. v. Town of Pembroke*, 152 N.H. 314, 321 (2005). The Court has applied administrative gloss sparingly, and only in cases of true ambiguity. *See Bovaird v. N.H. Dep't of Admin. Servs.*, 166 N.H. 755, 761 (2014) (phrase "if possible" rendered statute ambiguous); *N.H. Retirement Sys. v. Sununu*, 126 N.H. 104, 108, 109 (1985) (statute ambiguous as to whether state retirement system is independent from the executive branch where the statute is entirely silent on this point).

The Council correctly determined that, because the statute is unambiguous (a position advanced by NCES itself), the doctrine of administrative gloss does not apply. CR 3026, Order on Motion to Strike at

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NHDES was acting pursuant to an alleged discriminatory statute that is contrary to the Commerce Clause, NCES was required to appeal to the Waste Management Council . . . It failed to do so.").

2 ("The Council determined that NCES's administrative gloss argument fails as a matter of law because the relevant statutory language is not ambiguous."); *see also* CR 3035, Order on Reconsideration at 4, Addendum 93 ("the Council did not find the capacity need language in the statute ambiguous . . . NCES has not argued the relevant language . . . is ambiguous: to the contrary, NCES concluded RSA § 149-M:11, III is unambiguous.").

The doctrine of administrative gloss similarly does not apply when an agency's interpretation of a statute has not been consistent. *Anderson*, 155 N.H. at 502 (rejecting administrative gloss and noting that failure to demonstrate a de facto policy or consistent interpretation precludes application of the doctrine); *see also Hansel v. City of Keene*, 138 N.H. 99, 104 (1993) (declining to apply administrative gloss where the statute is unambiguous and prior interpretation is inconsistent.). As discussed *supra* at 23, DES has not established a consistent interpretation of RSA 149-M:11, V. Indeed, DES denies any long-standing interpretation of the capacity need provision. *See* CR 2684-2689, NCES Objection to Motion for Rehearing at 2-7. The doctrine, if considered by the Court, simply does not apply.

IV. The statute does not violate the dormant commerce clause, an argument NCES failed to preserve and has therefore waived.

In asserting that RSA 149-M:11 is unconstitutional, NCES bears the burden of proof, and must overcome a presumption of constitutionality. *N.H. Health Care Ass'n v. Governor*, 151 N.H. 378, 385 (2011). As the Court stated in *New Hampshire Health Care Association v. Governor*:

> In reviewing a legislative act, we presume it to be constitutional and will not declare it invalid except upon inescapable grounds. This means we will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution. It also means that when doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality.

Id. (internal quotations and citations omitted). NCES fails to meet this heavy burden.

A. NCES failed to preserve, and has therefore waived, its dormant commerce clause theory.

NCES identified its dormant commerce clause theory during the Council's proceedings but chose not to develop and pursue it. Accordingly, it failed to preserve, and has therefore waived, the issue for judicial review. *See supra* at 29-30 (discussing cases establishing that undeveloped claims are waived and not preserved for judicial review).

Similar to its administrative gloss argument, NCES was aware of its dormant commerce clause theory but made a strategic decision not to pursue it before the Council. NCES made a passing reference to the dormant commerce clause in a footnote in an early motion, CR 190, NCES Motion to Dismiss at n.8, and devoted just one paragraph in its Prehearing Memorandum to the topic. CR 754, NCES Prehearing Memorandum at 17. As with administrative gloss, NCES chose not to seek discovery, to develop the theory through motion practice, or to submit any evidence or testimony at the hearing regarding the dormant commerce clause.

Because NCES failed to develop its dormant commerce clause theory, the Council correctly declined to entertain NCES's belated attempt

to pursue the argument in its motion for reconsideration. As the Council properly explained:

> NCES had an opportunity to raise such [dormant commerce clause] arguments during the appeal and elected not to. NCES further had an opportunity to appeal the Permit itself if it felt that NHDES acted unlawfully when issuing it and elected not to. Moreover, NCES could have filed suit against NHDES independent of the present appeal to address the alleged unconstitutionality of RSA § 149-M:11 which, NCES argued, was injuring out-of-state waste importers to some degree. Instead, NCES elected to participate in this Appeal as an intervenor-permittee, arguing that NHDES acted lawfully and reasonably in issuing the Permit. NCES cannot now shift to be an appellant-permittee because NCES dislikes the Council's decision. NCES elected to pursue what it considered a beneficial outcome instead of seeking to address allegedly unlawful activity conducted by NHDES. For these reasons, the Council elects not to entertain NCES's dormant commerce clause argument.

CR 3039, Order on Reconsideration at 8, Addendum 97; *see also Appeal of Working on Waste*, 133 N.H. 312, 317 (1990) (affirming Waste Management Council decision denying rehearing on an issue raised for the first time in a motion for rehearing).

Having failed to develop a dormant commerce claim for review by the Council, NCES failed to preserve the argument for judicial review, and it is not properly before the Court. *See Olympic Mills Corp.*, 477 F.3d at 17; *Appeal of Bosselait*, 130 N.H. at 607, *see also supra* at 29-30.

Even if NCES *had* preserved a commerce clause claim for judicial review, NCES's brief before the Court presents an incomplete and

conclusory dormant commerce clause argument.[6] *See* NCES Br. at 34-38. Judicial review is additionally not warranted where, as here, a party fails to develop an issue fully in its brief. *Appeal of N. New England Tel. Operations, LLC*, 165 N.H. 267, 275 (2013) (quoting *Appeal of Omega Ent.*, 156 N.H. 282, 287 (2007) ("As we have repeatedly stated, judicial review is not warranted for complaints regarding adverse rulings without developed legal argument, and neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration.'")); *see also Montenegro v. City of Dover*, 162 N.H. 641, 651 (2011); *In re Lussier*, 161 N.H. 153, 159-160 (2010).

B. Even if the Court were to consider NCES's dormant commerce clause argument, it fails on the merits.

As discussed above, NCES failed to develop its dormant commerce clause theory before the Council; accordingly, the Council correctly refrained from entertaining it and the Court should do the same. But even if the Court were to consider NCES's dormant commerce clause argument, the argument fails on the merits.

[6] NCES misstates the Council's Order and asserts, without support, that the Council's construction of RSA 149-M:11, V violates the dormant commerce clause by "excluding out of state waste." NCES Br. at 37. To the contrary, the Permit, the Council's orders, and RSA 149-M:11 do not exclude out-of-state waste. Limits on landfill construction limit *all* waste going to landfills, whether the waste originates in New Hampshire or is imported from out-of-state. *See infra*, at 39.

The first step in analyzing a dormant commerce clause claim is to determine if a law facially discriminates against interstate commerce. *Oregon Waste Sys., Inc. v. Dep't of Env't. Quality of State of Or.*, 511 U.S. 93, 99 (1994). NCES admits that RSA 149-M:11 is *not* facially discriminatory. NCES Br. at 35 (the carefully chosen words of the legislature "avoided a facially discriminatory law.").[7] Accordingly, NCES must prove that the statute is discriminatory under the *Pike* balancing test. *See Oregon Waste Sys.*, 511 U.S. at 99 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Under *Pike*, "nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Oregon Waste Sys.*, 511 U.S. at 99 (quoting *Pike*, 397 U.S. at 142). NCES must overcome a presumption of validity, and must demonstrate that the purported burden imposed on interstate commerce outweighs local benefits. *See id.* Yet NCES fails to provide any analysis whatsoever of the benefits of the statute or its purported burden on interstate commerce. *See* NCES Br. at 37-38. Without a record of burden or benefits, the Court cannot weigh the two. *See Smith v. N.H. Dep't of Revenue Admin.*, 141 N.H. 681, 696 (1997) (to prove discrimination under the dormant commerce clause a petitioner must present evidence to support a precise determination of the extent of the discrimination); *see also*

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[7] *See also* CR 2601, NCES Motion for Rehearing at 33 ("The original, *non-discriminatory* goals of the statute were to ensure that adequate waste disposal capacity exists within New Hampshire for the needs of the state while protecting public health and the environment." (emphasis added).

American Trucking Assoc., Inc. v. Michigan Public Serv. Comm'n, 545 U.S. 429, 434-435 (2005) (upholding state's fee on interstate trucking and noting that the record showed little, if any, evidence of the fee's burden on interstate commerce and that the minimal facts in the record created many unanswered questions).

If the Court were to apply the *Pike* balancing test, it would find that the statute does not discriminate against interstate commerce. Managing solid waste is a traditional function of the state. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth*., 550 U.S. 330, 346-47 (2007) (detailing benefits of waste ordinances and describing them as "exercises of the police power . . . a typical and traditional concern of local government."); *see also id.* at 334 ("Disposing of trash has been a traditional activity for years, and laws that favor the government in such areas – but treat every private business, whether in-state or out-of-state, exactly the same – do not discriminate against interstate commerce for purposes of the Commerce Clause."); *American Trucking Assoc.*, 545 U.S. at 434 (the interstate commerce clause does not displace states' authority to protect the health and safety of their people under the state's police power). The benefits of waste management outweigh abstract assertions of harm to interstate commerce. *United Haulers Ass'n*, 550 U.S. at 346; *see also VIZIO, Inc. v. Klee*, 886 F.3d 249 (2nd Cir. 2018) (upholding Connecticut's e-waste law under the *Pike* balancing test, noting that "[t]he benefits provided by [the law] are legion."); *E. Kentucky Res. v. Fiscal Court of Magoffin County*, 127 F.3d 532, 545 (6th Cir. 1997) (listing the benefits of state's waste disposal program).

Beneficial waste statutes that treat in-state and out-of-state waste the same, such as RSA 149-M:11, do not violate the dormant commerce clause, even if they result in incidental effects on interstate commerce. *See VIZIO*, 886 F.3d at 260 (public benefit outweighs effects on interstate commerce where waste companies are treated the same, no matter which state they come from) (internal citations omitted). Statutes that limit or prevent construction of a landfill, including RSA 149-M:11, do not discriminate against interstate commerce because they limit *all* waste from disposal and do not distinguish between in-state and out-of-state waste. As DES has stated:

> Simply put, RSA 149-M:11 acts as limitation on the permitting of solid waste capacity, but it in no way restricts the source of waste to those in-state to the burden of out-of-state participants. Once the capacity is approved, anyone, either in-state or out-of-state, can use it – it is up to the permitted facility.

CR 2689, DES Objection to Motion for Rehearing at 7.

As explained in *Clarkco Landfill Co. v. Clark County Solid Waste Management Dist.,* 110 F.Supp.2d 627 (S.D. Ohio 1999): "Indeed, by preventing the Plaintiff from constructing the proposed landfill, the Clark County Defendants will be preventing the disposal of solid waste in Clark County, regardless of whether it was generated within the state of Ohio, or elsewhere." *Clarkco Landfill Co.,* 110 F.Supp.2d at 640 (dismissing dormant commerce clause claim). *See also City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) (explaining that, to support a state's goals of reducing disposal costs and protecting the environment, a state can slow down all waste going into a state's landfills, even if that results in incidental

effects on interstate commerce). Similarly, because they treat in-state and out-of-state waste alike, statutes that include provisions to ensure adequate capacity to address waste generated within a state are not facially discriminatory. *E. Kentucky Res.*, 127 F.3d at 541.

RSA 149-M:11's capacity need requirement limits *all* waste going into New Hampshire landfills, limiting in-state and out-of-state waste alike, and does not discriminate against out-of-state waste. See *City of Philadelphia*, 437 U.S. at 626; *E. Kentucky Res.*, 127 F.3d at 541; *Clarkco Landfill Co.*, 110 F.Supp.2d at 640.

V. The Council correctly ruled that CLF has standing.

Organizational standing is well established in New Hampshire: an organization has standing when it demonstrates that its members have suffered or will suffer a direct injury as a result of the agency decision at issue. *In re Londonderry Neighborhood Coal.*, 145 N.H. 201, 203 (2000); *see also Appeal of Richards*, 134 N.H. 148, 156 (1991) (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972), which states: "It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review."); *N.H. Bankers Ass'n v. Nelson*, 113 N.H. 127, 129 (1973).

Here, CLF established standing on the basis of two members who live in close proximity to, and are directly affected by adverse noise, odor, and view impacts from, the landfill at issue in this appeal. NCES challenged CLF's standing three times over the course of the appeal, starting with a motion to dismiss and followed by two motions for rehearing. CR 30, Motion to Dismiss for Lack of Standing; CR 142,

Motion for Reconsideration; CR 2568, Motion for Rehearing. Each time, the Council correctly determined that CLF has standing. CR 137, Order on Motion to Dismiss; CR 168, Order on Motion for Reconsideration; CR 3032, Order on Reconsideration, Addendum 90. Only NCES has challenged CLF's standing; at no time in the course of this appeal has DES done so.

A. The Council correctly ruled that CLF has standing because it has members who will be adversely affected by noise, odors, and view impacts from the landfill expansion.

Whether a party has standing depends on case-specific factors, such as the proximity of the party's property to the site at issue, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings. *Weeks Rest. Corp. v. City of Dover*, 199 N.H. 541, 544-545 (1979). These factors are illustrative and non-exhaustive considerations; other factors bearing on a party's direct, definite interest in the outcome of a proceeding also may be considered. *Hannaford Bros. Co. v. Town of Bedford*, 164 N.H. 764, 767 (2013) (citing *Weeks*, 119 N.H. at 544-45) ("This list is not exhaustive, we also consider any other relevant factors bearing on whether the appealing party has a direct, definite interest in the outcome of the proceeding.").

In objecting to NCES's motion to dismiss for lack of standing, CLF provided affidavits of two of its members, Andrea Bryant and Peter Menard, as well as a declaration of Ms. Bryant filed in a case in the U.S. District Court, District of New Hampshire, involving the NCES landfill. *See* CR 84-100, Objection to Motion to Dismiss Exhibits 1 – 3, CLF Appendix 10-26. In a subsequent filing, CLF also provided excerpts of the

deposition testimony of Ms. Bryant in the above-mentioned federal action. *See* CR 131-136, Surreply re: Motion to Dismiss, Exhibit 1, CLF Appendix 27-32.

These statements under oath establish that Ms. Bryant and Mr. Menard live in close proximity to the landfill (approximately one mile, and two miles, respectively); regularly experience noise from the landfill on their properties (in the case of Ms. Bryant, even with her windows closed); experience adverse odors from the landfill, including inside their homes; and are directly and adversely affected by the landfill's impacts on the views from their properties. CR 84-88, Affidavit of Andrea Bryant, CLF Appendix 10-14; CR 89-94, Affidavit of Peter L. Menard, CLF Appendix 15-20. The sworn statements also establish that the landfill interferes with Ms. Bryant's and Mr. Menard's use and enjoyment of natural resources, including the Ammonoosuc River, and that Ms. Bryant and Mr. Menard have been engaged in matters related to the landfill over time, including Ms. Bryant's active participation in the administrative hearings involving the Permit at issue in this appeal, authorizing an additional five years of operation and 1.2 million cubic yards of waste disposal. *Id.*

Based on Ms. Bryant's and Mr. Menard's sworn statements, and rejecting arguments raised by NCES (including its unsupported argument that odor and noise impacts are insufficient to confer standing), the Council correctly denied NCES's motion to dismiss, stating, *inter alia*:

> Contrary to Permittee's suggestion, there is no New Hampshire case law establishing that noise or odor are not direct and adverse injuries to the peaceful enjoyment of one's property. Nor is it mere speculation that the currently experienced negative effects of living near the landfill will

> continue in the future if the Permit to expand the scope and extend the life of the landfill is implemented as now written. While proximity to the source of the alleged injurious conduct is a relevant factor in the decided cases addressing standing issues, (*see, e.g., Weeks Rest. Corp. v. City of Dover*, 199 N.H. 541, 544-545 (1979), enumerating several factors to be considered) no one factor is determinative. Here, living within sight and a mile or two of one of the largest landfill operations in the state can reasonably be presumed to be sufficiently proximate for standing purposes.
>
> The alleged noxious odor, noise, and negative consequences to the value of the members' property stemming from operation of the landfill in its current state are not "generalized wrongs" to the public at large. Moreover, Ms. Bryant's and Mr. Menard's detailed affidavits of adverse consequences experienced by them as a result of living in the vicinity of the landfill, given under penalty of perjury, are not mere unsubstantiated allegation of direct and immediate harm. (Note that Ms. Bryant's assertions have been raised under oath in another litigated matter . . . .). It is reasonably foreseeable that these impacts will continue to be experienced as a result of future expansion and development of the landfill. . . .

CR 140, Order on Motion to Dismiss at 3.

Having apparently conceded that noise and odor impacts *can* establish standing, NCES persists in arguing that despite the adverse impacts already experienced by Ms. Bryant and Mr. Menard from the landfill, it is mere speculation that Ms. Bryant and Mr. Bryant will experience those impacts from the landfill's continued operation as authorized by the Permit. NCES Br. at 27. Stated in other terms, NCES contends that "a prospective plaintiff lacks standing to challenge a decision *until the possible future harm actually occurs*," *id.* at 27-28, meaning that

Ms. Bryant and Mr. Menard, despite already having experienced impacts from the landfill, have no right to appeal a permit for the landfill's expansion and instead must sit back and await its construction and operation and address its impacts only after-the-fact – i.e., after the permitting process has concluded.

