THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2022-0690

Appeal of New Hampshire Department of Environmental Services

Rule 10 Appeal from Administrative Agency per RSA 541:6
New Hampshire Waste Management Council

BRIEF OF THE APPELLANT, STATE OF NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL
SERVICES

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(Fifteen minutes of oral argument requested)

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2. Whether the Hearing Officer erred when he determined that RSA 149-M:11, III(a) and V preclude the Department from finding that a proposed facility satisfies a "need" unless the proposed facility will only operate during a period of capacity shortfall. A118-122, Department Motion for Reconsideration.

STATEMENT OF FACTS AND OF THE CASE

On October 9, 2020, the N.H. Department of Environmental Services ("Department") issued permit No. DES-SW-03-002 (the "Permit") to North Country Environmental Services, Inc. ("NCES") for an expansion of its Bethlehem, New Hampshire facility known as Stage VI.[1] BA42.[2] The Permit approved additional capacity and required that NCES operate Stage VI through the end of 2026. BA56-57. In order to issue the Permit, the Department had to determine that Stage VI provided a substantial public benefit in accordance with RSA 149-M:11, III. To do so, the Department must determine 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." RSA 149-M:11, III(a). To determine need, the department must "[p]roject … the amount of solid waste which will be generated within the borders of New Hampshire" for 20 years. *Id*. at V(a). It then must "identify any shortfall in the capacity of existing facilities" over that time. *Id*. at V(d). RSA 149-M:11 then states: "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." *Id*.

For the specified 20-year period, the Department estimated New Hampshire's waste generation, determined the amount of remaining landfill capacity, and calculated whether and when the State would encounter a

[1] Previously, NCES filed a similar Stage VI application, which it subsequently withdrew. BA48-49. During that process, the Department indicated, without deciding, that a facility must operate in some manner beyond an identified shortfall in order for the Department to find that it satisfied a capacity need. *See* BA48.

[2] "A" refers to the State's appendix filed with this brief. "BA" refers to the addendum accompanying this brief.

capacity shortfall. A153-160. That calculation demonstrated a capacity shortfall occurring in the beginning of 2026. NCES proposed that Stage VI would operate from 2021 to 2026. *Id.*; *See also* BA55. The Department graphically depicted this information on a chart. A159. The Department essentially found that because some of the capacity of Stage VI would exist during a predicted capacity shortfall, Stage VI satisfied a "capacity need" as required by the statute. A153-160.

Conservation Law Foundation, Inc. ("CLF") appealed the Department's decision to the Waste Council pursuant to RSA 21-O:14, I-a(a).[3] A3-19. CLF alleged, in relevant part, that the issuance of the Permit was both "unlawful and unreasonable because it does not satisfy the substantial-public-benefit criterion set forth in RSA 149-M:11, III(a)," the section related to determining "capacity need." A5. A hearing occurred on February 18 and 22, 2022.

In pre-hearing memoranda, CLF, NCES, and the Department provided different interpretations of RSA 149-M:11, III(a). CLF argued that the Department acted unreasonably and unlawfully because it allowed Stage VI to operate during periods when there would be no shortfall. A22-28. NCES, while nominally defending the Department's decision, argued for its own method. It asserted that any shortfall, at any point, within the 20-year planning period satisfied the III(a) criteria even absent any overlap with Stage VI operation, further suggesting that the Department should not engage in any "subjective" review of the sufficiency of the proposed

[3] The Hearing Officer and CLF use "Waste Management Council," "Waste Council," or "Council" to denote the council members and the Hearing Officer collectively; however, the "Waste Management Council" more properly refers to the council members only. RSA 21-O:9. Nevertheless, for consistency, in addition to using the term "Hearing Officer," the Department will refer to the council members and Hearing Officer together as the "Waste Council" and to the council members without the Hearing Officer as "Waste Council Members."

capacity. A78-80. The Department interpreted RSA 149-M:11, III(a) to require approval if a project provided capacity during a predicted shortfall except under limited circumstances. A103-108.[4]

During the hearing, CLF called an expert fact witness to testify as to the reasonableness of the Department's determination of capacity need. CLF also called several Department employees to testify.

Following closing arguments, the Hearing Officer circulated a memorandum to the Waste Council Members that included, among other things, a list of "issues" that he intended to be a "guide" for the Waste Council Members in their deliberations. A165-167; A704, lines 4-5. The Hearing Officer framed the relevant issues as follows:

> 1. Whether DES acted unreasonably in issuing the Permit based on the capacity need measurements for the State of New Hampshire during the proposed lifetime of the Permit?
>
> This issue includes sub-issues:
>
> a. Whether DES acted unreasonably in its measurement of the short- and long-term capacity need as required by RSA §149-M:11, III(a) when issuing the Permit; and
>
> b. Whether DES acted unreasonably in determining there was sufficient capacity need during the entire lifetime of the Permit.

A166. During deliberations, the Hearing Officer also asked the Waste Council Members to focus on narrow factual issues as he had defined them. However, the Waste Council Members challenged the formulations of the issues presented by the Hearing Officer. For instance, the Chairperson stated that the phrase "entire lifetime" offered by the Hearing Officer "is a

[4] In this case, the Department did not identify any relevant limited circumstances that would merit further review other than the Stage VI operating period. A467.

dangerous question," prompting another Council member to ask whether he could remove the word "entire" from a forthcoming motion. The Hearing Officer responded, "I see no reason why not," asserting that the document he circulated "is just meant as a guide…" A703, lines 14-23; A704-705; *see also* A696, lines 18-21. Eventually, the Waste Council Members generally rejected the articulation of issues presented by the Hearing Officer and crafted their own motions. The two most important of these, which the Waste Council Members unanimously approved, stated:

(1) "DES was lawful in finding the capacity need during the life of the [permit]" (*see* A700, lines 1-13; A143, footnote 5); and

(2) "DES acted reasonably in issuing a permit to help address the capacity needs during the life of the [permit]" (*see* A710, lines 15-23 and A711, lines 1-2).

The Hearing Officer issued the "Final Order on Appeal" on May 11, 2022 ("Order"). BA42-61. In it, the Hearing Officer upheld the Department's decision on the existence of short- and long-term need. BA44-46, Sections A and B. He then dispatched several claims not relevant to this appeal. BA57-61, Sections E-H. Most importantly, the Hearing Officer upheld the finding of the Waste Council Members that the Department "acted reasonably in issuing a permit to help address the capacity needs during the life of the permit." BA56-57, Section D; *see* RSA 21-M:3, IX(c). However, he attempted to limit the scope or otherwise reframe the import of this finding by interpreting the motives and what he believed to be the intent of the Waste Council Members. BA56-57, Section D.

Despite upholding the Waste Council Members' determination that the Department acted reasonably in determining that the project addressed capacity need, the Hearing Officer ruled against the Department on the

same issue – purportedly, as a matter of law. BA46-56., Section C. Specifically, the Hearing Officer ruled that the Department acted unlawfully in approving Stage VI for time periods when a capacity "shortfall" did not exist. *Id*. He further determined that "[the Department's] evaluation of a proposed facility under the (a) criteria is non-discretionary, just as a finding of capacity need is non-discretionary." BA54. To support his decision, the Hearing Officer relied upon many factual assertions, assumptions, or hypotheticals not discussed or ruled upon by the Waste Council Members. BA46-56, Section C.

Eventually, the Hearing Officer concluded that the language of RSA 149-M:11, III(a) and V "ties a finding of capacity need to a finding of shortfall, subject to the degree a proposed facility resolves said capacity need." BA50. The Hearing Officer rejected any more complicated analysis, stating:

> 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.

BA53.

He supported this determination by concluding that the tense of the word "satisfies" in subparagraph V mandates a "present-action relationship." BA51. In essence, the Hearing Officer interpreted the statute to require a strict one-to-one ratio between capacity shortfall and proposed capacity without room for Department discretion or evaluation of State needs.

On May 31, 2022, the Department filed a Motion for Reconsideration. The Department accepted several of the Hearing Officer's findings and expressed a willingness to alter its method in

conformance therewith. A118-124. However, the Department argued against the Hearing Officer's strict one-to-one ratio and asserted that the Hearing Officer improperly engaged in fact-finding. *Id*.

On November 3, 2022, the Hearing Officer issued an Order on the Motion for Reconsideration, which upheld the Order in all respects and expanded upon the strict interpretations in the Order. BA62-74. This appeal followed.

SUMMARY OF THE ARGUMENT

The Hearing Officer erred when he decided, as a matter of law, that a proposed facility can only "satisfy" a capacity "need" while operating during a period of capacity shortfall. This constitutes a question of fact as evidenced by the statements and behavior of the Hearing Officer, CLF, and the Waste Council Members. As such, the Department's decision could only be overturned if CLF proved that the Department acted unreasonably. The Waste Council Members, not the Hearing Officer, were tasked with deciding whether the appellant met its burden. In this case, the Waste Council Members sided with the Department, unanimously finding "that DES acted reasonably in issuing a permit to help address the capacity needs during the life of the permit." The Hearing Officer did not overrule this decision, he merely ignored it.

Even if the determination of "need" rested with the Hearing Officer, he misinterpreted RSA 149-M:11. Although the Department concedes that RSA 149-M:11 may envision a relationship between proposed capacity and a capacity "need," it does not require a one-to-one ratio in both time and amount between proposed capacity and the projected capacity "shortfall." The Hearing Officer's interpretation reads requirements into the statute that the Legislature did not see fit to include. The Hearing Officer bolstered his decision by an unwarranted reliance on his interpretation of the present tense verb "satisfies" to the derogation of the statute as a whole and Legislative intent.

ARGUMENT

I. THE HEARING OFFICER FAILED TO RECOGNIZE THE DISCRETION GIVEN TO THE DEPARTMENT BY RSA 149-M:11, III AND INCORRECTLY REVIEWED ITS DECISION AS A MATTER OF LAW RATHER THAN AS A QUESTION OF FACT.

The Hearing Officer overturned the Department decision that the proposed Stage VI expansion "satisfies" a capacity "need" as a matter of law, simultaneously ruling that the statute authorized the Department to perform only a non-discretionary, ministerial role. Specifically, the Hearing Officer based his decision on his interpretation of RSA 149-M:11. In doing so, the Hearing Officer erred.

A. The Plain Language of RSA 149-M:11 Gives the Department Discretion to Determine, as a Factual Matter, Whether a Proposed Facility "Satisfies" a Capacity "Need."

RSA 149-M:11 contains several ambiguous or undefined provisions; however, the statute clearly gives the Department the discretion to decide whether a proposed facility "satisfies" a capacity "need." RSA 149-M:11, III and III(a) state that "*[t]he Department shall determine*" whether a "proposed facility provides a substantial public benefit based upon," among other things, 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…." RSA 149-M:11, III and III(a) (emphasis added). *In re Hoyt*, 143 N.H. 533, 536 (1999) ("the intent of the legislature expressed by the words in the statute itself is the touchstone to its meaning").

Determining whether a facility "satisfies" a capacity "need" by "accommodat[ing] solid waste generated within the borders of New Hampshire" requires the Department to analyze and apply information. In other words, it constitutes a question of fact. As a factual decision, it can

only be overturned if the appealing party proves to the Waste Council that the Department acted "unreasonabl[y]." RSA 21-O:14, I-a(a). The Waste Council Members, not the Hearing Officer, must decide whether the appellant has met its burden. RSA 21-M:3, IX(c)-(e); RSA 21-O:9, V.

Rather than show deference to the Department, or the Waste Council Members, the Hearing Officer decided on his own, based on his interpretation of RSA 149-M:11, III(a), that the Department acted "unlawful[ly]." Section II below addresses his legal analysis in detail; however, as a threshold matter, his opinion wrongfully decides questions of fact and eliminates the discretion given to the Department by the Legislature.