NCES has identified no legal support for its novel theory that injury in fact, for standing purposes, does not exist until the injury has already been suffered. To the contrary, the Court has made clear that future harm can, in fact, provide a basis for standing. *In re Londonderry Neighborhood Coal.*, 145 N.H. at 203 (appellant must demonstrate it "has suffered or *will suffer* an injury in fact") (citing *Appeal of Richards*, 134 N.H. at 154) (emphasis added). Indeed, NCES's theory would turn the doctrine of standing on its head, depriving individuals who will be directly affected by an activity requiring a permit (or any other type of approval) from accessing adjudicative processes and the courts (thereby precluding their meaningful engagement in permitting and other approval processes) and forcing them instead to suffer actual harm – following issuance of a permit and commencement of the permitted activity – before seeking some remedy outside of the permitting process to redress their harm.

The Council correctly determined – in light of the *Weeks* factors and adverse impacts already suffered by Ms. Bryant and Mr. Menard from the landfill – that adverse impacts to Ms. Bryant and Mr. Menard from the landfill *expansion* are reasonably foreseeable and not speculative.

B. The Council correctly rejected NCES's unsupported argument that an organization has standing only if most or all of its members will be directly affected.

NCES attempts to re-write the law of standing by arguing, without any supporting authority, that organizational standing exists only if the *entirety* of an organization's members are directly harmed by the matter at issue. NCES Br. at 24-25. Its novel argument is simply incorrect and, again, would turn the doctrine of standing on its head, sharply limiting access to the courts.

Contrary to NCES's claims, and as correctly determined by the Council, there is simply no New Hampshire case law establishing, as a prerequisite of organizational standing, that all of an organization's members, or any specified quantity or proportion of an organization's members, must suffer harm. The Council correctly determined that "there are no decided supreme court cases in this jurisdiction reaching [the] conclusion [advocated by NCES, i.e., that organizational standing cannot be established on the basis of one or two members]." *See* CR 170, Order on Motion for Reconsideration at 2.

Moreover, in stark contrast to NCES's argument, during the pendency of this appeal before the Council, the rules governing appeals before the Water Council, Wetlands Council, and Air Resources Council all allowed organizational standing to be established on the basis of just one member harmed by the agency decision at issue.[8] The Council considered

[8] During this appeal, rules governing appeals to the Water Council, Wetlands Council, and Air Resources Council all provided that an

these other rules to interpret its own standing requirements. *See* CR 170, Order on Motion for Reconsideration at 2 ("The Council found no legal error in the Order's reference to the organizational standing rules of the other environmental councils for purposes of this Council's interpretation of its own standing provisions."). It committed no error in doing so, or in concluding that "there is no substantive basis for reaching a different result in an appeal before the Waste Management Council than before any of the other environmental councils." *Id.* Indeed, it would have been constitutionally infirm for the Council to adopt a different, more limiting standard denying equal access to the appeals process for waste permits as

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organization could have standing if at least one member themselves had standing. Admin. R. Env-WC 203.02(a)(6) ("If the appellant is a group, its statement [pertaining to standing] shall include information showing that at least one of its members possesses standing."); Admin. R. Env-WtC 203.02(b) (providing substantively identical requirement for appeals to the Wetlands Council); Admin. R. Env-AC 204.02(b)(5) (providing substantively identical requirement for appeals to the Air Resource Council). The rules governing appeals before the Wetlands and Air Resources Councils recently were recodified and readopted. Admin. R. Chapter Ec-Wet 100 *et seq.* (eff. Dec. 15, 2021) (Wetlands Council); Admin. R. Chapter Ec-Air 100 *et seq.* (eff. May 22, 2023) (Air Resources Council). The new rules require the presiding officer to review a notice of appeal and dismiss "any appeal that, viewed in the light most favorable to the appellant . . . (4) Does not plead facts or law sufficient to . . . b. Establish that the appellant has standing to bring the appeal." Admin. R. Ec-Wet 203.03(c)(4); Admin. R. Ec-Air 203.03(c). They do not specify the facts necessary to establish standing, including organizational standing. *Id.* Effective June 16, 2023, the Waste Management Council's rules have been similarly updated. Admin. R. Ec-Wst 203.03.

compared to the appeals processes of sister appeal councils pertaining to wetlands, water, and air permits.

NCES's argument also is inconsistent with the Council's past practice. In a prior appeal brought by CLF to the Council, involving Waste Management, Inc.'s Turnkey landfill (an appeal considered by this Court in *Appeal of Conservation Law Foundation (Waste Management Council)*, 174 N.H. 59 (2021), CLF established standing on the basis of two members who lived in close proximity to and were directly affected by the facility. *See* CR 77, 81, Objection to Motion to Dismiss at 4 (¶ 10), 9 (¶ 26).

NCES's argument also is inconsistent with the law of standing as it has evolved in the federal courts. In *Warth v. Seldin*, 422 U.S. 490 (1975), the U.S. Supreme Court explicitly stated that to establish organizational standing, an organization "must allege that its members, *or any one of them*, are suffering immediate or threatened injury . . . ." *Warth*, 422 U.S. at 511 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734-741 (1972)) (emphasis added).

Indeed, federal courts regularly confer standing on CLF based on a small number of directly affected members. *See, e.g., Delaware Dept. of Nat. Resources & Env't Control v. U.S. Env't Prot. Agency*, 785 F.3d 1, 7 (D.C. Cir. 2016) (upholding CLF's standing on the basis of declarations from two members, and noting that for an association to have standing "it must demonstrate that *at least one member* would have standing under Article III to sue in his or her own right . . . .") (emphasis added); *Conservation Law Found. v. Plourde Sand & Gravel Co., Inc.*, No. 13-cv-214-SM, Opinion No. 2014 DNH 235 (D.N.H., Nov. 6, 2014) (upholding CLF's standing based on declaration of one CLF member); *Conservation*

Law Found. v. Continental Paving, Inc., No. 16-cv-339-JL, Opinion No. 2016 DNH 130 (D.N.H., Dec. 6, 2016) (upholding CLF's standing based on declarations of three members).[9]

While the Council did not rely on federal law to reach its standing determination,[10] this Court has relied on the law of standing in the federal courts in shaping New Hampshire's law. *See, e.g., Appeal of Richards*, 134 N.H. at 156 (1991) (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)); *Teeboom v. City of Nashua*, 172 N.H. 301, 309 (2019) (relying in

[9] NCES suggests that the citizen-suit provisions in federal environmental laws such as the Clean Water Act have a "liberalizing" effect on standing, suggesting that federal case law on standing is not persuasive. NCES Br. at 27. Contrary to NCES's claim, the citizen-suit provisions contained in such laws have no such "liberalizing" effect. Rather, the courts engage in rigorous standing analyses in cases involving federal statutes with citizen suit provisions. *See e.g. Conserv. Law Found. v. Plourde Sand and Gravel co., Inc.,* No. 13-cv-214-SM, Opinion Number 2014 DNH 235 (D.N.H. 2014) (engaging in lengthy and rigorous standing analysis in Clean Water Act lawsuit); *Conserv. Law Found. v. Continental Paving, Inc.*, No. 16-cv-339-JL, Opinion Number 2016 DNH 130 (D.N.H. 2016) (same). Moreover, in federal cases involving environmental laws that *do not* contain citizen suit provisions, such as the National Environmental Policy Act ("NEPA"), courts regularly find standing for organizations on the basis of a small number of affected members. *See, e.g., Western Watershed Project et al. v. Grimm*, 921 F.3d 1141, 1147 (9th Cir. 2019) (in NEPA lawsuit brought by five organizations that collectively produced eight standing declarants, reversing District Court's denial of standing).

[10] *See* CR 170, Order on Motion for Reconsideration at 2 ("[T]he Order did not rely in (sic.) federal case law in reaching its conclusion regarding organizational standing.").

part on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) in addressing standing).

Finally, it is worth noting that NCES's unsupported theory of organizational standing, if adopted, would sharply curtail access to the courts, granting standing only to organizations with all or most members directly affected by a particular issue (e.g., in this case, an organization comprised only or mostly of people directly affected by the Bethlehem landfill).

The Council correctly rejected NCES's unsupported argument, determining "as a matter of law, that organizational standing can be established when only one or two members of the organization have alleged the requisite harm to themselves and their property; and the sworn allegations of harm to person and property amount to direct and adverse injuries sufficient to establish standing under Env-WMC 204.02(b)(5)." CR 169, Order on Motion for Reconsideration at 1.

C. The Council acted within its discretion in declining to hold an evidentiary hearing on NCES's motion to dismiss for lack of standing.

NCES's argument that it was entitled to an evidentiary hearing on its motion to dismiss – on the basis of an affidavit from one of its employees attempting to contest Ms. Bryant's and Mr. Menard's sworn statements about the odors and noise impacts they personally experience on their properties – fails for several reasons.

1. NCES waived its ability to seek a remand to the Council for an evidentiary hearing on standing.

Standing is a question of subject matter jurisdiction which can be raised at any time in a proceeding. *See Libertarian Party of N.H. v. Sec'y of State*, 158 N.H. 194, 195 (2008). Accordingly, despite not prevailing on its motion to dismiss for lack of standing, NCES could have raised standing at the final hearing, introducing its affiant employee as a witness and requesting cross-examination of other witnesses. Having failed to do so, NCES failed to preserve its claim that it is entitled to have the matter remanded for a hearing. *See Appeal of Rye School Dist.*, 173 N.H. 753, 764 (2020) (claim pertaining to lack of opportunity to cross-examine at hearing not preserved where appellant school district did not request cross-examination at hearing).

2. The Hearing Officer had broad discretion in managing the proceeding; his decision not to hold an evidentiary hearing on NCES's motion to dismiss was not clearly untenable or unreasonable to the prejudice of NCES.

Just as a trial court "has broad discretion in managing the proceedings before it," so too did the Council's hearing officer have broad discretion in managing the proceedings related to this appeal. *State v. Furlong*, 2018 WL 5840154, No. 2017-0164 (Oct. 17, 2018) (citing *In the Matter of Conner & Conner*, 156 N.H. 250, 252 (2007)); *see also* Admin R. Env-WMC 203.06(d)(2), (5) (authorizing presiding officer to regulate the course of the proceeding and "[t]ake such other action that is necessary for the efficient and orderly conduct of the proceeding, consistent with these rules and any other applicable state law."). Accordingly, NCES must show

that the Council's hearing officer unsustainably exercised his broad discretion by managing proceedings in a way that was "clearly untenable or unreasonable" to NCES's prejudice. *Id.* (citing *In the Matter of Conner & Conner*, 156 N.H. at 252). NCES has not met this heavy burden.

Importantly, the Council's rules governing this appeal provided for a final (evidentiary) hearing on the merits; they did not contemplate evidentiary hearings on motions. *See generally* Admin. R. Env-WMC 205 (APPEALS: PREHEARINGS; HEARINGS). Indeed, because the Council meets only periodically, it would create delays, not to mention overburden Council members (who are not compensated for their service), if the Council were to conduct multiple evidentiary hearings in any given appeal.[11] The Council's recently adopted rules implicitly reflect these concerns by clearly *not* providing for evidentiary motion hearings.[12]

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[11] According to its website, the Council "typically meets on the third Thursday of the month from 10 a.m. to 12 p.m." *See* https://www.nhec.nh.gov/waste-management-council/meetings. It is comprised of up to thirteen members, each representing certain statutorily prescribed interests, who receive no compensation except for mileage and other expenses incurred conducting Council business. RSA 21-O:9, I, III.

[12] Among the provisions governing "Motions and Objections," Admin. R. Ec-Wst 203.09, the Council's recently adopted rules state that after a motion and corresponding objection have been filed,

> the presiding officer shall:
> (1) Rule on the motion, if he determines that no material facts are in dispute and there is adequate information upon which to base a ruling as a matter of law;
> (2) Request from the parties such additional information as is necessary to rule on the motion, to be filed within such time as is

The hearing officer did not unsustainably exercise his discretion by declining to conduct an evidentiary hearing on NCES's motion.

In addition to the above, NCES was not prejudiced by the lack of a hearing on its motion to dismiss. Again, NCES could have addressed standing at the final hearing, yet it failed to do so. Moreover, its employee's affidavit describes certain actions and investigations relative to odor and noise, *see* CR 116-118, Affidavit of Kevin Roy, but it does not, nor could it, allege facts nullifying or specifically rebutting the personal experiences of Ms. Bryant and Mr. Menard on their respective properties. On this basis, after noting that Ms. Bryant's and Mr. Menard's affidavits were "sworn statements given under oath . . . and are sufficient to establish standing," the Council correctly concluded that "Mr. Roy's affidavit does not provide evidence that Mr. Menard and Ms. Bryant have not personally experienced direct and definite adverse effects from the landfill" and, therefore, "does not provide a basis for conducting an evidentiary hearing." CR 171, Order on Motion for Reconsideration at 3. In other words, the Roy affidavit created no material factual disputes; a hearing would not have altered the substantive outcome.

Finally, even if the NCES employee's affidavit *could* somehow nullify Ms. Bryant's and Mr. Menard's personal experiences of adverse

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> reasonable and necessary for the accurate and speedy resolution of the motion; or
>
> (3) Deny the motion if ruling on the motion would require the resolution of a material factual dispute.

Admin. R. Ec-Wst 203.09(f). They neither contemplate nor provide for evidentiary hearings on motions.

odor and noise impacts, the affidavit failed to address another ground on which the Council found standing to exist: the landfill's adverse impacts on views from Ms. Bryant's and Mr. Menard's properties. Nor did it address other grounds for standing in Ms. Bryant's and Mr. Menard's sworn statements, such as the landfill's impact on their use and enjoyment of natural resources. Accordingly, if the Council had held an evidentiary hearing on NCES's motion to dismiss, it would not have changed the Council's standing determination. As such, NCES suffered no material prejudice, and even if the Council's decision not to hold an evidentiary hearing on its motion to dismiss could be considered a procedural irregularity, it would not be a basis for remanding the matter for a hearing. *See Ruel v. N.H. Real Estate Appraiser Bd.*, 163 N.H. 34, 44 (2011) ("A court will not set aside an agency's decision for a procedural irregularity . . . unless the complaining party shows material prejudice.") (citing *Appeal of Concord Natural Gas Corp.*, 121 N.H. 685, 691 (1981)).

CONCLUSION

The Council correctly determined that, as a matter of law, the plain language of New Hampshire's solid waste management statute authorizes a proposed waste facility only when it will satisfy a New Hampshire need for waste disposal capacity. For that reason and the reasons stated above, CLF respectfully requests that the Court affirm the Council's decision in the Final Order, CR 2524, Addendum 57; Order on Reconsideration, CR 3009, Addendum 77; and Order on Reconsideration, CR 3032, Addendum 90.

ORAL ARGUMENT

CLF requests 15 minutes of oral argument. Heidi H. Trimarco will provide oral argument for CLF.

Respectfully submitted,

Date: August 4, 2023

Conservation Law Foundation
By its attorneys,

/s/ Heidi H. Trimarco
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CERTIFICATION OF SUBMITTAL OF APPEALED DECISIONS

Pursuant to N.H. Supreme Court Rules 16(3)(i) and 16(4)(a), I hereby certify that each written decision being appealed in this matter is provided in the Addendum below. The decisions are (1) Waste Management Council Final Order, CR 2524, Addendum 57; (2) Waste Management Council Order on Reconsideration, CR 3009, Addendum 77; and (3) Waste Management Council Order on Reconsideration, CR 3032, Addendum 90.

Dated: August 4, 2023

/s/ Heidi H. Trimarco
Heidi H. Trimarco

CERTIFICATE OF COMPLIANCE

Pursuant to N.H. Supreme Court Rule 26(7), I hereby certify that this brief complies with the word limitation as established in the Court's Order on May 26, 2023, limiting CLF's brief to no more than 15,000 words. This brief contains 11,912 words, exclusive of the table of contents, table of authorities, and addendum.

Dated: August 4, 2023

/s/ Heidi H. Trimarco
Heidi H. Trimarco

CERTIFICATE OF SERVICE

I certify that a copy of the forgoing was served via the court's electronic filing system to all attorneys and other parties who have entered electronic service contacts in these dockets.

Dated: August 4, 2023

/s/ Heidi H. Trimarco
Heidi H. Trimarco

ADDENDUM

ADDENDUM TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

DOCKET NO. 20-14 WMC

IN RE: CONSERVATION LAW FOUNDATION, INC. APPEAL

FINAL ORDER ON APPEAL

ORDER: APPEAL DENIED IN PART, GRANTED IN PART

BACKGROUND

On October 9, 2020 the New Hampshire Department of Environmental Services ("NHDES") issued a Type 1-A Permit Modification and Waiver for Expansion, Permit No. DES-SW-03-002 (the "Permit") to North Country Environmental Services, Inc. ("NCES") authorizing NCES's Stage VI landfill expansion of its solid waste facility in Bethlehem, NH (the "NCES Facility"). On November 9, 2020, the Conservation Law Foundation ("CLF") filed a Notice of Appeal with the Waste Management Council (the "Council") seeking to have the Permit deemed unlawful and unreasonable.

On February 18 and 22, 2022, a quorum of the Council along with a Hearing Officer assembled for a Hearing on this matter. The Council heard testimony and received evidence from the Parties. Deliberations occurred on February 22, 2022. The issue before the Council was whether NHDES, when issuing the Permit, acted lawfully and reasonably in determining that the NCES Facility provided a substantial public benefit pursuant to RSA § 149-M:11, III. CLF argued:

1. NHDES acted unlawfully and unreasonably by not determining the "short- and long-term" capacity need for the NCES Facility required under RSA § 149-M:11, III(a);

2. NHDES acted unlawfully and unreasonably in determining there existed sufficient capacity need under RSA § 149-M:11, III(a) justifying operation of the NCES Facility for its proposed six year operating period;

3. NHDES acted unlawfully and unreasonably by using vague and ambiguous language in the Permit (Condition 27), the vagueness and ambiguity of which inhibited NHDES from determining whether the NCES Facility would assist the state in achieving implementation of the State's Waste Reduction Goal (RSA § 149-M:2) and Waste Management Hierarchy (RSA § 149-M:3); and

4. NHDES acted unlawfully and unreasonably in determining the NCES Facility will assist in achieving the state's solid waste management plan because the state's solid waste management plan has not been updated since 2003, in violation of RSA § 149-M:29, I.[1]

RELEVANT LAW AND RULES

Under RSA § 21-O:9, V, the Council is required to hear all administrative appeals from NHDES decisions relating to the functions and responsibilities of the division of waste management, in accordance with RSA § 21-O:14. The decision being appealed in this matter qualifies as a 'department permitting decision' under RSA § 21-O:14. Pursuant to Env-WMC 205.14, CLF bore the burden of proving, by a preponderance of the evidence, that NHDES's decision to issue the Permit was unlawful or unreasonable. "Unlawful" is defined as "contrary to case law, statute, or rules" while "unreasonable" is defined as "arbitrary and capricious." *Env-WMC 205.14*. The Council decides upon questions of fact (RSA § 21-M:3, IX(c)), while the Hearing Officer decides upon questions of law (RSA § 21-M:3, IX(e)).

RSA § 149-M:11, III provides, in relevant part:

> "The department shall determine whether a proposed solid waste facility provides a substantial public benefit based upon the following 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.

[1] CLF raised further issues in its Notice of Appeal pursuant to RSA § 149-M:11, III(c) in regards to NHDES reviewing one or more solid waste management plans submitted to the department pursuant to RSA § 149-M:24 and RSA 149-M:25. These issues were dismissed at the Appeal Hearing.

(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 . . . ."

RSA § 149-M:11, V details how NHDES must determine the state's solid waste capacity need. RSA § 149-M:2 provides the state's Waste Reduction Goals. RSA § 149-M:3 details the state's endorsement of a Waste Management Hierarchy, wherein six methods of waste disposal are identified and ordered in preference, with 'landfilling' being the least preferred method. RSA § 149-M:29 imposed a requirement on NHDES to prepare a State Solid Waste Plan in 1998 and then to update said plan every six years thereafter.

DISCUSSION

A. NHDES lawfully determined the 'short- and long-term' capacity need for the NCES Facility required under RSA § 149-M:11, III(a).

Under New Hampshire law every statutory word must be given its full effect and all parts of a statute are construed together. *See Town of Amherst v. Gilroy*, 157 N.H. 275 (2008); *State Employees' Ass'n of New Hampshire v. State*, 161 N.H. 730 (2011). CLF emphasizes that the language regarding 'short- and long-term need' in RSA § 149-M:11, III(a) is a component element of the (a) criteria which NHDES is required to consider when determining whether a proposed solid waste facility provides a substantial public benefit.

CLF is correct that 'short- and long-term need' is a required component of the (a) criteria which NHDES must consider when determining whether a proposed facility provides a substantial public benefit. Per the (a) criteria, NHDES must measure the short- and long-term need for a proposed facility to satisfy the state's capacity need for waste generated in the state. It is readily apparent that the 'short- and long-term need' language is separate from the capacity need calculation in RSA § 149-M:11, V, and the 'short- and long-term' language cannot be ignored.

The (a) criteria required NHDES to evaluate the state's need for the NCES Facility to provide the requisite capacity to hold the solid waste generated in New Hampshire. The capacity need is calculated pursuant to RSA § 149-M:11, V, but capacity need is merely the measurement of the state's need- the (a) criteria itself is the requirement that NHDES determine whether a proposed facility will in fact be necessary, based on the capacity need calculation. The (a) criteria explicitly required NHDES to evaluate the state's short- and long-term capacity needs when evaluating whether the NCES Facility would satisfy the state's capacity need.

What qualifies as 'short- and long-term' time periods, however, is unclear. RSA § 149-M:11, V establishes a definite twenty year window in which NHDES must evaluate shortfalls in the state, but there is no indication where this twenty year period lands in the spectrum of 'short- or long-term' time periods contemplated by the (a) criteria. No definitions are provided for what qualifies as 'short-' and 'long-' term need, nor are any further instructions or mandates provided to NHDES as to how it must determine or measure 'short- and long-term need' in the context of the (a) criteria.

NHDES was charged with determining the 'short- and long-term' need for the NCES Facility to provide for the capacity need of the state. While the question of whether 'short and long' need is a requisite consideration under the (a) criteria is a question of law, whether NHDES sufficiently determined the 'short- and long-term' need for the NCES Facility is a question of fact. The Council determined via a unanimous vote that NHDES did sufficiently determine the short- and long-term need for the NCES Facility. The Council received evidence and testimony that NHDES interpreted short and long term need as required under the (a) criteria and applied its interpretation of this requirement to the NCES Facility when considering the Permit.

The Council determined the October 2020 Permit Application Review Summary evidences NHDES's considerations regarding the short- and long-term need for the NCES Facility. *See* Appellant Exhibit 8, pp. 268-275. NHDES explicitly projected the amount of waste to be generated within New Hampshire from October 2020 to September 2040, resulting in a determination of 1.45 tons per capita per year for each year within the twenty year time period under review. *Id.* at 269. NHDES independently determined the state's disposal capacity as a function of time in an effort to identify any shortfalls in the state's capacity need, explicitly in

furtherance of the requirement that NHDES examine "the short- and long-term need . . ." of the NCES Facility. *Id*. at 272, quoting RSA § 149-M:11, III(a). NHDES ultimately generated the Projected Waste Disposal Need & Capacity for New Hampshire graph which depicts the results of NHDES's evaluation of the short- and long-term needs of the state. *See Id.* at 274.

Based on the above information, the Council determined that NHDES sufficiently determined the short- and long-term need for the NCES Facility. As the law pertaining to this matter is ambiguous in regards to what NHDES must consider when evaluating short- and long-term need, and the Council has determined that NHDES sufficiently determined short- and long-term need when deciding the Permit, it cannot be said that NHDES acted unlawfully in its practices regarding its determination of the NCES Facility satisfying a short and long-term need as required by RSA § 149-M:11(a). Accordingly, this portion of CLF's appeal is denied.

B. NHDES reasonably determined the 'short- and long-term' capacity need for the NCES Facility required under RSA § 149-M:11, III(a).

Whether NHDES acted reasonably in determining the 'short- and long-term' capacity need for the NCES Facility required under the (a) criteria is a question of fact. As discussed above, the Council determined NHDES did sufficiently determine the short- and long-term need for the NCES Facility. The Council further determined via a unanimous vote that NHDES did act reasonably in determining there existed a short- and long-term capacity need for the NCES Facility.

The Council determined that, due to the ambiguous nature of the phrase 'short- and long-term,' and the lack of definiteness ascribed to these temporal periods, it was reasonable for NHDES to interpret 'short- and long-term' as needed. The Council found no evidence that NHDES acted arbitrarily or capriciously in its measurement of 'short- and long-term' need when evaluating the Permit. The October 2020 Permit Application Review Summary shows a methodology relied upon by NHDES wherein NHDES evaluated the state's capacity need for a twenty year period and examined the state's capacity need on a year-to-year basis. *See* Appellant Exhibit 8, pp. 268-275. The Council determined this interpretation of 'short- and long-term' need to be reasonable, and concluded that the 'short- and long-term' language is purposefully

ambiguous so as to grant NHDES the necessary leniency to effectively achieve the goals of RSA § 149-M:11(a). Accordingly, this portion of CLF's appeal is denied.

C. NHDES acted unlawfully in determining there existed sufficient capacity need under RSA § 149-M:11, III(a) justifying operation of the NCES Facility for its proposed six year operating period.

Whether NHDES acted lawfully in determining there existed sufficient capacity need during the lifespan of the NCES Facility justifying a finding of substantial public benefit pursuant to RSA § 149-M:11, III is a question of law. CLF contends NHDES acted unlawfully upon deciding to grant the Permit for the NCES Facility for a period of time when no capacity need existed. NCES contends that the existence of any capacity need during the lifespan of the NCES Facility satisfied the requirements of RSA § 149-M:11, III(a). NHDES argues that the "exclusive overlap, minimal overlap, or lack of any overlap between the proposed [lifespan of the NCES Facility] and a period of shortfall in capacity is not solely determinative of a RSA 149-M:11, III(a) capacity need finding." NHDES's Limited Pre-Hearing Memorandum, p. 4.

In its October 2020 Application Review Summary for the NCES Facility, NHDES acknowledged: "[t]the proposed facility would provide disposal capacity for NH generated waste during a time period that the data show the state has excess disposal capacity, as well as a time period when the state has a disposal capacity shortfall." Appellant Exhibit 8, p. 275. It is apparent from the record that NHDES, at the time of the issuance of the Permit, ascribed to the argument that the existence of any shortfall during the proposed lifespan of a facility authorized a finding of capacity need for the entire lifespan of said facility. *See Id.* ("in conclusion pursuant to RSA 149-M:11, V(d), NHDES has determined that a capacity shortfall exists during the planning period for the proposed type of facility (i.e. landfill), which is satisfied by the proposed facility for one year . . . . Thus, the proposed facility satisfies a need for disposal capacity within the planning period").

The issues raised in this matter result in two questions regarding the interpretation of RSA § 149-M:11:

1. *Does the existence of the (a) criteria of RSA § 149-M:11, III imply there must exist a capacity need for NHDES to determine a proposed facility provides a substantial public benefit?*

NHDES argues that NHDES could lawfully find that the NCES Facility satisfied the requirements of RSA § 149-M:11, III(a) regardless of the extent the proposed lifespan of the NCES Facility 'overlapped' with a period of capacity shortfall. *See* NHDES's Limited Pre-Hearing Memorandum, p. 4. NHDES argues it must evaluate the totality of the circumstances when determining whether the (a) criteria is met: as an example, NHDES contends that "a proposed facility, despite operating during a time of excess capacity, could have a substantial effect on a later identified shortfall due to the present solid waste management situation, geography, or type of wastes accepted." *Id*. It is NHDES's current position that "the exclusive overlap, minimal overlap, or lack of any overlap between the proposed operating life of a facility and a period of shortfall in capacity is not solely determinative of a RSA 149-M:11, III(a) capacity need finding." *Id.* NHDES asserts that the application of RSA § 149-M:11, III(a) is subject to NHDES's discretion, and NHDES is charged with determining whether a proposed facility has a "meaningful effect, short- and long-term, on capacity need—the shortfall in capacity." *Id.*

This argument contradicts NHDES's findings in its February 2020 Permit Application Review Summary which contains NHDES's review of NCES's initial application for its Stage VI expansion. *See* Appellant Exhibit 5, p. 191. After reviewing NCES's initial application—in which NCES's proposed facility would operate during a period without any shortfall in New Hampshire's waste capacity need—NHDES concluded: "[t]he proposed facility cannot satisfy a need for disposal capacity when that need does not exist during the time the proposed facility would be accepting solid waste for landfilling." *Id*. NHDES further concluded that NCES's argument that allowing its proposed facility during a period without capacity need would incur the benefit of saving capacity at other facilities during the twenty year planning facility to be without merit. *Id*. NHDES acknowledged that allowing the proposed facility to increase the state's capacity without a corresponding capacity need does not alter other facility permits already issued which allow said facilities to operate at their maximum disposal rates based on the state's capacity need. *Id*. NHDES ultimately concluded that NCES's initial application did not

meet the requirements of the (a) criteria because the proposed facility would have operated during a period without capacity need. *Id.* at 193. The Council received testimony that this initial application was withdrawn by NCES upon being informed that NHDES intended to deny it.

Though not explicitly articulated by NHDES, its current argument rests on an interpretation of RSA § 149-M:11, III wherein the (a) criteria does not impose a requirement that there must be a capacity need during the lifetime of a proposed facility for said proposed facility to provide a substantial public benefit. Per NHDES's argument, a proposed facility could be found to provide a substantial public benefit even if there exists no capacity need during the lifespan of the facility, if the existence of the proposed facility will have a positive effect on the state's later capacity need. For such a result, the (a) criteria must either not require a finding of capacity need or, if it does, the (a) criteria must not be a requisite for a finding of substantial public benefit.

In relevant part and in simplified form, RSA § 149-M:11, III(a) requires NHDES to determine whether a proposed facility provides a substantial public benefit based upon the short- and long-term need for the proposed facility to provide capacity for New Hampshire waste. The statute presumes that NHDES will be evaluating a 'need' for a proposed facility to provide for capacity: for there to be a 'need' there must be a 'want for' or deficit. As the 'need' to be evaluated by NHDES is the 'need' for capacity, it can be inferred that the (a) criteria anticipates the existence of a 'capacity need' which NHDES must evaluate in determining whether a proposed facility provides a substantial public benefit. This inference is further supported by the inclusion of the language "capacity need shall be identified as provided in paragraph V" at the end of the (a) criteria, even though the (a) criteria does not contain the term 'capacity need' save for in the identification language.

A plain reading of the (a) criteria clearly demonstrates there must be a 'capacity need' to exist for NHDES to justify a finding of substantial public benefit. Whether this 'capacity need' must exist during the lifespan of a proposed facility, however, is not explicitly identified in the (a) criteria. Reading the (a) criteria in isolation may create the impression that NHDES need only find 'capacity need' at any point and need only evaluate the effect of a proposed facility on said 'capacity need.' Such an interpretation may be supported by the additional language 'short- and

long-term' which, undefined, may extend a measurement of 'capacity need' beyond a proposed facility's lifespan. Such an interpretation, however, neglects the language in the (a) criteria which requires capacity need to be identified as provided in paragraph V.

Paragraph V details the method by which NHDES must determine the state's solid waste capacity need. After projecting the amount of solid waste generated within New Hampshire for a twenty year period from the date of determination, NHDES is required to identify any shortfall in New Hampshire's waste capacity during this entire twenty year period. Paragraph V(d) provides that a capacity need will be deemed to exist if any shortfall is identified by NHDES, but only to the extent a proposed facility satisfies that capacity need. This is the only method identified in paragraph V to determine capacity need.

As with other language in RSA § 149-M:11, the meaning of "satisfies" is undefined. A plain reading of the word 'satisfies,' subject to general understanding and coupled with the context of the statute results in the meaning: "to sufficiently provide something that is needed." *See also Webster's Third New International Dictionary of the English Language, Unabridged. Springfield, Mass.: Merriam-Webster, 2002*. In the context of the statute, the language "to the extent that the proposed facility satisfies that [capacity] need" ties a finding of capacity need to a finding of shortfall, subject to the degree a proposed facility resolves said capacity need. Regardless of the exact definition of the language used, it is readily apparent that a finding of capacity need is limited in scope based on a proposed facility's ability to 'resolve' said capacity need. The application of this language is best displayed by an example:

If there is a ten ton shortfall and a proposed facility will provide for ten tons of capacity, then the proposed facility satisfies a capacity need of ten tons. Pursuant to paragraph V, NHDES is required to conclude there is a capacity need of ten tons because the proposed facility satisfies the ten ton capacity need. If there is a ten ton shortfall and a proposed facility will provide for eight tons of capacity, then the proposed facility satisfies a capacity need of eight tons. The proposed facility only satisfies a capacity need of eight tons because this is the amount of capacity which the facility can provide, leaving an additional two tons in shortfall. NHDES is required to conclude there is a capacity need of eight tons because the proposed facility can only satisfy eight tons of the shortfall. It would be illogical for NHDES to determine that the full ten

ton shortfall is satisfied by the eight ton capacity, just as it would be illogical for NHDES to find no capacity need just because a proposed facility does not satisfy the entirety of a shortfall. The 'extent language' of paragraph V appears designed to account for such results so as to ensure New Hampshire's waste facilities provide effective and proportional capacity to New Hampshire's waste needs.

Pursuant to the 'extent language,' if there is a ten ton shortfall and a proposed facility will provide for fifteen tons of capacity, NHDES must conclude that the proposed facility satisfies the capacity need of ten tons, for there is nothing in RSA § 149-M:11 empowering NHDES to grant a permit which allows the proposed facility to operate at the full fifteen ton capacity when there is only a ten ton shortfall. Paragraph V limits a finding of capacity need to the extent a proposed facility satisfies said need, and inexorably links a finding of shortfall with a finding of capacity need. As a result, if there is no shortfall in the state's capacity to handle solid waste, there cannot be a finding of capacity need; likewise, if there is only X amount of shortfall, there can only be X amount of capacity need.