Under the Hearing Officer's decision, the Department can only perform two preliminary tasks. The Department can: (1) determine how much waste will be generated in New Hampshire over a twenty-year period; and (2) acknowledge the amount and timing of capacity proposed by the applicant. At that point, according to the Hearing Officer's decision, the Department retains only the ability to perform the ministerial task of subtracting its first finding from the second. The resulting number dictates the size and operating period of the facility. The Department can no longer use its discretion to determine "the 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" as required by paragraph III(a). RSA 149-M:11, III(a) (emphasis added). This reads the Department's discretion out of the statute. *K.L.N. Constr. Co. v. Town of Pelham*, 167 N.H. 180, 186 (2014) (the Court "must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words"). Instead, entities wholly lacking the expertise and familiarity with solid waste management possessed by the Department can provide the ultimate answer. As evidence of this, both the Hearing Officer

and CLF completed this task easily and with numerical certainty.

The Hearing Officer's decision also ignores the fundamentally factual nature of the required task. As shown below, although describing his decision as a "matter of law," the Hearing Officer was unable to avoid the inevitable factual entanglement.

B. The Hearing Officer, the Waste Council Members, and the Parties to the Appeal All Treated the Determination that the Proposed Facility "Satisfied" a Capacity "Need" as a Factual Matter.

Not only does the statute give the Department discretion to determine whether a facility satisfies a "need" as a factual matter, the Hearing Officer, the Waste Council Members, and all of the parties to the appeal treated it as one.

1. In Order to Reach His Conclusion, the Hearing Officer Made Numerous Factual Assertions.

Although he described his decision as resolving a "question of law," the Hearing Officer repeatedly demonstrated that he viewed the determination related to the satisfaction of "need" as one of fact. On page 4 of his Order, the Hearing Officer summarized this view when he stated: "whether NHDES sufficiently determined the 'short- and long-term' need for the NCES Facility is a question of fact." BA45. Although this quote rests among many similar statements wherein the Hearing Officer attempts to slice the "need" analysis ever thinner to preserve some role for himself, the quote betrays an unavoidable truth: the Department determined the need for the Stage VI facility as a question of fact and it should have been reviewed as such.

Later, when exploring hypotheticals to illustrate his point, the Hearing Officer used factual examples to establish his eventual factual conclusion. For instance, on page 9 of the Order, the Hearing Officer stated:

> 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….

BA50. Factual conclusions like these occur throughout the Order. For instance, the Hearing Officer stated: "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." BA52. He later asserted: "the only way a proposed facility can satisfy a need is by operating…" finding that "a proposed facility can only provide for a capacity need during the breadth of its lifetime." BA52-53.

Recognizing that the simple, and facially logical statements above belie a more complicated reality, the Hearing Officer attempted to head off more technical arguments. For instance, the Hearing Officer realized the possibility that the existence of present capacity arguably could have an impact on future need. To thwart this possibility, the Hearing Officer made a rather complicated factual finding that adding new capacity in a period when no shortfall existed would merely "redistribute" other capacity. He then rebuked the Department for not providing "evidence" to refute his newly created factual assertion. Specifically, he stated:

> 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. No evidence or argument has been forthcoming that such a result would not be the inevitable repercussion of NHDES's current argument.

BA53. In this case, the Hearing Officer made these factual findings without deference to the Department and wrongfully supplanted his judgment for that of the Waste Council Members.

2. CLF Also Treated the "Need" for the Proposed Facility as a Question of Fact.

In its notice of appeal, CLF described the Department's decision on "need" as both "unlawful and *unreasonable*," indicating that it too believed the decision at least arguably rested on factual grounds. A5 (emphasis added) ("The permit is unlawful and unreasonable because it does not satisfy the substantial-public-benefit criterion set forth in RSA 149-M:11, III(a)"); *see also* A23, CLF Pre-Hearing Memorandum, ¶12 ("New Hampshire does not have a disposal capacity need to lawfully and reasonably support a finding of substantial public benefit"). In addition, at the hearing, CLF produced an expert fact witness to describe why the proposed facility did not "satisfy" a capacity "need." The following example shows some of the factual testimony elicited by CLF:

> [CLF] WITNESS: …. If a ton of MSW is disposed of properly in a landfill and it came from New Hampshire, then that has obviously, New Hampshire benefit and benefits the citizens that created it, the generators, and benefits the overall plan, because it was being dealt with properly.
>
> If the next ton that comes into that facility is not from New Hampshire, then it doesn't have a New Hampshire benefit at all**.** If you have excess capacity, it assumes that all of your New Hampshire need has been taken care of. And you don't need any further capacity. So that other capacity can be sold to New York or Massachusetts, or whoever. It will not benefit the citizens of New Hampshire.

A287, lines 4-19. When asked if New Hampshire benefited from the proposed facility, the CLF witness stated:

> Actually, I believe it's a detriment to New Hampshire because if you have accommodated your need for that particular

> timeframe for that year, for example, and you have excess capacity you then sell to out-of-state customers, you've eliminated the possibility of having that capacity later for New Hampshire if it needs it.

A293, lines 11-17. The merits of these factual assertions can be debated, but they are factual assertions nonetheless.

3. The Waste Council Members Ruled as a Question of Fact that the Department's Decision that the Proposed Facility Satisfied a Capacity Need Was Reasonable.

The Council not only addressed but voted on the ultimate question of whether the Department acted reasonably in finding that the proposed facility "satisfie[d] need." It reviewed this issue as a question of fact. Specifically, the Waste Council Members unanimously found "that DES acted reasonably in issuing a permit to help address the capacity needs during the life of the [permit]." A710, lines 16-19.

The Hearing Officer did not overtly overrule this decision. In fact, the Hearing Officer's Order includes a section dedicated to this result under the heading:

> *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.*

BA56 (italics original). Attempting to limit the scope of this finding of the Waste Council Members, he described it as one related merely to the *existence* of need, not whether the proposed facility "satisifie[d] the need." *Id*. ("The Council determined via a unanimous vote that NHDES did act reasonably in determining there was sufficient capacity need"). He next attempted to caveat this finding by stating his perception that the Waste Council Members made it based on the Department's description of how the Department interpreted its task. *Id*. ("The Council found that NHDES acted reasonably because NHDES acted in accordance with its

interpretation of RSA § 149-M:11"). The Hearing Officer did not provide citations to the record in his Order that led him to these conclusions or explain why what he perceived to be the motivation behind a decision of the Waste Council Members mattered.[5] In his Order on Reconsideration, the Hearing Officer reiterated these viewpoints citing only to his previous Order and two unrelated documents for support. BA65.