The extent language further provides clarity as to whether capacity need must exist during the lifespan of a proposed facility in order to satisfy the requirement of the (a) criteria. The language of paragraph V provides: "[i]f such a shortfall is identified, a capacity need for the proposed type of facility shall be deemed to exist to the extent that *the proposed facility satisfies that need*" (emphasis added). The word 'satisfies' is a present-tense verb, through which 'the proposed facility' (the subject) acts upon 'that need' (the object): this language imposes a present-action relationship between the proposed facility and the capacity need. The use of the word 'satisfies' in this context results in two implications: first, a proposed facility must have a present effect on capacity need, and second, it is not enough for a proposed facility to just affect capacity need—the proposed facility must 'satisfy' it to some degree.

NHDES's argument relies on the premise that, though there is no capacity need during the lifespan of a proposed facility, the effect of the proposed facility on a future capacity need sufficiently satisfies the (a) criteria. This future-looking measurement of a proposed facility's ability to satisfy a future capacity need is problematic for several reasons. First, a plain reading of paragraph V(d) imposes a requirement that a proposed facility must presently satisfy capacity

need: relying on a future 'satisfaction' of a capacity need by a proposed facility obviously conflicts with this present-requirement interpretation. Second, even if paragraph V(d) is read such that the present-tense nature of 'satisfies' extends to capacity need outside the lifespan of a proposed facility because paragraph V, arguably, is in the nature of a future looking provision, this future-looking interpretation conflicts with the definition of 'satisfy.'

As discussed above, to 'satisfy' in the current context requires a proposed facility to sufficiently provide something (in this case, capacity) that is needed. To satisfy is NOT to affect, influence, support, continue, or enhance. The legislature used the word 'satisfy' and presumably used it in its common form. By the very nature of how waste is generated, there is a constant stream of new waste to be accommodated in New Hampshire; NHDES in fact measures waste generation within New Hampshire for the purposes of paragraph V, and is able to generate a calculation of pounds of waste produced by person per day. *See e.g.* Appellant Exhibit 8, p. 269. Paragraph V provides the method by which capacity need is to be identified, and it limits a finding of capacity need to the extent a proposed facility can accommodate New Hampshire waste. It is impossible for a proposed facility to satisfy capacity need beyond the scope of said facility's lifespan because said facility cannot accommodate capacity need during a period when it is not operating. The proposed facility is not projected to operate during a future period and, therefore, cannot be said to satisfy any capacity need, even if a shortfall is predicted to exist during this future period. To 'satisfy' in the current context requires a proposed facility to, at a minimum, provide some capacity need to the state: a non-operating facility cannot accomplish this requirement. This interpretation of 'satisfy' and capacity need under the (a) criteria is the exact argument NHDES relied on in the February 2020 Permit Application Review Summary when NHDES found that NCES's initial application failed to meet the requirements of the (a) criteria. *See* Appellant Exhibit 5, p. 191.

NHDES argues that a proposed facility may provide benefits to the state beyond its lifespan, and may influence future shortfalls and capacity need. It may even be argued that NHDES is required to consider such factors pursuant to the (a) criteria's "short- and long-term" language. While such future possibilities are factors NHDES may/must consider, the above analysis of 'satisfy' and capacity need shows NHDES *must* consider whether a proposed facility satisfies a capacity need. As the only way a proposed facility can satisfy a need is by operating, a

proposed facility can only provide for a capacity need during the breadth of its lifetime. During NCES's initial permit application for the Stage VI expansion, NCES raised a similar argument to that raised by NHDES in this appeal: NCES argued that, though the initially proposed facility would operate during a period without shortfall, the proposed facility would still provide for capacity need beyond said facility's lifespan by increasing the capacity of other facilities in the future. *See* Appellant Exhibit 5, p. 191. NHDES denied this argument at that time because the 'capacity need' identified by NCES would not manifest because other facilities already had permission to operate at their maximum-allowed fill rates based on the state's capacity need. *See Id*. Adding additional capacity via the proposed facility would merely redistribute the capacity of the state while not resolving the capacity need of the state, thereby allowing facilities to take in more non-New Hampshire waste to meet their maximum-allowed fill rates instead of actually accommodating New Hampshire waste as expected by RSA § 149-M:11. *See Id*. No evidence or argument has been forthcoming that such a result would not be the inevitable repercussion of NHDES's current argument.

Accordingly, the (a) criteria does require a proposed facility to satisfy a capacity need during the lifespan of the facility, regardless of whatever other effects said facility may have on the future. If there is no capacity need during the lifespan of a proposed facility, then NHDES cannot lawfully determine said facility provides a substantial public benefit pursuant to the (a) criteria.

Though not raised explicitly, NHDES's argument that a proposed facility may provide a substantial public benefit even if said facility satisfies no capacity need implies a secondary argument that, even if the (a) criteria requires a proposed facility operate during a period of capacity need, the (a) criteria is not a requisite for a finding of substantial public benefit. RSA § 149-M:11 requires NHDES to "determine whether a proposed facility provides a substantial public benefit based upon the following criteria," which includes the (a) criteria. It may be argued that the language 'based upon' does not compel NHDES to treat each criteria as determinative of whether a proposed facility provides a substantial benefit: 'based upon' may be read to require NHDES to consider and evaluate each criteria, but to ultimately determine substantial public benefit based on the totality of the factors considered in the criteria. Under such a 'totality of the circumstances' interpretation, NHDES may contend that the lack of

capacity need for the NCES Facility was, as required by the (a) criteria, evaluated by NHDES—as evidenced in the October 2020 Permit Application Review Summary—but NHDES found other factors (such as those in the (b) and (c) criteria) compelling enough to override the (a) criteria's findings.

This argument is not explicitly raised by either NHDES or NCES in the course of this appeal, likely because NHDES has not interpreted RSA § 149-M:11, III in such a manner previously. In both the February 2020 and October 2020 Permit Application Review Summaries, NHDES affirmed its interpretation that all three of the criteria under RSA § 149-M:11, III must be met for a proposed facility to provide a substantial public benefit. S*ee* Appellant Exhibit 5, p. 184 and Exhibit 8, p. 268 ("[a]ll three of the criteria must be satisfied for a proposed facility to receive a determination that it provides a substantial public benefit . . . If NHDES determinates that the applicant has failed to demonstrate that the proposed facility satisfies the three criteria listed under RSA 149-M:11, III, the department must deny the application . . ."). A plain reading of the statute supports this interpretation, and therefore it is affirmed that the (a) criteria is a requirement under RSA § 149-M:11, III.

From these two assessments, it must be concluded that the (a) criteria does requires a proposed facility to operating during a period of capacity need and, in order for NHDES to determine a proposed facility provides a substantial public benefit, said facility must satisfy the (a) criteria. NHDES's evaluation of a proposed facility under the (a) criteria is non-discretionary, just as a finding of capacity need is non-discretionary.

2. *Can NHDES determine a proposed facility provides a substantial public benefit if the proposed facility will operate for periods without a capacity need?*

NHDES affirmed in the October 2020 Permit Application Review Summary that the NCES Facility would operate for a period without a capacity need and for a period with a capacity need. *See* Appellant Exhibit 8, p. 275. CLF argues that NHDES acted unlawfully in finding the NCES Facility provided a substantial public benefit when the NCES Facility will operate during periods without a capacity need as required by the (a) criteria, per the language of RSA § 149-M:11. NCES contends that the existence of any shortfall within the lifespan of the

NCES Facility warranted a finding of capacity need for the entire lifespan of the facility and therefore NHDES lawfully determined substantial public benefit pursuant to the (a) criteria.

As discussed above, a finding of capacity need is prescribed by paragraph V: if there is a shortfall, a capacity need will be deemed to exist to the extent a proposed facility satisfies said need. If there is no shortfall, there can be no finding of capacity need because paragraph V details the sole method of identifying capacity need under the (a) criteria. Accordingly, if a proposed facility operates for a period without any shortfall, then NHDES cannot lawfully find there to be a capacity need thereby meeting the requirement of the (a) criteria when determining substantial public benefit. This is the exact circumstance which occurred when NHDES evaluated NCES's initial application for the Stage VI expansion: NHDES determined the proposed facility could not meet the requirements of the (a) criteria because there existed no capacity need during the proposed facility's lifespan. *See* Appellant Exhibit 5, p. 191.

In the current matter, the NCES Facility was proposed to operate for six years: during this six years, the NCES Facility was to operate for a five year period without any shortfall until about the beginning of 2026 whereupon a shortfall period was identified. *See* Appellant Exhibit 8, p. 274. Until 2026, there was no shortfall and therefore there was no capacity need. *Id.* at 274-75. RSA § 149-M:11 requires a finding of capacity need under the (a) criteria for a proposed facility to provide a substantial public benefit. There is no evidence that RSA § 149-M:11 allows a partial finding of capacity need for a proposed facility to satisfy the requirement of the (a) criteria. To the contrary, the language of paragraph V explicitly limits a finding of capacity need to only instances where a proposed facility will satisfy a shortfall. If there is no shortfall, there can be no capacity need. It is ultimately irrelevant that a proposed facility will provide a capacity need for only some of its lifespan, because NHDES is required to evaluate the entire lifespan of a proposed facility when measuring capacity need. If there is no capacity need to be satisfied, then NHDES cannot determine that a proposed facility will provide a substantial public benefit under RSA § 149-M:11, III.

The record reflects that the NCES Facility would operate for a period without capacity need, and capacity need is a requisite element for finding substantial public benefit under the (a) criteria. Accordingly, NHDES acted unlawfully when it determined that the NCES Facility

would provide a substantial public benefit based on the capacity need of the state and the NCES Facility's ability to accommodate waste generated within New Hampshire. Accordingly, CLF's appeal is granted regarding this matter.

D. NHDES acted reasonably in determining there existed sufficient capacity need under RSA § 149-M:11, III(a) justifying operation of the NCES Facility for its proposed six year operating period.

Whether NHDES acted reasonably in determining there existed sufficient capacity need during the lifespan of the NCES Facility justifying a finding of substantial public benefit pursuant to RSA § 149-M:11, III is a question of fact. The Council determined via a unanimous vote that NHDES did act reasonably in determining there was sufficient capacity need for the NCES Facility because the facility was projected to provide for a capacity need for part of its lifespan. The Council received evidence and testimony regarding NHDES's review of the NCES Facility and its basis for a finding of substantial public benefit.

The Council determined that NHDES acted reasonably in granting the Permit even though, by NHDES's own acknowledgment, the NCES Facility would operate during both a period of capacity excess and a period of capacity need. *See* Appellant Exhibit 8, p. 275. The Council found that NHDES acted reasonably because NHDES acted in accordance with its interpretation of RSA § 149-M:11. NHDES explicitly affirmed its understanding of the statute to be that a capacity shortfall must exist during 'the planning period for the proposed type of facility (i.e., landfill)." *Id*. The record reflects that the NCES Facility was indeed projected to operate during a period of shortfall in the state's capacity. *See Id.* at 274. The Council found this determination by NHDES to be consistent with its review of NCES's prior application earlier in 2020, wherein NHDES stated NCES's earlier proposed facility would not satisfy the requirement of RSA § 149-M:11, III(a) because the proposed facility was not projected to operate during a period of shortfall in the state's capacity. *See* Appellant Exhibit 5, pp. 190-93 ("[t]he proposed facility cannot satisfy a need for disposal capacity when that need does not exist during the time the proposed facility would be accepting solid waste for landfilling"). As NHDES interpreted RSA § 149-M:11, III(a) to only require capacity need exist during at least part of a proposed

facility's lifespan, and NHDES applied this standard to the NCES Facility and found that the Facility would provide for a capacity need if operated through December 31, 2026, the Council determined that NHDES did not act unreasonably.

Moreover, the Council found NHDES's interpretation of the (a) criteria reasonable because of other outside factors which the Council determined made the continued operation of the NCES Facility preferable. The Council noted that NHDES's calculation of capacity need is a projection, the accuracy of which is not guaranteed, and there is always the possibility of other waste facilities unexpectedly failing to satisfy the state's capacity need. By issuing the Permit for the NCES Facility, NHDES was both providing for a capacity need while ensuring the state would have the necessary capacity immediately upon an unexpected shortfall. Accordingly, this portion of CLF's appeal is denied.

E. NHDES acted lawfully in using the language contained in Condition 27 of the Permit.

RSA § 149-M:11, III(b) provides NHDES shall determine whether a proposed facility provides a substantial public benefit based on: "[t]he ability of the proposed facility to assist the state in achieving the implementation of the hierarchy and goals under RSA 149-M:2 [the State's Waste Reduction Goal] and RSA 149-M:3 [the State's Waste Management Hierarchy]." NHDES relied on Condition 27 of the Permit to support its determination that the Permit met the standards for a substantial public benefit under RSA § 149-M:11, III(b). *See* Appellant Exhibit 7, p. 228. CLF contends Condition 27 is vague and ambiguous to such a degree that NHDES acted unlawfully in relying on Condition 27 to meet the standard for a substantial public benefit under RSA § 149-M:11, III(b). Whether NHDES acted lawfully in determining the language contained in Condition 27 of the Permit sufficiently assists the state in achieving the implementation of the State's Waste Reduction Goal and Waste Management Hierarchy is a question of law.

Language almost identical to that in Condition 27 was addressed in the Appeal of Conservation Law Foundation, Docket No. 18-10 WMC in 2019, which ultimately rose to the New Hampshire Supreme Court in *Appeal of Conservation L. Found.,* 174 N.H. 59 (2021). Though the language in Condition 27 and the condition in dispute in the prior matter are almost identical, there is no precedential value in the previous Council Appeal decision, and the New

Hampshire Supreme Court's review of the matter measured the capacity of the Council to come to its conclusions and did not provide a binding ruling on whether the language in Condition 27 met the standards for RSA § 149-M:11, III(b). Accordingly, the language of Condition 27 is reviewed independently of these previous decisions.

As evidenced by the existence of Condition 27, NHDES did determine the ability of the NCES Facility to assist the state in achieving the State's Waste Reduction Goals and Waste Management Policy. Though the language relied upon by NHDES may be vague and ambiguous, such deficiencies do not rise to unlawfulness in determining whether NHDES adhered to RSA § 149-M:11, III(b). NHDES was required to evaluate the ability of the NCES Facility to assist the state in achieving the state's waste reduction goals and hierarchy: Condition 27 identifies the mechanisms by which the NCES Facility will assist the state in achieving these waste goals and hierarchy. There is no legal requirement that NHDES use any specific language or require any specific action by a proposed facility to aid the state in achieving the waste goals and hierarchy. Accordingly, this portion of CLF's appeal is denied.

F. NHDES acted reasonably in using the language contained in Condition 27 of the Permit.

Whether NHDES acted reasonably in determining the language contained in Condition 27 of the Permit sufficiently assists the state in achieving the implementation of the State's Waste Reduction Goal and Waste Management Hierarchy is a question of fact. The Council determined in a vote of five-to-two that NHDES did act reasonably in relying on the language in Condition 27 to assist the state in achieving the implementation of the state's waste reduction goals and hierarchy. The Council received evidence and testimony regarding the language contained in Condition 27, its lack of certainty, and NHDES's purpose for Condition 27 and the specific language contained therein.

The Council determined that, while some of the language relied upon in Condition 27 is ambiguous, NHDES's witnesses testified to the effect of the present language and its ability to provide NHDES a data-gathering mechanism. Per NHDES's witnesses' testimony, the 'ambiguity' of the language is, in part, due to the lack of information which NHDES has from waste facilities regarding diversion; Condition 27 is intended to remedy this lack of information.

Once such information has been collected, the language for future permits may be appropriately adjusted or defined to ensure said permits achieve the results sought by NHDES. Until such information is acquired, however, NHDES and permittees rely on the 'ambiguous' language to ensure flexibility is available when needed. The Council determined NHDES did not act unreasonably in relying on Condition 27 to evaluate the ability of the NCES Facility to aid the state in achieving the state's waste reduction goals and hierarchy. Accordingly, this portion of CLF's appeal is denied.

G. NHDES acted lawfully in determining the NCES Facility will assist in achieving the State's solid waste management plan.

RSA § 149-M:11, III(c) provides NHDES shall determine whether a proposed facility provides a substantial public benefit based on the criteria: "[t]he ability of the proposed facility to assist in achieving the goals of the state solid waste management plan . . . ." CLF contends that NHDES acted unlawfully in determining the NCES Facility will assist in achieving the State's solid waste management plan because the state's solid waste management plan has not been updated since 2003, in violation of RSA § 149-M:29, I (2015). Whether NHDES acted lawfully in determining that the NCES Facility assists the state in in achieving the goals of the state's solid waste management plan is a question of law. The Council received testimony regarding the current status of the state's solid waste management plan and the failure of NHDES to update the plan.

CLF failed to meet its burden to prove that NHDES acted unlawfully by relying on the non-updated state solid waste management plan when evaluating whether the NCES Facility would assist the state in achieving the goals of the state solid waste management plan pursuant to RSA § 149-M:11, III(c). CLF's argument failed because there was a solid waste management plan in effect when NHDES was reviewing the Permit: there is nothing to indicate that the solid waste management plan passed in 2003 ceased to be effective upon the expiration of the six year period identified in RSA § 149-M:29. The record reflects that NHDES did in fact rely on the 2003 solid waste management plan when reviewing the Permit. *See* Appellant Exhibit 8, pp. 277-78. Though NHDES was required to update the waste management plan, there is no statutory provision which terminates a non-updated state solid waste management plan upon NHDES's

failure to abide by RSA § 149-M:29. Likewise, no evidence was entered in the record that the 2003 state solid waste management plan has been revoked or terminated in any fashion. As the 2003 state solid waste management plan is the controlling document which details the state's goals in regards to solid waste management, NHDES did not act unlawfully in relying on this plan when reviewing the Permit. Accordingly, this portion of CLF's appeal is denied.

H. NHDES acted reasonably in determining the NCES Facility will assist in achieving the state's solid waste management plan.

Whether NHDES acted reasonably in determining that the NCES Facility assists the state in achieving the goals of the state's solid waste management plan is a question of fact. The Council determined via a unanimous vote that NHDES did act reasonably in determining that the NCES Facility would assist the state in achieving the state's solid waste management goals even though the solid waste management plan has not been updated since 2003. The Council received testimony regarding the current status of the state's solid waste management plan, the failure of NHDES to update the plan, the potential deficiencies which can/may arise upon NHDES relying on a plan not updated since 2003, and NHDES's justifications for the failure to timely update the plan.

The Council determined that, while NHDES should update its state solid waste management plan, NHDES did not act unreasonably in relying on the 2003 plan when reviewing the Permit. Testimony from NHDES indicated that the failure of NHDES to update the 2003 plan was a matter of financing, manpower, and time: the Council heard that NHDES's failure to update the 2003 plan was not a matter of choice by NHDES, but was a matter of legislative budgeting. The Council further determined that NHDES has been issuing permits pursuant to the 2003 plan since its inception, and NHDES acted consistently when reviewing the Permit as evidenced in the record. *See* Appellant Exhibit 8, pp. 277-78. The Council ultimately decided that, to impose the requirement that RSA § 149-M:11, III(c) can only be satisfied if there is an updated state waste management plan would result in the state-detrimental result that no solid waste facilities can be approved by NHDES until a new solid waste management plan is approved. Such a result could be catastrophic to the management of solid waste within New Hampshire, far beyond any potential repercussions the state may suffer by NHDES relying on

the goals set forth in an out-of-date solid waste management plan. Accordingly, this portion of CLF's appeal is denied.

CONCLUSION

Consistent with the above Discussion, CLF's appeal is denied in part and granted in part.

Pursuant to RSA § 21-O:14, the Council **AFFIRMS** NHDES's decisions regarding the Permit, as addressed in Discussion Sections A, B, D, E, F, G, and H, above. CLF's appeal claims, as they are addressed in these Sections, are denied.

The Council **REMANDS** the Permit to the NHDES Commissioner with respect to Discussion Section C. The Council has determined that NHDES acted unlawfully in finding the NCES Facility provided a substantial public benefit under RSA § 149-M:11, III when the NCES Facility was projected to operate during a period without capacity need.

For the Council, and by Order of the Hearing Officer,

/s/ Zachary Towle Date: 5/11/2022
Zachary N. Towle, Esq., NH Bar 270211
Hearing Officer, Waste Management Council

Pursuant to Env-WMC 205.16, any party whose rights are directly and adversely affected by this decision may file a motion for rehearing with the Council within 20 days of the date of the decision.

STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

DOCKET NO. 20-14 WMC

IN RE: CONSERVATION LAW FOUNDATION, INC. APPEAL

ORDER ON STATE OF NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES' MOTION FOR RECONSIDERATION

ORDER: MOTION DENIED

BACKGROUND

On October 9, 2020 the New Hampshire Department of Environmental Services ("NHDES") issued a Type 1-A Permit Modification and Waiver for Expansion, Permit No. DES-SW-03-002 (the "Permit") to North Country Environmental Services, Inc. ("NCES") authorizing NCES's Stage VI landfill expansion of its solid waste facility in Bethlehem, NH (the "NCES Facility"). On November 9, 2020, the Conservation Law Foundation ("CLF") filed a Notice of Appeal with the Waste Management Council (the "Council") seeking to have the Permit deemed unlawful and unreasonable. On February 18 and 22, 2022, a quorum of the Council along with a Hearing Officer assembled for a Hearing on this matter. The Council heard testimony and received evidence from the Parties. Deliberations occurred on February 22, 2022.

On May 11, 2022 the Council issued its Final Order on Appeal (the "Final Order"), wherein the Council denied seven out of eight of CLF's appeal claims. The Council remanded a single item to NHDES, with the Council having determined that NHDES acted unlawfully in determining there existed sufficient capacity need under RSA § 149-M:11, III(a) justifying operation of the NCES Facility for its proposed six-year operating period. See Final Order, Discussion Section C, pp. 6-15. On May 31, 2022 NHDES filed a Motion for Reconsideration regarding the Council's decision to remand; on June 24, 2022 CLF filed an objection.

RELEVANT LAW AND RULES

RSA § 21-O:9, V requires the Council to hear all administrative appeals from NHDES decisions relating to the functions and responsibilities of the division of waste management, in accordance with RSA § 21-O:14. Pursuant to Env-WMC 205.14, the appellant bore the burden

of proving, by a preponderance of the evidence, that NHDES's decision to issue the Permit was unlawful or unreasonable. "Unlawful" is defined as "contrary to case law, statute, or rules." Env-WMC 205.14. The Council decides all disputed issues of fact (see RSA § 21-O:9, V), while the Hearing Officer decides upon questions of law (see RSA § 21-M:3, IX(e)).

A motion for reconsideration is permitted under Env-WMC 205.16 and RSA § 541:3.[1] A motion for reconsideration "allows a party to present points of law or fact that the [Council] has overlooked or misapprehended." Smith v. Shepard, 144 N.H. 262, 264 (1999), quoting Barrows v. Boles, 141 N.H. 382, 397 (1996). A motion for reconsideration which merely reiterates arguments previously raised should be denied. See Barrows, 141 N.H. at 397; Appeal of Northridge Env't, LLC, 168 N.H. 657, 665 (2016). The Council may grant a motion for reconsideration if "in its opinion good reason for the rehearing is stated in the motion." RSA § 541:3. The moving party bears the burden of persuasion. See Env-WMC 204.15(d).

Parties are authorized to raise issues for the first time in a motion for reconsideration, so long as the failure to raise the issue earlier did not deprive the Council of a full opportunity to correct its error. See Mortg. Specialists, Inc. v. Davey, 153 N.H. 764, 786 (2006); State v. Hilliard, No. 2020-0063, 2021 WL 5029405, at *3 (N.H. Oct. 29, 2021). It is at the Council's discretion whether to refuse to entertain issues first raised in a motion for reconsideration due to a party's failure to raise said issue at an earlier time. See Smith v. Shepard, 144 N.H. 262, 265 (1999); Mortg. Specialists, Inc. v. Davey, 153 N.H. at 786.

DISCUSSION

In its Motion for Reconsideration NHDES requested the Council a) reconsider its Final Order as it relates to the Council's interpretation of RSA § 149-M:11, III and V (see NHDES's Motion for Reconsideration, p. 5); and b) if the Final Order is remanded, schedule a hearing for NHDES to provide facts in support of NHDES's interpretation of RSA § 149-M:11, III and V as articulated in its Motion for Reconsideration (see Id. at 7). The crux of NHDES's Motion for Reconsideration was a request by NHDES to bolster its arguments as presented at the Appeal Hearing to sufficiently establish that NHDES acted lawfully in determining the NCES Facility

[1] For the purposes of this Order, and pursuant to Env-WMC 205.16(a), no distinction is drawn between the terms 'reconsideration' and 'rehearing.'

provided sufficient capacity need. See Id. at 6 ("if the Hearing Office feels that NHDES did not do enough to justify a result using the standards it articulated at the [Appeal Hearing], NHDES respectfully requests that the decision be remanded to allow it to do so").

NHDES argued the Council misapprehended RSA § 149-M:11, III because the Council determined that RSA § 149-M:11, III requires the existence of a capacity need/shortfall during the entire lifespan of a proposed facility for said facility to provide a substantial public benefit as defined in the statute. NHDES contended this reading of RSA § 149-M:11, III is incorrect because it is possible for a facility to 'satisfy' a capacity need/shortfall even though said facility operates during a period before said capacity need/shortfall exists. See NHDES's Motion for Reconsideration, p. 2.

The heart of NHDES's argument in its Motion for Reconsideration was that RSA § 149-M:11, III and V do not include 'timing' language which defines when capacity need/shortfall must exist in relation to a proposed facility's lifespan. See NHDES's Motion for Reconsideration, p. 3 ("[t]he real disconnect appears to relate solely to timing . . . .") NHDES argued the word 'satisfies' in the statute does not require a direct and present relationship between a proposed facility and a capacity need/shortfall. See Id. at 3-4. Instead, NHDES contended that a proposed facility may 'satisfy' a future capacity need/shortfall, even though said facility operates during a period without any capacity need/shortfall. See Id. at 3-4. NHDES proposed the statute contemplates such an interpretation because the statute also requires NHDES to contemplate 'short- and long-term need' for a facility and the twenty-year planning period. See Id. at 4. Through this interpretation of the statute, NHDES concluded it bears the discretion to determine whether a proposed facility 'satisfies' any capacity need/shortfall, and therefore the Council was mistaken in interpreting the statute to mean RSA § 149-M:11, III(a) mandates that a proposed facility operate during a period of capacity need/shortfall.

As a preliminary matter, it must be noted that NHDES's interpretation of RSA § 149-M:11, III as articulated in its Motion for Reconsideration was distinct from NHDES's interpretation of the statute as articulated in its Pre-Hearing Memorandum and as argued at the Appeal Hearing. Prior to its Motion for Reconsideration, NHDES argued for an interpretation of RSA § 149-M:11 such that NHDES is required to measure the 'totality of the circumstances'

when determining whether a proposed facility provides a substantial public benefit. See NHDES's Limited Pre-Hearing Memorandum, pp. 3-6. NHDES asserted that the "crux of the analysis" regarding RSA § 149-M:11 is "whether [a] proposed facility has a meaningful effect, short- and long-term, on the capacity need—the shortfall in capacity." Id. at 4. NHDES argued "the exclusive overlap, minimal overlap, or lack of any overlap between the proposed operating life of a facility and a period of shortfall in capacity is not solely determinative of a RSA 149-M:11, III(a) capacity need finding." Id. NHDES's ultimate conclusion was that RSA § 149-M:11, III(a) includes multiple factors which must be considered, and "the legislature required [NHDES to] undertake the analysis and determine whether there exists a short- and long-term nexus between the proposed facility (of the type, size, and location) and the shortfall within the 20 year planning period," and NHDES asserted that it did just such an analysis in the present matter. Id. at 6.

At the Appeal Hearing, the Council found that NHDES's granting of the Permit was reasonable because NHDES argued for an interpretation of RSA § 149-M:11, III whereby the existence of any capacity need/shortfall during the lifespan of a facility justified NHDES finding capacity need for the entire lifespan and NHDES applied this interpretation when granting the Permit. See Final Order, Discussion Section D, pp. 15-16. The Council's decision relied on the undisputed language in NHDES's October 2020 Application Review Summary for the NCES Facility, wherein NHDES acknowledged: "NHDES has determined that a capacity shortfall exists during the planning period for the proposed type of facility (i.e. landfill), which is satisfied by the proposed facility for one year . . . . Thus, the proposed facility satisfies a need for disposal capacity within the planning period." Appellant Exhibit 8, p. 275. The Council found this interpretation of the statute by NHDES to be consistent with the undisputed language used by NHDES in its comments on the first NHCES Facility application. See Final Order, p. 15; Appellant Exhibit 5, pp. 190-93 ("[t]he proposed facility cannot satisfy a need for disposal capacity when that need does not exist during the time the proposed facility would be accepting solid waste for landfilling").

It is readily apparent that NHDES has raised a new argument in its Motion for Reconsideration- NHDES has argued an interpretation of RSA § 149-M:11, III which it did not raise during the appeal process. It can be argued, however, that the Motion for Reconsideration

interpretation is not contrary to NHDES's previously articulated interpretation of the statute. NHDES's previous arguments regarding interpretation of RSA § 149-M:11, III were general in nature and emphasized NHDES's discretion when evaluating a permit and the multitude of factors which NHDES must consider. NHDES provided "[t]he determination of whether a capacity need is *satisfied* . . . [a term that is] not defined . . . is subject to [NHDES's] discretion and expertise to decide within the confines of the statute." NHDES Pre-Hearing Memorandum, p. 4. Though this interpretation of the statute did not explicitly state NHDES's interpretation of the statute as detailed in its Motion for Reconsideration, the foundation was present: there is no reason to conclude that NHDES's Motion for Reconsideration interpretation was not contained within NHDES's previous arguments. Why NHDES did not explicitly raise this specific component of its interpretation of the statute earlier is unclear: NHDES absolutely had an opportunity to raise this interpretation of the statute at an earlier time. The Council's interpretation of RSA § 149-M:11, III as recorded in the Final Order was an interpretation which was argued by CLF from the beginning of the appeal, therefore NHDES was not ignorant of this potential interpretation. Moreover, NHDES responded to CLF's interpretation of the statute: NHDES articulated and argued the interpretation of RSA § 149-M:11, III contained in NHDES's Pre-Hearing Memorandum to counter CLF's and NCES's interpretations of the statute, but made no mention to an interpretation of the statute by which a facility operating during a period of excess capacity may 'satisfy' a capacity need/shortfall outside the lifespan of the facility. Ultimately it cannot be concluded that NHDES was merely reiterating an earlier issue, for NHDES did not raise its present interpretation of RSA § 149-M:11, III until its Motion for Reconsideration. The Council elects to address NHDES's interpretation of the statute even though such an interpretation could have been raised earlier: NHDES raised a genuine question of statutory interpretation and resolving this matter is relevant to the overall appeal. Accordingly, the Council will determine whether it misapprehended RSA § 149-M:11, III and V as argued by NHDES in its Motion for Reconsideration.

The appeal claim which resulted in NHDES's Motion for Reconsideration asserted that NHDES acted unlawfully in determining there existed sufficient capacity need under RSA § 149-M:11, III(a) justifying operation of the NCES Facility for its proposed six-year operating period: a period in which the NCES Facility would operate for five years with capacity excess

followed by one year of capacity need/shortfall. The question posed to the Council was whether NHDES acted unlawfully at the time the Permit was issued i.e. did NHDES fail to adhere to an accurate interpretation of RSA § 149-M:11, III when issuing the Permit. In the Final Order the Council determined that NHDES was relying on an inaccurate interpretation of the statute, thereby making NHDES's actions in compliance with the inaccurate interpretation unlawful.

As the only point of reconsideration posited by NHDES in its Motion for Reconsideration regards whether RSA § 149-M:11, III allows NHDES to find a facility operating during a period of excess capacity satisfies a future capacity need/shortfall, it is inferred that NHDES intends this interpretation to have some bearing on the question of whether NHDES lawfully determined the NCES Facility satisfied a capacity need. To succeed in convincing the Council to reverse its decision in the Final Order, NHDES will need to argue that its Motion for Reconsideration interpretation of RSA § 149-M:11, III is accurate; NHDES applied this interpretation when issuing the Permit; and NHDES effectively followed this interpretation when issuing the Permit. NHDES was aware of these requirements, for the Motion for Reconsideration articulated NHDES's present interpretation of RSA § 149-M:11, III and offered to present further evidence that NHDES applied and adhered to this interpretation when issuing the Permit.

1. NHDES's Interpretation of RSA § 149-M:11, III

The meaning of 'satisfies' is a question of statutory interpretation, which the Council undertook in the Final Order. See Final Order, pp. 10-11. Undefined statutory language is given its plain and ordinary meaning, and the intent of the legislature is considered through examination of a statute as a whole. See Cross v. Brown, 148 N.H. 485, 486 (2002). A statutory provision must be construed in a manner "consistent with the spirit and objectives of the legislation as a whole." Stablex Corp. v. Town of Hooksett, 122 N.H. 1091, 1102 (1982). As addressed in the Final Order, RSA § 149-M:11, V(d) uses the word "satisfies," creating the requirement that a proposed facility 'satisfy' a capacity need/shortfall: the statute creates a direct link between granting a proposed facility and said facility's ability to 'satisfy' a capacity need/shortfall. The legislature chose the word 'satisfy'- not affect, influence, support, continue, enhance, alleviate, 'free up,' or impact. 'Satisfy' has a plain and ordinary meaning: "to

sufficiently provide something that is needed." See Final Order, p. 9, quotation omitted. For ease of discussion, the Council found the word 'resolve' to be a sufficient synonym with 'satisfy.'