The Hearing Officer's eventual summary casts the Waste Council Members' decision in a more accurate light by acknowledging that the Waste Council Members determined that the Department acted reasonably in issuing a permit to "satisfy" the identified "need." BA57. Among other things, the Hearing Officer specifically recognized that the Waste Council Members examined the Department's actions with respect to what the Hearing Officer coined the "(a) criteria." *Id*. He then accepted the Waste Council Members' decision and seemingly "denied" that portion of the appeal. In relevant part, the Order states:

> 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.

Id. The Hearing Officer's summary, but more importantly, the motion actually voted upon, indicate that the Waste Council Members found, as a matter of fact, that the Department acted reasonably. This finding of the Waste Council Members cannot coexist with the Hearing Officer's "legal" exegesis of "need." Although the Hearing Officer can overturn a factual

[5] Only a few of the ten Waste Council Members actually spoke to this issue in a material way at the deliberation session; however, they all voted in favor of the motion. A693-711.

decision of the Waste Council Members in some circumstances, he did not do so. RSA 21-M:3, IX(c)-(e). As such, the decision of the Waste Council Members controls.

NCES alerted the Hearing Officer to an argument similar to that made above in its motion for rehearing.[6] In a lengthy footnote, the Hearing Officer rejected it, stating:

> NCES claimed the Council unanimously affirmed a motion "that DES was lawful in finding a capacity need during the life of the permit", 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. 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." 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 when 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-

[6] The Waste Council Members made nearly identical findings supporting the Department's decision first as "lawful" and then as "reasonable," believing that both findings resolved the same ultimate issue. A710 ("I thought we just voted on [(b)]…[UNKNOWN SPEAKER]: That was the issue of law… Now we [are] doing the one on reasonableness…); *also compare* discussions at A693, line 15 through A700, line 18 *with* A700, line 19 through A711, line 2.

> 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.

A143, footnote 5 (emphasis original).

First, one can only speculate as to what the Waste Council Members felt when reviewing the draft Order because, pursuant to RSA ch. 91-A, they were not allowed to deliberate or interact during their review as it did not occur during a noticed meeting. More than likely, the Waste Council Members only reviewed the section relative to their decision, not the part of the Order overturning that decision.[7]

Second, the Department respectfully believes that a more thorough examination of the Waste Council deliberations reveals a different outcome than that suggested by the Hearing Officer. In actuality, the Waste Council Members took at least four actions related to "need":

(1) They decided that the Department did, in fact, measure short- and long-term capacity requirements as stated in RSA 149-M:11 (A687, lines 22-23; A688, lines 1-17);

[7] On December 14, 2022, NCES filed a petition in Merrimack County Superior Court against the Waste Council claiming that it, among other things, violated RSA ch. 91-A when reviewing the draft Order. On April 5, 2023, the Superior Court granted the Waste Council's motion to dismiss NCES's RSA 91-A Petition. *See* A833-846, *North Country Env. Services, Inc. v. Waste Management Council*, Docket No. 217-2022-CV-01132. NCES has since appealed this order to this Court. Although the Department agrees with the Superior Court that no violation of RSA ch. 91-A occurred, the petition filed by NCES shows that at least one Waste Council Member did not agree with the Hearing Officer's conclusion and that all were specifically told not to review the Hearing Officer's part of the decision.

(2) The Waste Council Members also decided that the Department "acted reasonably in its measuring the short and long-term capacity needs required by RSA [149-M:11, III(a)] in issuing the permit" (A693, lines 1-14);

(3) The Waste Council Members next voted in the manner described by NCES in its motion for rehearing, finding "that DES was lawful in finding a capacity need during the life of the [permit]," – a finding that, by its terms, they should not have made since decisions of law lie with the Hearing Officer, (A700, lines 1-13; A143, footnote 5); and,

(4) The Waste Council Members then made the ultimate factual finding discussed above; namely, "that DES acted reasonably in issuing a permit to help address the capacity needs during the life of the [permit]." A710, lines 5-23; A711, lines 1-2.

With respect to this last, most important finding, the deliberation transcript indicates that the Waste Council Members purposely rejected at least one proposed draft motion of the Hearing Officer and specifically developed their own motion, which they later unanimously approved. This included removing the word "entire" as it pertained to a facility's "lifespan" in relation to satisfaction of need, a word that the Hearing Officer found important in his justification of his opinion. A64 ("the Council [meaning the Hearing Officer] determined that RSA § 149-M:11, III requires the existence of a capacity need/shortfall during the *entire* lifespan of a proposed facility" (emphasis added)); *see also* A165-167 (Hearing Officer's "Issues on Appeal and Memorandum of Law to the Council"). More importantly, although the Hearing Officer attempted to cleave "need" into multiple, complicated subparts, the language of the motion that the Waste Council Members specifically formulated and approved embodies the ultimate issue. The following discussion supports this conclusion:

> UNKNOWN SPEAKER: This wording that's in here is not required wording, it's something you gave us as a guide?

> MR. TOWLE [HEARING OFFICER]: Correct. Correct. [It's merely] as a guide just to create the topics.
>
> UNKNOWN SPEAKER: Because… I think the word "entire" needs to be removed to get back to our previous discussion.
>
> MR. TOWLE [HEARING OFFICER]: All right. [Fine with me].
>
> UNKNOWN SPEAKER: …. So *I think if… we consider the question whether DES acted reasonably in providing the permit -- or issuing the permit with regards to capacity, then I think we're okay. There is a capacity need, they're addressing some of that capacity need. So I think our question is whether or not they were reasonable in issuing the permit to address some of the capacity need that exists in state*.

A704, lines 19-23; A705, lines 1-22 (emphasis added). The Waste Council Members' final motion clearly encompassed the ultimate question: Did the Department act reasonably in issuing this permit for Stage VI with respect to capacity need? The deliberations demonstrate this:

> UNKNOWN SPEAKER: *…This permit addresses the need. I don't think they were unreasonable*.
>
> UNKNOWN SPEAKER: Good point.
>
> UNKNOWN SPEAKER: So are you proposing also just [take the word] "sufficient" out of that statement, so it doesn't appear that we're voting on it?
>
> UNKNOWN SPEAKER: Yeah, so I was going to reword it as a motion and say, "*DES acted reasonably in issuing a permit to help address capacity needs during the [life of the permit]*. It doesn't necessarily address the entire capacity need, and it doesn't necessarily address it every single year, but it is addressing big capacity need that we had during the life of the permit.

A706, line 23; A707, lines 1-16 (emphasis added). These discussions shaped the language of the eventual motion. A710, lines 16-19 (wherein a

Waste Council Member stated: "Okay. So I'd like to make a motion that DES acted reasonably in issuing a permit to help address the capacity needs during the life of the [permit]"). The Hearing Officer's subjective belief of what the Waste Council Members thought they decided cannot undermine the motion they actually adopted. The Waste Council Members adopted their motion, not their motivations. *Compare Pollard v. Gregg*, 77 N.H. 190, 194 (1914) ("The question is, not what views upon the point some members of the legislature [] may have entertained, but what is the effect and meaning of the language of the act finally ratified and adopted"). The factual determination of the Waste Council Members, memorialized in their adopted motion, controls.

II. EVEN IF THE DECISION FELL WITHIN THE PURVIEW OF THE HEARING OFFICER, HE INCORRECTLY INTERPRETED RSA 149-M:11 TO REQUIRE A STRICT ONE-TO-ONE RATIO BETWEEN PROPOSED CAPACITY AND NEW HAMPSHIRE WASTE GENERATION.

A. RSA 149-M:11 Strikes a Balance Between Ensuring that Permitted Facilities Accommodate New Hampshire Waste and Constitutional Limits on Protectionism that the Hearing Officer's Decision Disregards.

Although the Hearing Officer's conclusion has an instinctive logical appeal, it fails to provide any of the flexibility envisioned by the statute. This rigid approach presents significant problems in a reality where unexpected events (e.g., hurricanes, floods, etc.) can create unforeseen demand, where markets can shift without warning (*see* A292, lines 6-9), and where private facilities remain free to conduct business as they see fit. It also appears to be an attempt to provide solely for New Hampshire waste in a manner that the drafters of RSA 149-M:11 found unworkable. Legislative history provides insight into the compromise embodied by RSA 149-M:11 that the Hearing Officer's decision tilts wholly to one side.

The three major private facilities in New Hampshire can accept

waste from whatever source they choose with about half currently originating out-of-state. A288, lines 20-22; *see also* A255, lines 4-7 ("This chart cannot contemplate out-of-state waste. And imported waste eats into the state's capacity at a substantially higher rate than what's shown on this chart"). Without a way to control out-of-state waste, some sponsors of HB 509, the bill that led to the enactment of RSA 149-M:11, were concerned that New Hampshire might become "the dumping ground for the rest of New England." A180, April 10, 1991 Senate Committee on Environment Hearing. Proponents of the bill contemplated banning waste originating outside of New Hampshire but abandoned this approach due to issues with the federal "Dormant Commerce Clause." A224, Senate Journal May 16, 1991 ("The problem is that constitutionally we cannot ban out-of-state trash"). Instead, the focus shifted from precluding out-of-state waste to ensuring that capacity existed for in-state waste. A203 (wherein the Department Assistant Commissioner stated that "the AG believes [in] this approach where the focus is 'Let's take care of New Hampshire,' the approach is not 'Let's keep out Massachusetts and Maine'").

Consequently, the purpose section of RSA 149-M:11, I, does not reflect a protectionist viewpoint. RSA 149-M:11, I. Instead, it focuses on accommodating New Hampshire waste. Specifically, three of the five enumerated paragraphs in the purpose section of RSA 149-M:11 – paragraphs (a), (b), and (d) – focus on satisfying New Hampshire's needs. *Id*. The remaining paragraphs relate to other topics. *Id*. At least in the purpose section, therefore, nothing indicates a goal to accommodate *only* New Hampshire waste.

Later paragraphs detail how these purposes will be achieved. Two of these are III(a) and V which relate to the satisfaction of need. RSA 149-M:11, III(a) and V. Paragraph III(a) requires the Department to determine whether a proposed facility can "accommodate" a "need" and refers to

paragraph V with respect to implementation. RSA 149-M:11, III(a). Paragraph V consists of subparagraphs (a) through (d). *Id*. at V. Subparagraph V(a) requires the Department to determine the amount of waste generated solely in New Hampshire. *Id*. at V(a). Subparagraph (V)(b) then requires the Department to identify the types of solid waste that can be managed by other methods established in RSA 149-M:3. *Id*. at V(b). Next, subparagraph (V)(c) requires the Department to identify all existing permitted waste facilities that accept the same type of waste as the facility being proposed. *Id*. at V(c).

The final subparagraph, subparagraph V(d), consists of two sentences. *Id*. at V(d). The first sentence in V(d) requires the Department to calculate a shortfall. *Id*. The second states: "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*." *Id*. (emphasis added). Any intellectually honest examination of the statute reveals that the second sentence of paragraph V(d) creates interpretive difficulties. As discussed more fully below, the sentence does not say that "need" exists to the extent a "shortfall" exists. Instead, however curious it may seem, it relates "need" to itself. This nettlesome sentence represents an uneasy truce between those in the Legislature who desired to accommodate only New Hampshire waste and those who recognized a reality that forbids it. Although the provision may embody some kind of relationship between shortfall and capacity, it also reflects a purposeful ambiguity that allows the Department to operate within constitutional and factual constraints. The Hearing Officer's requirement for a strict one-to-one ratio between New Hampshire-generated waste and permitted capacity fails to respect this compromise and by doing so, as explained below, ignores the actual language in paragraph V.