NHDES argued that RSA § 149-M:11, V(d) may be read such that a facility with excess capacity may 'satisfy' a future capacity need/shortfall, and therefore there is no requirement that a proposed facility must exist during a period of capacity need/shortfall (as concluded by the Council). A separation of wheat from chaff must occur here, for NHDES repeatedly stretched its statutory interpretation argument to include language outside the scope of the word 'satisfies.' See NHDES's Motion for Reconsideration, p. 2 ("NHDES believes that it can make a finding of substantial public benefit if the capacity provided by the facility *alleviates* a capacity shortfall even if the shortfall occurs after the facility's capacity is brought on-line); Id. ("even if a permitted facility's capacity is used before next week, this use could have *freed up* capacity at another, existing landfill"); Id. ("there is nothing novel about looking to the *impact* on future capacity needs"); Id. at p. 3 ("even if NHDES definitely shows that the proposed facility will have a *positive effect* on a future need, i.e. that its capacity will resolve a future capacity shortfall"), emphasis added. While NHDES appears to confirm the applicability of the word 'satisfies' and the definition relied upon by the Council (see Id. at 1), NHDES repeatedly relied upon other words when discussing the effect a proposed facility must have on a capacity need/shortfall- other words which are inherently less restrictive than the word 'satisfies.' This replacement of the word 'satisfies' with other terms appears to be an extension of NHDES's full interpretation of RSA § 149-M:11, III as articulated in NHDES's Pre-Hearing Memorandum and at the Appeal Hearing.

Prior to its Motion for Reconsideration, NHDES's conclusions regarding RSA § 149-M:11, III heavily relied on the concept that there are multiple factors which NHDES must review when determining whether a proposed facility provides a substantial benefit. This conclusion is absolutely correct. In both its previous arguments and its present argument, however, NHDES was inappropriately mixing all the factors to be considered in RSA § 149-M:11, III: instead of viewing the requirements as independent components, NHDES was amalgamating them. The dispute over the 'satisfies' language is a prime example of this amalgamation process.

NHDES is absolutely correct that it is required to review the impact a proposed facility will have on future capacity need/shortfall. RSA § 149-M:11, III(a) explicitly requires NHDES to determine "[t]he short- and long-term need for a [proposed facility] of the type, size, and location to provide capacity to accommodate solid waste generated within the borders of New Hampshire . . . ." RSA § 149-M:11, III(a). Such a requirement supports NHDES's argument that it must determine whether a proposed facility impacts, alleviates, or 'frees up' future capacity. Such factors are relevant, as it is possible that such factors may also undermine substantial public benefit which would impact NHDES's determination to issue a permit. See NHDES's Limited Pre-Hearing Memorandum, p. 5.

This requirement, however, is separate from the 'satisfies' requirement in RSA § 149-M:11, V(d). The 'satisfies' requirement is limited to determining whether a capacity need exists, for a capacity need will only be found to the extent a proposed facility 'satisfies' said capacity need. In the context of this requirement, it is irrelevant what other impacts a facility may have on the State's waste management (as discussed above, those factors are considered elsewhere)- the only inquiry is whether a facility satisfies a capacity need.

NHDES is correct that there are no explicit time restrictions in RSA § 149-M:11, III and V limiting a finding that a facility 'satisfies' a capacity need/shortfall to only the period when a facility operates. This observation resulted in NHDES concluding that RSA § 149-M:11, III may not prohibit a finding that a facility operating during a period of excess capacity may 'satisfy' a future capacity need/shortfall. This premise was reliant on an inference regarding what it means to 'satisfy' a capacity need/shortfall. NHDES consistently expanded the word 'satisfies' to include many other considerations, but, as discussed above, 'satisfies' was the word chosen by the legislature. The extent of what the term 'satisfies' encompasses in the statute is ultimately the question posed by NHDES, which is a question of statutory interpretation.

It is undisputed that a facility 'satisfies' a capacity need/shortfall when said facility operates during a period of capacity need/shortfall. There is no requirement that a facility 'fully satisfy' a capacity need/shortfall: so long as some capacity need/shortfall is satisfied, the statutory requirement is met. Likewise, a finding of capacity need is limited to the extent by which a facility satisfies a capacity need/shortfall: a facility will not be found to satisfy a

capacity need/shortfall in excess of the capacity need/shortfall which is actually satisfied by the facility. See RSA § 149-M:11, V(d); see also Final Order, pp. 9-11 (discussing effect of 'extent language' in statute). Ultimately a measurement of whether a facility 'satisfies' a capacity need/shortfall is a measurement of the capacity said facility provides: to 'satisfy' is to provide capacity.

In the context of RSA § 149-M:11, III, 'capacity' is the space a facility will provide to accommodate New Hampshire-generated waste. When NHDES issues a permit authorizing a facility to operate, it grants said facility X amount of time to fill its 'capacity.' On or before the expiration of X time the facility will need to re-apply for a permit: if no permit is issued, then the facility no longer provides 'capacity' because New Hampshire-generated waste will no longer be directed to said facility (legally, at least). The 'capacity' provided by a facility is linked to the operation of the facility, for no waste can be accommodated by a facility if it is not operating.

It is undisputed that New Hampshire-generated waste is generated at a consistent rate: waste is generated every day and needs to go somewhere every day. See Appellant Exhibit 8, p. 269 (NHDES calculation of pounds of waste produced by person by day in the State). The State therefore has a consistent need for capacity to hold this waste, which is why NHDES issues permits to facilities to provide capacity over time.

These factors combine to create the requirement that a facility, as a matter of law, cannot 'satisfy' a capacity need/shortfall outside the operating lifespan of the facility. To 'satisfy' is to provide capacity, which is the ability to accommodate waste: if a facility is not operating it cannot accommodate waste and therefore cannot provide capacity. A point in the future—outside the lifespan of a facility—is inherently a period of time where a facility cannot accommodate waste: by the very nature of the situation, the facility will not be operating at that time (as this period is outside the then-identified lifespan of the facility). As New Hampshire-generated waste is generated at a consistent rate, the waste generated in the future cannot be accommodated by a present facility because said facility is not providing capacity at that future time and the generated waste will not come into being until that future time.

The language used in RSA § 149-M:11, III requires this interpretation of the word 'satisfies,' thereby limiting NHDES to only find a facility 'satisfies' a capacity need/shortfall during the operating lifespan of the facility. To find otherwise results in outrageous repercussions. If a facility operating during a period of excess capacity is deemed to 'satisfy' a future capacity need/shortfall, how does said facility provide capacity for waste not yet generated? The 'capacity' provided under the theory posed in this question is inherently unfillable by New Hampshire-generated waste because the waste intended to fill the capacity cannot exist until some future point. In its Motion for Reconsideration NHDES appears to address this impossibility by arguing that the facility may 'alleviate,' 'free up,' or 'effect' the future, thereby warranting a finding of capacity need for the facility in the present: NHDES's argument is unpersuasive, however, because NHDES articulated the wrong standard. The question was whether a present facility 'satisfies' a future capacity need/shortfall, and to 'satisfy' is to provide capacity. So long as the future capacity need/shortfall is outside the lifespan of the facility, it cannot be concluded the facility will provide capacity for any waste generated in the future because future waste will be generated in the future independently of any capacity existing in the past or present.

The present situation of the NCES Facility is distinct from the examples discussed above because there is a period of capacity need/shortfall in the last year of the facility's lifespan. This situation, however, makes no difference in the application of the word 'satisfies'- it is undisputed that a facility operating during a period of capacity need/shortfall may satisfy said capacity need. The last year of the NCES Facility is therefore not connected with the preceding five-years: the last year includes a capacity need and a satisfaction of said capacity need. The preceding five-years, however, undisputedly operate during a period of excess capacity: the reason for why the NCES Facility during this period does not satisfy any capacity need/shortfall is the same as detailed above. The argument that any of these years may satisfy the capacity need/shortfall in year six is also uncompelling: as discussed above, a present capacity cannot accommodate future waste, and year six has its own capacity need/shortfall and is therefore not reliant on an earlier period to provide the necessary capacity need/shortfall.

NHDES raised the argument that interpreting RSA § 149-M:11, III to limit a finding of capacity need to facilities which satisfy capacity need/shortfall during their operating lifespan

results in parts of the statute becoming nugatory. This argument is also unpersuasive. NHDES first argued that the RSA § 149-M:11, III(a) requirement that NHDES evaluate the 'short- and long-term need' for a facility would be unnecessary if a finding of capacity need can only occur when a facility operates during a capacity need/shortfall. This argument fails because the 'short- and long-term need' requirement is independent of the capacity need determination: these two requirements are connected, but independent requirements which NHDES must meet. NHDES must both determine whether a facility satisfies a capacity need AND determine the 'short- and long-term need' for a given facility.

NHDES further argued the twenty-year planning period which NHDES must evaluate under RSA § 149-M:11, V(a) becomes irrelevant if NHDES is limited to finding capacity need to only situations where a facility's lifespan overlaps with a capacity need/shortfall. This argument is also unpersuasive because the twenty-year planning period establishes a set amount of time for NHDES to identify shortfalls- the requirement that NHDES can only find capacity need when a facility operates during a shortfall does not make this twenty-year review period nugatory. The twenty-year review period is intended to provide NHDES a set amount of time to review when evaluating whether shortfalls exist: such a set up in fact provides NHDES a view of upcoming shortfalls perhaps just outside of a proposed facility's operating lifespan, thereby allowing NHDES to grant or deny permits accordingly. Likewise, by reviewing a full twenty-year period, NHDES is able to grant permits for the periods when shortfalls exist, even if they are disconnected and outside the proposed time offered by a permit seeker. If NHDES's interpretation of the statute was adopted, then questions arise as to why the legislature limited NHDES's review to twenty-years: based on NHDES's argument, there is nothing to indicate that a facility could not satisfy a capacity need/shortfall twenty-one years or more in the future. The language of the statute does not support NHDES's argued interpretation, nor does the language become irrelevant under the Council's interpretation.

For the above identified reasons, NHDES's interpretation of RSA § 149-M:11, III as articulated in its Motion for Reconsideration fails as a matter of law. NHDES's application of the 'satisfies' language to future capacity need/shortfalls is untenable and in conflict with the plain language of the statute. NHDES's argument as articulated in its Motion for Reconsideration fails as a matter of law, just as NHDES's previous argument failed as a matter of law. NHDES's

interpretation of RSA § 149-M:11, III is flawed and NHDES has failed to evidence that the Council misapprehended RSA § 149-M:11, III in the Final Order. Accordingly, NHDES's Motion for Reconsideration fails.

2. NHDES's Application of RSA § 149-M:11, III to the Permit and Adherence to RSA § 149-M:11, III when Issuing the Permit

As NHDES's argument regarding its proposed interpretation of RSA § 149-M:11, III is uncompelling, there is no reason to grant NHDES's further requests to introduce additional evidence. The Council has determined that NHDES's interpretation of RSA § 149-M:11, III as articulated in its Motion for Reconsideration is inaccurate, so allowing NHDES to introduce evidence that NHDES's applied and adhered to this interpretation is ultimately irrelevant: even if NHDES can prove that it perfectly applied and adhered to its interpretation of the statute when issuing the Permit, it was still relying on a flawed reading of the statute and therefore acted unlawfully. Accordingly, there is no reason for NHDES to present further evidence in support of its argument as requested in it Motion for Reconsideration.

CONCLUSION

As discussed above, the issues raised by NHDES in its Motion for Reconsideration relate to a question of law regarding the interpretation of RSA § 149-M:11, III and V. NHDES is mistaken in concluding that the Hearing Officer made a factual determination regarding whether it is *possible* for a proposed facility to satisfy capacity need during a period when it is not operating. See NHDES's Motion for Reconsideration, p. 4. The question raised in this Appeal and addressed by the Hearing Officer in the Final Order was not whether it is factually possible for a proposed facility to satisfy a future capacity need/shortfall, but whether the statute's language can be interpreted such that NHDES is empowered to determine that a proposed facility may be found to satisfy a future capacity need/shortfall. The Hearing Officer interpreted the statutory language and determined the word 'satisfies' must be strictly interpreted, which as a matter of law precludes a finding that a proposed facility can satisfy a capacity need/shortfall outside the lifespan of the facility.

NHDES's interpretation of RSA § 149-M:11, III, as articulated in its Motion for Reconsideration, failed to adhere to the language of the statute, and therefore failed to indicate

the Council misapprehended the statute in its Final Order. For the above detailed reasons, NHDES's Motion for Reconsideration is **DENIED**.

For the Council, and by Order of the Hearing Officer,

/*s/ Zachary Towle* Date: 11/3/2022
Zachary N. Towle, Esq., NH Bar 270211
Hearing Officer, Waste Management Council

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. 20-14 WMC

IN RE: CONSERVATION LAW FOUNDATION, INC. APPEAL

ORDER ON NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.'S MOTION FOR RECONSIDERATION

ORDER: MOTION DENIED

BACKGROUND

On October 9, 2020 the New Hampshire Department of Environmental Services ("NHDES") issued a Type 1-A Permit Modification and Waiver for Expansion, Permit No. DES-SW-03-002 (the "Permit") to North Country Environmental Services, Inc. ("NCES") authorizing NCES's Stage VI landfill expansion of its solid waste facility in Bethlehem, NH (the "NCES Facility"). On November 9, 2020, the Conservation Law Foundation ("CLF") filed a Notice of Appeal with the Waste Management Council (the "Council") seeking to have the Permit deemed unlawful and unreasonable. On February 18 and 22, 2022, a quorum of the Council along with a Hearing Officer assembled for a Hearing on this matter. The Council heard testimony and received evidence from the Parties. Deliberations occurred on February 22, 2022.

On May 11, 2022 the Council issued its Final Order on Appeal (the "Final Order"), wherein the Council denied seven out of eight of CLF's appeal claims. The Council remanded a single item to NHDES, with the Council having determined that NHDES acted unlawfully in determining there existed sufficient capacity need under RSA § 149-M:11, III(a) justifying operation of the NCES Facility for its proposed six-year operating period. See Final Order, Discussion Section C, pp. 6-15. On June 10, 2022 NCES filed a Motion for Rehearing regarding the Council's decision to remand. On June 24, 2022 NHDES filed a limited objection to NCES's Motion for Rehearing and CLF filed an objection to NCES's Motion for Rehearing. On July 6, 2022 NCES filed replies to both NHDES's and CLF's objections, and on July 18, 2022 CLF filed a surreply to NCES's reply.

On September 21, 2022 NCES filed a Motion to Stay, wherein NCES revealed that it (as well as Granite State Landfill, LLC) had filed a Petition for Declaratory Judgment with the Merrimack County Superior Court seeking the Court's interpretation regarding RSA § 149-M:11, III.

RELEVANT LAW AND RULES

RSA § 21-O:9, V requires the Council to hear all administrative appeals from NHDES decisions relating to the functions and responsibilities of the division of waste management, in accordance with RSA § 21-O:14. Pursuant to Env-WMC 205.14, the appellant bore the burden of proving, by a preponderance of the evidence, that NHDES's decision to issue the Permit was unlawful or unreasonable. "Unlawful" is defined as "contrary to case law, statute, or rules." Env-WMC 205.14. The Council decides all disputed issues of fact (see RSA § 21-O:9, V), while the Hearing Officer decides upon questions of law (see RSA § 21-M:3, IX(e)).

A motion for reconsideration is permitted under Env-WMC 205.16 and RSA § 541:3.[1] A motion for reconsideration "allows a party to present points of law or fact that the [Council] has overlooked or misapprehended." Smith v. Shepard, 144 N.H. 262, 264 (1999), quoting Barrows v. Boles, 141 N.H. 382, 397 (1996). A party aggrieved by a decision of the Council is allowed to raise arguments relating to "*any* matter determined in the action or proceeding" in a motion for reconsideration, so long as the motion is filed within thirty days of any order or decision made by the Council. RSA § 541:3, emphasis added; see Appeal of N. New England Tel. Operations, LLC, 165 N.H. 267, 271–72 (2013). A motion for reconsideration which merely reiterates arguments previously raised should be denied. See Barrows, 141 N.H. at 397; Appeal of Northridge Env't, LLC, 168 N.H. 657, 665 (2016). The Council may grant a motion for reconsideration if "in its opinion good reason for the rehearing is stated in the motion." RSA § 541:3. The moving party bears the burden of persuasion. See Env-WMC 204.15(d).

Parties are authorized to raise issues for the first time in a motion for reconsideration, so long as the failure to raise the issue earlier did not deprive the Council of a full opportunity to correct its error. See Mortg. Specialists, Inc. v. Davey, 153 N.H. 764, 786 (2006); State v.

[1] For the purposes of this Order, and pursuant to Env-WMC 205.16(a), no distinction is drawn between the terms 'reconsideration' and 'rehearing.'

Hilliard, No. 2020-0063, 2021 WL 5029405, at *3 (N.H. Oct. 29, 2021). It is at the Council's discretion whether to refuse to entertain issues first raised in a motion for reconsideration due to a party's failure to raise said issue at an earlier time. See Smith v. Shepard, 144 N.H. 262, 265 (1999); Mortg. Specialists, Inc., 153 N.H. at 786.