B. The Hearing Officer's Premise that Proposed Capacity of a Facility Must Equal the Projected Capacity *Shortfall* Reads Words into the Statute that the Legislature Did Not See Fit to Include.

The Hearing Officer's entire ruling rests on a premise that proposed capacity must equal, both in time and amount, the projected capacity *shortfall*. In other words, the Hearing Officer treats the words "need" and "shortfall" as synonymous. Evidence of this arises throughout his opinion.

For instance, although at first only implying a relationship between "capacity *need*" and "capacity *shortfall*," the Order later fully substituted the word "shortfall" for "need." It states: "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*." BA50 (emphasis added). On the next page, this word change became the basis for the Hearing Officer's overarching factual finding: "[I]f there is only X amount of *shortfall*, there can only be X amount of capacity *need*." BA51 (emphasis added).

"[W]hen the legislature uses two different words, it generally means two different things." *State v. Bakunczyk*, 164 N.H. 77, 79 (2012). In this case, the statute uses the term "need" in some locations and the term "shortfall" in others. In paragraph V, it specifically states that a need exists "to the extent that the proposed facility satisfies that *need*." RSA 149-M:11, V (emphasis added). When the Legislature meant to say "shortfall," including in paragraph V, it did so. The Legislature could easily have used the word "shortfall" in place of "need" – it clearly knew how – but it did not. In the alternative, the Legislature could have stated the Hearing Officer's ultimate interpretation had it intended that outcome. For instance, the Legislature could have said: "The Department shall only permit capacity at times and in amounts that equal the projected shortfall." Again, it did not do so. The actual language of the statute, although admittedly more circular and perhaps opaque, does not equate "need" to "shortfall."

Instead, for better or worse, paragraph V defines "need" in relation to itself, not in relation to "shortfall," and this Court "will not read language into a statute that the legislature did not see fit to include." *Sivalingam v. Newton*, 174 N.H. 489, 502 (2021).

C. The Department's Method for Determining "Need," Though Imperfect, Better Complies with the Statutory Language and Legislative Intent.

The Department's approval of Stage VI allows the word "shortfall" and the word "need" to be viewed as separate terms while simultaneously providing the Department with limited discretion. Pursuant to its understanding of the statute, the Department related "shortfall" to "need" in a way that essentially creates a trigger or gatekeeping mechanism. Once a shortfall exists and once an applicant shows that its proposed facility would operate during that shortfall, the Department acknowledges that the facility satisfies "need" in a manner that allows the Department to continue with permitting. BA65. But the Department's analysis does not necessarily end there as it viewed "need" as encompassing something more; though admittedly, not much more. A463, lines 17-23; A465, lines 8-12. Even if a facility would operate during a time of shortfall, the Department believed it could still deny an application for limited grounds related to "need." *Id*. Those grounds did not exist here, so the Department did not make any findings related to them. Nevertheless, one can infer that the Department believed that it had enough discretion to deny an application in at least extreme situations; for instance, if proposed capacity far outweighed the amount of expected waste generated in New Hampshire. The Department also believed it could evaluate whether the proposed operating plan for a proposed facility made it unsuited to accommodating New Hampshire waste. A467, lines 1 – 10 (discussing concerns related to "operating life"). Admittedly, denials on these bases might occur rarely, especially if a savvy

applicant tailored its application to meet Department expectations, but they could occur.

The Hearing Officer took issue with the Department's method in his Order. The Hearing Officer asserted that the Department did not provide a reasoned analysis for its decision, it merely used an overly broad rule of thumb; namely, that satisfaction of any amount of New Hampshire "need," not satisfaction of a proportional amount of need, provided a basis for issuing the permit for the entire amount requested. BA65. Looking at the application review summary, the Hearing Officer also described what he deemed discrepancies between what the Department argued for in its pre-hearing memorandum and the Department's summary of what it did during permitting. He stated:

> 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.

BA47. This reflects an understandable misgiving given the Department's apparent reticence to do more than its perceived gatekeeping function except in relatively extreme circumstances; however, contrary to the Hearing Officer's assertion, at the hearing the Department described a more fluid permitting process than that reflected in the permit summary.[8] Waste Management Division Director Michael Wimsatt responded to the assertion that finding any shortfall during the proposed operating life of a facility resulted in a permit by saying "[i]t's *part* of the analysis," and later stating

[8] The Hearing Officer relies extensively on communications related to the previous NCES permit application that NCES withdrew. This reliance raises questions of both due process and fairness for NCES. Those communications never resulted in either a permit or denial. In other words, no Department decision issued. RSA 21-O:14, I. Without a Department decision, NCES had no need, right, or ability to appeal any Department statements. It cannot now be denied a permit based on those statements.

"I don't think the analysis is [as simple or direct as that]. Each application has to be taken by itself…" A463, lines 17-23; A465, lines 8-12 (emphasis added). When asked if any overlap with a shortfall ended the analysis, he replied: "[t]hat contributed to its determination. It's also true that -- but the [proposed] operating life of the facility doubled from that time or between the two applications, and so that was a consideration as well." A467, lines 5-10; *see also* A524, lines 16-22 (wherein Director Wimsatt states that a connection between present capacity and future need "is theoretically true" and "may well be true in certain circumstances"). Therefore, although the Department did not view the statute as requiring one-to-one proportionality between New Hampshire waste generation and proposed capacity, it did reserve the ability to deny applications that, in its opinion, varied too far from the needs of New Hampshire.

Legislative history supports a similar interpretation. Bill sponsors seemed to envision a general relationship between proposed capacity and New Hampshire need that would protect against outliers but that would not create a strict one-to-one relationship. *See* A179, April 10, 1991 Senate Committee on Environment Hearing (this bill "would not forbid trash from out of state, but it talks about the fact that capacity has to show a *relationship* to the needs within the borders of the state…." (emphasis added)). The Legislative history does not envision permitting only the amount projected for in-State waste, but rather foresees preclusion of new facilities if vastly disproportionate to the amount of waste generated in New Hampshire. *See* A184 (hoping to guard against a facility "which was *far* in excess of anything we need in New Hampshire") and A185 ("I think the question of what was meant by public benefit has to be tightened up to make sure that we wouldn't be fighting 1,500 and 2,000 [ton] or larger facilities when they are *clearly not needed* or being designed for *any* in-state capacity needs" (emphasis added)).

For their part, Waste Council Members articulated reasons why the Department must be able to use its discretion to permit capacity in an amount greater than just the exact amount of New Hampshire generation found by the Department. First, Waste Council Members recognized that the projected capacity shortfall represents only an estimate. BA57. Second, Waste Council Members drew on their own experience to realize that attempting to stay close to the projected shortfall estimate can be fraught with issues, especially given short-term, quickly changing conditions. *See* A708, lines 4-9 (Council Member stating: "the DES acted reasonably, because I don't think that we ever want to get to the point where we're riding that line where there's capacity, not capacity, you know, that we want always to have sufficient capacity" (emphasis added)). Other members recalled what happened when unexpected capacity shortages led to high prices:

> at the end of last year where, through unforeseen issues, capacity became a real big problem on short-term. People had to make [zigs and zags]. It was surprising to me when it happened because I've been doing this for 35 years. I've never seen anything like it. So it can happen.… you do have to have some wiggle room when it comes to capacity.

A698, lines 15-23; A699, lines 1-5. The Department's method provides it with discretion to preclude facilities wholly disproportionate to the needs of New Hampshire but also allows enough flexibility to meet constitutional mandates and real-life constraints.

The Department's method admittedly gives minimal emphasis to the phrase "to the extent" and the word "satisfies" in paragraph V(d). As the Department previously conceded, the Hearing Officer provided some important perspectives on these terms that deserve consideration. For instance, the Department agrees with the Hearing Officer's assertion that the phrase "to the extent" normally establishes a relationship between the

subjects being compared. *See e.g., Hillsborough County. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) ("state law is nullified *to the extent* that it actually conflicts with federal law" (emphasis added)). This relationship usually occurs as a ratio or proportion. *See e.g., In re Hampers & Hampers*, 166 N.H. 422, 436 (2014) ("the definition of 'investment income' limits the deduction of capital losses, at most, *to the extent* of any capital gains within the same year" (emphasis added)). Further, as stated by the Hearing Officer, the word "satisfies" also means something akin to "resolves." BA50; *See also* BA68.

However, by using these terms to create a one-to-one ratio between permitted capacity and "shortfall," the Hearing Officer went too far. As demonstrated above, the terms "to the extent" and "satisfies" in paragraph V(d) do not refer to mathematically quantifiable subjects like "shortfall" or the amount of "waste generated in New Hampshire." Instead, these terms refer to the more qualitative concept of "need," which they then relate to itself. By stating it in this manner, the Legislature left open the possibility that satisfying a capacity "need" includes more than a simple mathematical relationship to "shortfall." For instance, to actually satisfy New Hampshire "need" requires, at a minimum, some ability to account for the realities inherent in solid waste disposal. As noted by the Waste Council Members, these include short-term or unexpected variations in waste production. A697-699; 707-708. These conditions become exacerbated during times of crisis, i.e., at times when New Hampshire's needs may be greatest.[9]

Again, the Department admits that placing a stronger relational emphasis on these terms differs from what the Department has done in the past. If this Court determines that the Department acted wrongly in issuing

[9] The Court may take judicial notice of the U.S. FEMA publication issued after Hurricane Katrina as an example:
https://iwaste.epa.gov/rpts/debris_mgmt_plan_katrina.pdf.

its decision, the Department welcomes any guidance that this Court can provide. However, the Hearing Officer's decision creates a strict correlation between "need" and shortfall contrary to the statutory language and unworkable in practice.

D. The Use of the Present Tense Verb "Satisfies" Does Not Mean that a Facility Can Only "Satisfy" a "Need" When It Operates During a Time of Projected Shortfall.

Although the Department agrees with some aspects of the Order, it takes issue with the Hearing Officer's interpretation that, because the statute uses the word "satisfies" in the present tense, the proposed facility cannot "satisfy" a "need" unless it only operates entirely contemporaneous with a projected shortfall. The Order states:

> 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.

BA51 (emphasis original). The Order on Reconsideration relies even more heavily on the tense of "satisfy." BA67-71.

However, use of a present tense verb does not create an artificially strict temporal relationship. For instance, the Minnesota Court of Appeals examined the use of the word "endangers" in an executive order intended to protect tenants. *Fairmont Hous. & Redevelopment Auth. v. Winter*, 969 N.W.2d 839, 848-49 (Minn. Ct. App. 2021). The defendant argued that

"because 'endangers' is present tense," the executive order "require[d] a *current* endangerment," or in other words, a contemporaneous action. *Fairmont*, 969 N.W.2d at 848 (emphasis original). The plaintiff countered with a more sophisticated grammatical argument that the word "endangers" represents "the present indefinite tense (also described as the simple present tense), which is a verb that does not require an ongoing act." *Id*. After reviewing these arguments, the court held "that present-tense verbs in statutes do not require ongoing behavior." *Id*. at 848-49. The court further noted that the executive order lacked modifiers, like the word "current," that a Legislature would usually use to create a requirement that behavior be contemporaneous:

> Moreover, despite being written in the present tense, executive order 20-79 does not use the words "current" or "currently" to modify the endangerment. Because [it] omits those words, we will not read them into an unambiguous rule under the guise of interpretation….

Id. at 849 (internal citation omitted). In this case, the Hearing Officer recognized that the statute lacks words like "current" that would usually be used to indicate contemporaneous actions. BA69 ("NHDES is correct that there are no explicit time restrictions in RSA § 149-M:11, III and V"). He nevertheless read a strict temporal relationship into the statute.