DISCUSSION

NCES raised four items for reconsideration in its Motion for Rehearing:

ITEM 1: The Council's Interpretation of RSA § 149-M:11, III

As a preliminary matter: NCES's Motion to Stay clarified and informed part of the basis for Item 1 in NCES's Motion for Rehearing, specifically regarding NCES's disagreement with the Hearing Officer's interpretation of RSA § 149-M:11, III regarding capacity need (identified in the Motion to Stay as the 'pure function of time approach'). In its Motion to Stay NCES acknowledged that NHDES did not exercise the 'aggregate capacity need approach' when issuing the Permit. See Motion to Stay, p. 8 ("the aggregate capacity need approach was not at issue because that was not the approach NHDES used in granting the Stage VI permit"); p. 3 ("[NHDES] used [the partial function of time approach] in its consideration of NCES's Stage VI permit applications . . ."). NCES argued that NHDES should have applied the 'aggregate capacity need method' when issuing the Permit. See Motion to Stay, p. 6 ("NCES does not have a full and fair opportunity before the council to litigate its theory that capacity need is to be determined under the aggregate capacity need method"). Accordingly, it appears NCES has concluded that NHDES acted unlawfully regarding the Permit because—per NCES—NHDES was legally obligated to exercise the 'aggregate capacity need method' when issuing the Permit and failed to do so. NCES, CLF, and the Council are therefore in agreement that NHDES acted unlawfully in finding that the NCES Facility provided a substantial public benefit under RSA § 149-M:11, III, which warrants remand of the Permit to the NHDES commissioner pursuant to RSA § 21-O:14, I-a(b).

The issue raised in NCES's Motion for Rehearing regarding Item 1 is, therefore, not whether the Council should remand the Permit to the NHDES commissioner, but rather how did NHDES act unlawfully when issuing the Permit and how should NHDES interpret RSA § 149-

M:11, III when it re-evaluates the Permit pursuant to the Council's remand. Item 1 therefore contained a question of law regarding whether the Council misapprehended RSA § 149-M:11, III in the Final Order

After reviewing NCES's filings and arguments, the Council concludes it did not misapprehended RSA § 149-M:11, III as addressed in the Final Order, Subsection C.

NCES misconstrued the Council's discussion of the language in RSA § 149-M:11, III in the Final Order, Subsection C, as a conclusion that the statute is ambiguous. See NCES's Motion for Rehearing, p. 18 ("the hearing officer apparently found the statute to be ambiguous . . ."); NCES's July 6, 2022 Reply to CLF's Objection, p. 7 ("if the hearing officer is correct and the statute is ambiguous . . . ."). In the Final order, Subsection C, the Council did not find the capacity need language in the statute ambiguous and limited its statutory interpretation to the plain and ordinary meaning of the words used therein. See Final Order, pp. 8-13. NCES has not argued the relevant language in RSA § 149-M:11, III is ambiguous: to the contrary, NCES concluded RSA § 149-M:11, III is unambiguous. See NCES's Motion for Rehearing, p. 20 ("the statute was unambiguous in the first place").[2] Identifying and discussing the plain meaning of language which is in dispute does not indicate ambiguity. The Council determining that NHDES and NCES failed to accurately interpret the plain language of the statute does not indicate ambiguity.

As the statute was not found to be ambiguous or of 'doubtful meaning,' the Council was under no obligation to consider the administrative application of the statute when it interpreted the statute. See Hamby v. Adams, 117 N.H. 606, 609 (1977). "[A] lack of ambiguity in a statute or ordinance precludes application of the administrative gloss doctrine." Anderson v. Motorsports Holdings, LLC, 155 N.H. 491, 502 (2007). Moreover, an agency's interpretation of a statute will not hold precedential effect "if it clearly conflicts with the express statutory language . . . or if it is plainly incorrect." Appeal of Morrissey, 165 N.H. 87, 91 (2013). The

[2] NCES argued RSA § 149-M:11, III is unambiguous as evidenced by NHDES's allegedly consistent application of the statute. See NCES's Motion for Rehearing, p. 20 ("the statute was unambiguous in the first place. This is demonstrated by the decades of consistent application of this statute by NHDES"). Though the reason for why the Council and NCES have determined the statute to be unambiguous are different, NCES's argument in its Motion for Rehearing shows that NCES has not been arguing that the relevant language in RSA § 149-M:11, III is ambiguous.

Council reviewed RSA § 149-M:11, III; received NHDES's claimed interpretation of the statute at the time the Permit was issued; and determined that NHDES's interpretation conflicted with the statutory language and was plainly incorrect. NCES's claims regarding 'administrative gloss' and the Council's alleged-misapprehension of RSA § 149-M:11, III are based on the inaccurate premise that the statute is ambiguous: none of the Parties have argued the relevant language in the statute is ambiguous; the Council never found the statute ambiguous; and it does not find it ambiguous now.[3] As the statute was not deemed ambiguous, its meaning and purpose could be derived from a plain reading of the statutory language, which is exactly what the Council did in interpreting the RSA § 149-M:11, III capacity need language. The resulting evaluation indicated that NHDES's interpretation and application of the statute conflicted with the plain language of the statute, and therefore NHDES acted unlawfully in adhering to this inaccurate interpretation when issuing the Permit. The length of time NHDES may have mis-interpreted RSA § 149-M:11, III is irrelevant to how the statute must be read according to its plain language.

To the degree NCES further argued the Council's interpretation of the RSA § 149-M:11, III language is inaccurate (see NCES's Motion for Rehearing, pp. 23-24), NCES raised no new arguments as to how the language of the statute should be interpreted differently. See also Order on NHDES's Motion for Reconsideration, pp. 6-11 (detailing interpretation of RSA § 149-M:11, III language based on its plain meaning and the requisite inferences which must be drawn therefrom). Likewise, NCES's 'practicality' arguments are both uncompelling and irrelevant to the inquiry of whether the Council misapprehended RSA § 149-M:11, III in the Final Order. See NCES's Motion for Rehearing, pp. 24-25. NCES predicted a series of dire consequences from the Council's interpretation of RSA § 149-M:11, III, but prophesized repercussions do not change the language of the statute. See Id., at 24-27.

[3] While NCES argued in its Motion for Rehearing that administrative gloss should apply to any interpretation of RSA § 149-M:11, NCES did not argue that RSA § 149-M:11 is ambiguous. NCES asserted that *if* RSA § 149-M:11 is ambiguous, then administrative gloss must apply, but this statement is not an argument that the statute is ambiguous. As no Party has argued the relevant statutory language is ambiguous in the course of this Appeal and NCES did not argue as such in its Motion for Rehearing, it cannot be concluded the issue of whether RSA § 149-M:11 is ambiguous has been raised for the Council's determination. The Council impliedly determined the statutory language is unambiguous by evaluating the statutory language's plain meaning, but the issue of ambiguity has not been raised—whether for the first time or otherwise—in NCES's Motion for Rehearing.

NCES further raised the prospect that RSA § 149-M:11, III may allow a proposed facility to operate during both a period of capacity need/shortfall and a period without capacity need/shortfall, with NCES offering a hypothetical of "a facility proposing to offer capacity on both sides of [a] shortfall event . . . ." See Id., at 27. NCES proposed that such an arrangement would still meet the objectives of RSA § 149-M:11, III, even though the facility would be operating during periods without capacity need/shortfall. Id. This argument is uncompelling, and indicates NCES does not fully appreciate the interpretation of RSA § 149-M:11, III provided in the Final Order. It is the Council's opinion that a proposed facility must be projected to operate during a period of capacity need/shortfall for NHDES to approve said facility in compliance with the statute: the 'extent' language in RSA § 149-M:11, V requires as much. See Final Order, pp. 9-13. As RSA § 149-M:11, III and V require the existence of a capacity need/shortfall, it may be inferred that the lack of such capacity need/shortfall (even if proximate to a capacity need/shortfall) bars NHDES from approving a facility during said lack of capacity need/shortfall time period.

For the above identified reasons, NCES failed to establish that the Council misapprehended RSA § 149-M:11, III in its Motion for Rehearing. NCES's argument for reconsideration regarding Item 1 is **DENIED**.

ITEM 2: The Dormant Commerce Clause

Item 2 raised issues regarding a) whether NCES can now raise its dormant commerce clause arguments; and b) NCES's position in both its Motion for Rehearing and in the Appeal as a whole. NCES raised the dormant commerce question twice in its filings (see NCES's Motion to Dismiss, June 30, 2021, p. 10, n. 8; NCES's Prehearing Memorandum, p. 17). Both instances were passing mentions and emphasized that NHDES cannot prohibit the acceptance of waste from other states: in its Prehearing Memorandum, NCES raised the dormant commerce clause to counter an alleged argument made by CLF that the Permit should have been denied by NHDES because the NCES Facility would accept out-of-state waste. See NCES's Prehearing Memorandum, p. 17. NCES did not develop an argument regarding the dormant commerce clause at the Appeal Hearing.

In its Motion for Rehearing NCES argued that RSA § 149-M:11 is facially unconstitutional because of the dormant commerce clause (see NCES's Motion for Rehearing, p. 29) and the Hearing Officer's interpretation of RSA § 149-M:11, III in the Final Order, Subsection C, resulted in the statute still being unconstitutional. See Id., at 32. NCES further argued that NHDES has not been enforcing relevant portions of RSA § 149-M:11, which resulted in the impact of the statute being nominal enough that no party affected by the 'facially unconstitutional' provisions have challenged it. See Id., at 31. A plain reading of NCES's argument indicates NCES believes RSA § 149-M:11 is unconstitutional regardless of which interpretation of the statute is applied, but NCES would prefer one interpretation over the others because the impact is less severe on importers of out-of-state waste. See Id.

The Council is faced with an odd challenge: NCES, the intervenor-permittee which has been arguing that NHDES acted lawfully in issuing the Permit, is now arguing that the relevant statute through which NHDES issued the Permit is unconstitutional. Though NCES raised the dormant commerce clause in previous filings, such arguments were to counter CLF arguments, not to raise a claim that RSA § 149-M:11, III is facially unconstitutional. Though not articulated by the Parties, it appears that if NHDES acted in accordance with an unconstitutional statute, then the argument could be made that NHDES acted unlawfully; alternatively, if as proposed by NCES, NHDES was purposefully disregarding language in a statute, then NHDES may have also acted unlawfully.

CLF, the appellant, did not raise any arguments regarding the dormant commerce clause in its Notice of Appeal or any subsequent filings in this Appeal (except in response to NCES's arguments). If the roles were reversed in this matter and CLF filed a motion for reconsideration of the Final Order because the dormant commerce clause allegedly makes RSA § 149-M:11 unconstitutional, it is readily apparent that such an argument would be precluded. CLF would have been required to raise such an argument early in the appeal process and would have been expected to make such an argument well before the entry of the Final Order. Moreover, to the degree NCES's dormant commerce clause argument is an appeal claim (i.e. NHDES acted unlawfully by adhering to an unconstitutional statute when issuing the Permit), the time for NCES to have raised such an appeal claim is well past.

NCES all but confirmed that its goal in this appeal was to have NHDES's issuance of the Permit affirmed by the Council. See NCES's July 6, 2022 Reply to CLF's Objection, p. 5. Raising arguments that RSA § 149-M:11 is facially unconstitutional likely would not have supported a finding that NHDES acted lawfully and reasonably in issuing the Permit, hence it is understandable for such arguments to not be raised by NHDES and NCES during the appeal process. That being said: NCES had an opportunity to raise such arguments during the appeal and elected not to. NCES further had an opportunity to appeal the Permit itself if it felt that NHDES acted unlawfully when issuing it and elected not to. Moreover, NCES could have filed suit against NHDES independent of the present appeal to address the alleged unconstitutionality of RSA § 149-M:11 which, NCES argued, was injuring out-of-state waste importers to some degree. Instead, NCES elected to participate in this Appeal as an intervenor-permittee, arguing that NHDES acted lawfully and reasonably in issuing the Permit. NCES cannot now shift to be an appellant-permittee because NCES dislikes the Council's decision. NCES elected to pursue what it considered a beneficial outcome instead of seeking to address allegedly unlawful activity conducted by NHDES. For these reasons, the Council elects to not entertain NCES's dormant commerce clause argument.[4] NCES's argument for reconsideration regarding Item 2 is **DENIED**.

ITEM 3: The Hearing Officer Improperly Resolved Mixed Questions of Law and Fact

NCES argued the Hearing Officer improperly resolved the following issues:

a. *The Hearing Officer concluded that the question of whether NHDES acted unlawfully in determining there was sufficient capacity need was "purely a question of law." NCES's Motion for Rehearing, pp. 36-37.*

NCES argued the Hearing Officer, while empowered to determine the meaning and requirements of RSA § 149-M:11, III, exceeded his power by interpreting the statute and then in turn ruling that NHDES violated said statute. NCES contended the Council was empowered to deliberate with the Hearing Officer whether "NHDES's decision to grant the [Permit]

[4] Even if, *arguendo*, the Council were to consider NCES's dormant commerce clause argument, the results of the Final Order would remain unchanged. NCES's dormant commerce clause argument would have failed for the reasons identified in NHDES's June 24, 2022 Limited Objection to [NCES's] Motion for Rehearing, pp. 7-12.

comport[ed] with the legal requirements defined by the hearing officer" pursuant to RSA § 21-M:3, IX(d). Id.

NCES is mistaken in concluding that the question raised at this point in the Appeal was a mixed question of law and fact. The relevant appeal question was whether NHDES acted unlawfully by authorizing the NCES Facility to operate during periods without capacity need/shortfall. A mixed question of law and fact "concern[s] the application of a rule of law to the facts and the consequent determination whether the rule is satisfied." Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 282 (1992). The Council did not, however, need to decide any factual questions regarding what actions NHDES had taken regarding the Permit because NHDES's actions regarding the Permit were undisputed.[5] See RSA § 21-O:9, V (the Council "shall decide all disputed issues of fact . . ."). Neither CLF, NCES, or NHDES argued that NHDES did not act as the record reflected when it issued the Permit: the record showed that NHDES issued the Permit for a five-year period where there was no present capacity need/shortfall followed by a one-year period where there was capacity need/shortfall. See Appellant Exhibit 8, p. 274.

[5] NCES claimed the Council unanimously affirmed a motion "that DES was lawful in finding a capacity need during the life of the permit" (Audio Recording of February 22, 2022 Deliberations at Time Stamp 1:56:04), and NCES concluded a) the Council's approval of this motion affirmed that NHDES properly interpreted RSA § 149-M:11, III and applied this interpretation when issuing the Permit, and b) the Hearing Officer improperly set aside this determination in the Final Order. See NCES's Motion for Rehearing, p. 37; NCES's July 6, 2022 Reply to CLF's Objection, p. 14. NCES correctly quoted the audio record of the Council's deliberations, but clearly neglected to listen to the preceding eight minutes. After informing the Council there was a question of law for the Hearing Officer to decide, the Hearing Officer told the Council: "what matters for the Council is the question of fact of did DES in fact *determine that there is a capacity need* during the life of the Permit." Audio Recording of February 22, 2022 Deliberations at Time Stamp 1:48:49, emphasis added. The Council undertook a discussion of this topic, specifically addressing the question of whether NHDES determined there was a capacity need during the life of the Permit issuing the Permit. At the end of the discussion, the Chairperson posed the motion presented by NCES. The Hearing Officer failed to correct the language used by the Chairperson and interpreted the motion as the Council affirming its conclusion that NHDES had determined there was capacity need during the life of the Permit when issuing the Permit. Such a conclusion would have been necessary for the Hearing Officer and Council to find NHDES acted lawfully if the Hearing Officer found the interpretation of RSA § 149-M:11, III proposed by NHDES compelling. A review of the record makes it immediately apparent the Council was not addressing the topic proposed by NCES, and NCES's claims regarding the Council's conclusion and the Hearing Officer's treatment of said conclusion are unfounded. The inaccuracy of NCES's interpretation of the record is further reinforced by the fact that the Council reviewed and approved the Final Order pursuant to RSA § 21-M:3, IX(f)) and found no issue with the Hearing Officer's treatment of the issues in the Final Order, Subsection C.

A mixed question of law and fact becomes a question of law when the facts have been agreed upon by the parties or are undisputed. See Tuttle v. Dodge, 80 N.H. 304 (1922), quoting Harrison v. Cent. Const. Corp., 135 Md. 170 (1919) ("[w]hen the facts have been ascertained and agreed upon by the parties, or are undisputed, and there is no dispute as to the inferences to be drawn from the facts, the question becomes one of law"); see also Cahoon v. Coe, 57 N.H. 556, 600 (1876) ("whether or not a certain place is a public place is a mixed question of law and fact, which ought to go to the jury. But when the facts are admitted, the question is one of law").

NHDES and NCES did not address CLF's appeal claim by arguing factual issues, but instead by challenging CLF's proposed interpretation of RSA § 149-M:11, III. As the Parties all agreed that NHDES issued the Permit for periods without capacity need/shortfall, the potential mixed question of law and fact became solely a question of law regarding the interpretation of RSA § 149-M:11, III. The Parties argued numerous interpretations of the statute, and the Hearing Officer interpreted the statute pursuant to RSA § 21-M:3, IX(e). At that point there were no questions of fact or questions of law to deliberate with the Council: interpreting the statute inherently determined whether NHDES acted lawfully.

To the degree the Hearing Officer was required to pose the question provided by NCES to the Council, the decision recorded in the Final Order would remain unchanged. No Party disputed the fact that NHDES authorized the NCES Facility to operate during periods without capacity need/shortfall, and no evidence was entered into the record to contradict this fact. Therefore there could be no evidentiary support for the Council to find that NHDES comported with the Hearing Officer's interpretation of RSA § 149-M:11, III, and therefore the Council would have been required to find that NHDES acted unlawfully.[6] This inevitable outcome is readily apparent because the Hearing Officer's interpretation of RSA § 149-M:11, III required a proposed facility to operate during periods of capacity need/shortfall and the record shows the NCES Facility was authorized to operating during periods without capacity need/shortfall.

[6] If the Council had tried to find that NHDES had complied with the Hearing Officer's interpretation of RSA § 149-M:11, III (i.e. NHDES had authorized the NCES Facility to operate only during periods of capacity need/shortfall), such a finding would have been rejected by the Hearing Officer pursuant to RSA § 21-M:3, IX(c) because there was no evidence in support of such a conclusion by virtue of the fact the Parties were not disputing whether the NCES Facility was set to operate during periods without capacity need/shortfall.

b. *The Hearing Officer identified and distilled the Parties' arguments on the merits of the appeal in the Final Order. See NCES's Motion for Rehearing, p. 37.*

NCES argued the Hearing Officer "improperly engaged in fact-finding to identify and apply the department's alleged arguments" (NCES's Motion for Rehearing, p. 37) by noting the Hearing Officer recorded Parties' arguments in the Final Order, such as: "NHDES, at the time of the issuance of the Permit, ascribed to the argument that the existence of any shortfall during the proposed lifespan of a facility authorized a finding of capacity need for the entire lifespan of said facility." Id.; see also Final Order, p. 6. NCES's argument is uncompelling because the Hearing Officer was required to prepare and submit a proposed written decision on the merits of the Appeal to the Council (see RSA § 21-M:3, IX(f)) for the Council's review. The Council attended the Appeal Hearing; had access to all filings made in the Appeal; was fully aware of the Parties' arguments and evidence; and engaged in deliberations regarding the Parties' arguments and evidence. The Hearing Officer, after attending the Appeal Hearing, deliberations, and reviewing the Parties' filings, was obligated to prepare a written decision regarding the merits of the Appeal, including the Council's decisions on questions of fact and the Hearing Officer's decisions on questions of law. The Hearing Officer's re-recording of the Parties' arguments—coupled with citations to the written sources for said arguments—in the Final Order was not a matter of fact-finding, but a matter of ensuring the Parties' positions were accurately presented and preserved in the Final Order. The Council reviewed the Final Order prior to its publication and was satisfied with the Hearing Officer's recording of the Parties' arguments.

c. *The Hearing Officer determined that "capacity need" requires a present-tense relationship between capacity and a proposed facility. See NCES's Motion for Rehearing, p. 37-38.*

RSA § 21-M:3, IX(e) empowers the Hearing Officer to decide all questions of law presented during an appeal. Statutory interpretation of the language used in RSA § 149-M:11, III and V was at the heart of this Appeal. Evaluating the plain meaning of language used in a statute is quintessential statutory interpretation.

d. *The Hearing Officer concluded there was "no evidence" on the record regarding alleged repercussions from a specific interpretation of RSA § 149-M:11 nor regarding an argument that RSA § 149-M:11 may allow a partial finding of capacity need. See NCES's Motion for Rehearing, p. 38*.

RSA § 21-M:3, IX(e) empowers the Hearing Officer to decide all questions of law presented during an appeal. Statutory interpretation of the language used in RSA § 149-M:11, III was at the heart of this Appeal. In both instances identified by NCES in its Motion for Rehearing, the Hearing Officer was conducting statutory interpretation and concluded that claims asserted by the Parties regarding the interpretation of RSA § 149-M:11 were unsupported by evidence. As the Hearing Officer is empowered to decide questions of law in the Appeal, the Hearing Officer is required to review and judge evidence provided by the Parties regarding questions of statutory interpretation. Acknowledging a lack of evidence regarding a statutory interpretation question is merely an acknowledgment that the Parties did not provide further support for their position and therefore the Hearing Officer had to make his decision on the available information.

Regarding the 'inevitable repercussion' item (see Final Order, p. 12; NCES's Motion for Rehearing, p. 38), the Hearing Officer was clearly addressing the interpretation of the word 'satisfies' as used in RSA § 149-M:11, V and NCES's/NHDES's arguments regarding an alternative interpretation of the word and statute. A proposed counter-interpretation of the relevant statute was raised and, by addressing such interpretation, the Hearing Officer further affirmed the accuracy of his interpretation. Acknowledging that no evidence or argument was forthcoming to support NCES's/NHDES's interpretation was not a finding of fact, but an affirmation the Parties did not present any further evidence or argument in support of their positions.

Regarding the 'partial finding of capacity need' item (see Final Order, p. 14; NCES's Motion for Rehearing, p. 38), the Hearing Officer merely acknowledged there was no evidence that the relevant statute allows for a finding of partial capacity need. Such a determination is part of statutory interpretation, with the Hearing Officer acknowledging his inability to find support for a claim that RSA § 149-M:11 allows for a finding of partial capacity need.

The Hearing Officer did not misapprehend his powers nor inappropriately apply them in the Final Order. For the above identified reasons, NCES's arguments for reconsideration regarding Item 3 are **DENIED**.

ITEM 4: CLF Lacks Standing

Issues of subject matter jurisdiction, including standing, may be raised at any time in a proceeding. See Gordon v. Town of Rye, 162 N.H. 144, 149-150 (2011); Libertarian Party of New Hampshire v. Sec'y of State, 158 N.H. 194, 195 (2008). NCES was empowered to raise arguments related to "any matter determined in the action or proceeding" in its motion for rehearing, so long as the motion was filed within thirty days after any order or decision made by the Council. RSA § 541:3; see Appeal of N. New England Tel. Operations, LLC, 165 N.H. at 271–72. NCES's present Motion for Rehearing was filed within thirty-days of the Council's Final Order, and, while the Final Order did not address CLF's standing, NCES was entitled to raise the standing issue in its Motion for Rehearing because said issue was previously raised and decided upon by the Council. See March 17, 2021 Decision and Order on Permittee's Motion to Dismiss; May 11, 2021 Decision and Order on Permittee's Motion for Reconsideration.

In its Motion for Rehearing, NCES raised two primary items which it contends the Council overlooked or misapprehended in determining that CLF has standing to bring this Appeal: a) two members of a group are insufficient for said group to qualify for organizational standing (see NCES's Motion for Rehearing, pp. 39-42), and b) the CLF members relied upon by CLF for organizational standing are unable to sufficiently allege injuries-in-fact qualifying for individual standing, thereby undermining CLF's alleged organizational standing. Id., at 42-44.

NCES acknowledged that an organization can have organizational standing in New Hampshire. See Id., p. 39, citing New Hampshire Bankers Ass'n v. Nelson, 113 N.H. 127, 127-129 (1973); Appeal of Richards, 134 N.H. 148, 156 (1991);and In re Londonderry Neighborhood Coal., 145 N.H. 201, 203 (2000). NCES's sole contention was that two members is an insufficient number of members to grant organizational standing. NCES argued the New Hampshire Supreme Court has never found organizational standing to apply when only a 'token' number of members are injured. See NCES Motion for Rehearing, p. 40. NCES contended the

Court has only ever found organizational standing when "the majority of [] members were actually harmed." Id. This conclusion by NCES was, however, entirely unsupported in the motion, and review of the matters cited by NCES do not indicate that the number of injured members was ever considered by the Court when determining organizational standing.

The language of the Court's decisions may support the conclusion that multiple members must be impacted for an organization to have standing, but no majority requirements are imposed by the Court. See e.g. In re Londonderry Neighborhood Coal., 145 N.H. at 203 ("[b]ecause EFSEC could have found that LNC's members have suffered or will suffer a direct economic injury as a result of the decision approving AES's application, LNC has standing to pursue this appeal"); Appeal of Richards, 134 N.H. at 156 ("[the CRR] does . . . have standing to represent its members if they have been injured"). In Appeal of Richards, the Court cites to Sierra Club v. Morton wherein the U.S. Supreme Court affirmed that organizations may represent injured members. See Appeal of Richard, 134 N.H. at 156, citing Sierra Club v. Morton, 405 U.S. 727, 739 (1972). The U.S. Supreme Court has also confirmed that an organization may have standing pursuant to injury suffered by "its members, or any one of them . . . ." Warth v. Seldin, 422 U.S. 490, 511 (1975).

NCES's contention that CLF cannot have organizational standing because it relies on injuries suffered by a 'token' number of members is unconvincing. NCES, as in its February 8, 2021 Motion to Dismiss, once again failed to show that such 'token' membership-based organizational standing is prohibited in New Hampshire. NCES provided no compelling argument that an organization cannot qualify for organizational standing so long as it is representing an injured member who would qualify for standing him/herself. The Hearing Officer, in his March 17, 2021 Decision and Order on Permittee's Motion to Dismiss, addressed the question of law regarding whether organizational standing can extend to an organization when only one or two members have standing by determining that at least one of CLF's members had standing (see March 17, 2021 Decision and Order on Permittee's Motion to Dismiss, p. 3) and said member's standing was sufficient for CLF to have organizational standing. The Hearing Officer denied NCES's motion to dismiss, and the Council now re-affirms that decision: the Council did not overlook or misapprehend any points of law or fact in its earlier decision.

NCES further argued that CLF lacks organizational standing because the members it represents lack standing. This contention is broken into two parts by NCES: first, evidence of Peter Menard ("Mr. Menard") suffering injury should not have been accepted and considered by the Council when determining whether CLF's members had standing because Mr. Menard's alleged injuries were not identified in the Notice of Appeal, and second, Andrea Bryant ("Ms. Bryant") lacked sufficient injuries-in-fact to qualify for standing.

Regarding standing, appellants are only required to submit a "clear and concise statement as to why the appellant has standing to bring an appeal, for example, why the appellant will suffer a direct and adverse affect as a result of the decision being appealed in a way that is more than any impact of the decision of the general public . . ." in their notice of appeal. Env-WMC 204.02(b)(5). The notice of appeal is reviewed for compliance with Env-WMC 204.01 and Env-WMC 204.02(b) and is then accepted by the Council if compliance is determined. See Env-WMC 204.03. As acknowledged by NCES, a claim for lack of standing is an affirmative defense which shifts the burden to the appellant if standing is challenged. See NCES's Reply to CLF's Objection to NCES's February 8, 2021 Motion to Dismiss, p. 3.

NCES's argument regarding the inadmissibility of Mr. Menard's affidavit is unconvincing. CLF's Notice of Appeal was determined to meet the standards of Env-WMC 204.02(b)(5) when it was filed, which was an acknowledgment that CLF provided a clear and concise statement regarding its standing. There was no requirement that CLF fully detail and evidence every basis for standing that it possessed.[7][8] CLF stated in its Notice of Appeal that its members—plural—were directly and adversely affected by the NCES Facility's operations, and that such members would continue to be impacted by NHDES granting the Permit. See Notice of Appeal, p. 4. In its February 8, 2021 Motion to Dismiss, NCES raised the issue of standing

[7] NCES's passing argument that the language in RSA § 21-O:14, I-a(a) ("[o]nly those grounds set forth in the notice of appeal shall be considered by the council") required CLF to specifically identify Mr. Menard and his injuries for the Council to receive and consider Mr. Menard's affidavit is uncompelling. See NCES's Motion for Rehearing, p. 42. The 'grounds' addressed in RSA § 21-O:14, I-a(a) unequivocally relate to the basis for an appellant's claim i.e. why the appellant claims NHDES acted unlawfully or unreasonably. An appellant's standing, and the sufficiency of presenting said standing in a notice of appeal, is not considered or addressed in RSA § 21-O:14.

[8] Under organizational standing, CLF may only need to present a single member's standing for CLF to have qualified for standing. Therefore, presenting the details for a single member would meet the requirements of Env-WMC 204.02(b)(5), even though other member's standing may also have contributed to CLF's organizational standing.

thereby compelling CLF to prove its standing, which it did so by filing two affidavit's detailing injuries claimed by its members. The Council accepted Mr. Menard's affidavit and concluded it, along with Ms. Bryant's affidavit, sufficiently established the affiant's standing and, in turn, CLF's standing. NCES's argument for the barring of Mr. Menard's affidavit is based on the premise that Mr. Menard's injuries were not sufficiently raised in the Notice of Appeal.[9] See NCES's Motion for Rehearing, p. 42. The Hearing Officer disagreed, and accepted Mr. Menard's affidavit, concluding that Mr. Menard sufficiently articulated injury-in-fact from the NCES Facility. See Decision and Order on Permittee's Motion to Dismiss, p. 3. It is readily apparent that the injuries attested to by Mr. Menard are described in the Notice of Appeal, which supported the Hearing Officer's decision to allow Mr. Menard's affidavit. The Council now re-affirms this decision: the Council did not overlook or misapprehend any points of law or fact in its earlier decision to accept Mr. Menard's affidavit.

NCES was empowered to argue that Mr. Menard and Ms. Bryant lacked sufficient injuries-in-fact to qualify for standing. It does not appear, however, that NCES in its Motion for Rehearing was denying the validity of the injury claims made in the CLF affidavits. See NCES's Motion for Rehearing, p. 43. Instead, NCES argued that CLF's affidavits and filings failed to articulate a basis for standing which satisfied CLF's burden. See Id. at 43-44 (NCES contends that CLF "never met its burden to demonstrate standing, and thus the council must reconsider its decision and dismiss the appeal . . ."). As NCES is not disputing the contents of the affidavits, the question of whether CLF met its burden to demonstrate standing is a question of law.

Whether a party has standing is typically a factual determination. See Weeks Rest. Corp. v. City of Dover, 119 N.H. 541, 545 (1979); see also Appeal of New Hampshire Right to Life, 166 N.H. 308, 311 (2014) (if material facts are not in dispute, the issue of standing is a question of law). The Weeks decision identifies a non-exhaustive list of factors which can be considered when determining whether a party has standing: 1) proximity of a party's property to the site at

[9] Though NCES contends Mr. Menard's affidavit should have been disallowed because Mr. Menard's injuries are not explicitly identified in the Notice of Appeal, no members names were identified in the Notice of Appeal. NCES *inferred* that Ms. Bryant is the member described in the Notice of Appeal, (see NCES's March 1, 2021 Reply to CLF's Objection, p. 4), but this inference was based on the unsupported premise that Ms. Bryant was the only female member of CLF who owned and resided at property close to the NCES Facility who experienced noise and odor from the facility and who had raised unaddressed concerns with NCES.

issue; 2) the types of changes proposed at a site; 3) the immediacy of the injury claimed; and 4) the party's participation in administrative hearings. Id. Whether a party has a direct, definite interest in the outcome of a matter is a further basis for standing. See Id.; see also Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 770 (2013).

Both Mr. Menard's and Ms. Bryant's affidavits indicated they own and reside at properties proximate (one mile and two miles, respectively) to the NCES Facility. Both individuals asserted they have experienced foul odors and disturbing sounds from the NCES Facility on their properties and in their homes. Both affiants asserted their quiet enjoyment of their properties, as well as the surrounding woodlands, was negatively impacted by the NCES Facility's operations. NCES argued that Mr. Menard's and Ms. Bryant's alleged injuries are merely speculative because it is unknown whether they will continue to suffer injuries due to NHDES granting the Permit, and therefore Mr. Menard and Ms. Bryant failed to sufficiently articulate an injury-in-fact caused by the Permit. See NCES's Motion for Rehearing, p. 43.

To establish standing, an appellant must show it is "likely, as opposed to merely speculative, that [his] injury will be redressed by a favorable decision." Teeboom v. City of Nashua, 172 N.H. 301, 309 (2019), quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992). The affidavits indicated the affiants own property close to the NCES Facility. By granting the Permit for the NCES Facility, NHDES authorized NCES to continue its operations and to continue accepting waste. The injuries claimed to be suffered by the affiants are the result of NCES's operations and continued acceptance of additional waste. The Permit authorized NCES to expand its facilities via the implementation of Stage VI, which implies NCES has previously implemented earlier stages which did not resolve the odor and noise harms alleged by the affiants. The record supports the conclusion that there was sufficient information provided by the affiants for the Council to conclude the affiant's predicted injuries were not merely speculative, but likely, based on the affiant's past experiences with the NCES Facility and the nature of the Permit. NCES's claim that CLF never met its burden to demonstrate its members have standing to raise the appeal is therefore uncompelling. The Council did not overlook or misapprehend any points of law or fact in finding CLF provided sufficient information to establish its members had standing.

For the above identified reasons, NCES's argument for reconsideration regarding Item 4 is **DENIED**.

CONCLUSION

For the above detailed reasons, NCES's Motion for Rehearing is **DENIED**.

For the Council, and by Order of the Hearing Officer,

/*s/ Zachary Towle* Date: 11/3/2022
Zachary N. Towle, Esq., NH Bar 270211
Hearing Officer, Waste Management Council

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.