Other courts have reached various conclusions about the use of the present tense. Some have found that it can relate even to past actions. *See Hayes v. State*, 474 P.3d 1179, 1183-84 (Alaska Ct. App. 2020) ("the present tense is also commonly used to describe the content of a recording or photograph, even though the recording or photograph was necessarily made at some time in the past"). Some jurisdictions read the present tense as a strong indicator that a statute excludes past actions; however, almost all allow the present tense to include the future. *See Crown W. Realty, LLC v. Pollution Control Hr'gs Bd.*, 435 P.3d 288, 304 (Wash. Ct. App. 2019)

("A statute's undeviating use of the present tense presents a striking indicator of its prospective orientation"); *see also Sherley v. Sebelius*, 396 U.S. App. D.C. 1, 7, 644 F.3d 388, 394 (2011) (Although "[t]he use of the present tense in a statute strongly suggests it does not extend to past actions[, t]he Dictionary Act provides 'unless the context indicates otherwise ... words used in the present tense include the future as well as the present'") *but compare Saint Alphonsus Reg'l Med. Ctr., Inc. v. Ada Cty.*, 487 P.3d 333, 340 (Idaho 2021) ("The repeated use of the present tense verb 'are' … indicates" something occurring "at the time"). Still other jurisdictions recognize that Legislators use the present tense for other purposes, including indicating actions independent of time. *State v. Gonzalez-Valenzuela*, 365 P.3d 116, 125 (Or. 2015) ("One of the other meanings expressed by the simple present tense is 'timeless' statements, like scientific, mathematic, or geographic facts, such as, 'Water boils at 100° C'"). In the Department's view, the Hearing Officer erred by over-relying on the tense of "satisfies" and ascribing to it a rigid meaning.

In his Order on Reconsideration, the Hearing Officer also held that the word "'satisfies' must be strictly interpreted." BA73. However, he fails to say why. Usually only special circumstances merit strict interpretation of terms. *See Estate of Gordon-Couture v. Brown*, 152 N.H. 265, 271 (2005) (using "strict interpretation" when abrogating common law rights); *see also Town of Hooksett v. Baines*, 148 N.H. 625, 628-29 (2002) (using strict interpretation because the statute "expressly provide[d]" for it). Otherwise, normal rules of statutory construction apply; namely, that terms, including present tense terms, should be construed according to their ordinary usage and considered in context to effectuate a statute's purpose and intent. *Ocasio v. Fed. Express Corp.*, 162 N.H. 436, 450 (2011); *State v. Keenan*, 171 N.H. 557, 561 (2018). These rules of construction take precedence over strict, overly literal interpretations that narrow words

capable of broader, more flexible interpretation to a singular construction. *See Newell v. Moreau*, 94 N.H. 439, 446 (1947) ("We prefer a liberal construction of the statute consistent with its history and general policy rather than a strict and literal interpretation"); *see also Appeal of Mikell*, 145 N.H. 435, 439-40 (2000); *see also Appeal of Inter-Lakes Sch. Bd.*, 147 N.H. 28, 32 (2001). In fact, rather than requiring strict construction against the agency, New Hampshire opinions establish that the Department's interpretation of the statute it implements enjoys at least some persuasive weight. *In re Carrier*, 165 N.H. 719, 724 (2013).

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."

CONCLUSION

The Department asks that this Court uphold the decision of the Department, as it was upheld by the Waste Council Members or, at a minimum, invalidate the decision of the Hearing Officer and remand the matter for further proceedings consistent with whatever instruction the Court may provide.

K. Allen Brooks shall provide oral argument.

Respectfully submitted,

STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES

By its attorneys,

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June 15, 2023

/s/ K. Allen Brooks

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CERTIFICATION OF SUBMITTAL OF APPEALED DECISIONS

Pursuant to N.H. Supreme Court Rule 16(3)(i), the State hereby certifies that each written decision the State is appealing is being provided with this brief. The Waste Management Council's May 11, 2022 "Final Order on Appeal," and the November 3, 2022, "Order on State of New Hampshire Department of Environmental Services' Motion for Reconsideration," are included within the addendum to this brief.

STATEMENT OF COMPLIANCE

The State hereby certifies that this brief complies with the word limitations of New Hampshire Supreme Court Rule 16(11) by containing 9,480 words exclusive of cover page, table of contents, table of authorities, and addendum.

June 15, 2023 /s/ K. Allen Brooks
K. Allen Brooks, N.H. Bar #16424

CERTIFICATE OF SERVICE

The State hereby certifies that a copy of the foregoing has been served this day via the New Hampshire Supreme Court's electronic filing service upon counsel of record for North Country Environmental Services, Inc. and Conservation Law Foundation, Inc.

June 15, 2023 /s/ K. Allen Brooks
K. Allen Brooks, N.H. Bar #16424

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.

RSA 149-M:11. Public Benefit Requirement.

I. The general court finds and declares as follows:

(a) It is responsible to provide for the solid waste management need of the state and its citizens.

(b) In order to provide for these needs, it must ensure that adequate capacity exists within the state to accommodate the solid waste generated within the borders of the state.

(c) Facilities necessary to meet state solid waste capacity needs must be designed and operated in a manner which will protect the public health and the state's natural environment.

(d) An integrated system of solid waste management requires a variety of types of facilities designed to accommodate the entire solid waste stream, including materials which can be recycled, recovered or reused, materials which can be composted, and residual materials which must be disposed of permanently.

(e) The enactment of statutes to address the needs identified in this section is an exercise of the police power granted to the general court under part II, article 5 of the New Hampshire Constitution.

II. The general court declares that it is the purpose of this chapter to ensure benefit to the citizens of New Hampshire by providing for solid waste management options which will meet the capacity needs of the state while minimizing adverse environmental, public health and long-term economic impacts.

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.

(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, and one or more solid waste management plans submitted to and approved by the department under RSA 149-M:24 and RSA 149-M:25.

IV. The department shall also consider as part of its public benefit determination:

(a) The concerns of the citizens and governing bodies of the host municipality, county, and district and other affected persons. For any proposed solid waste facility, including

transfer stations, designed to accommodate in excess of 30 tons of solid waste per day, the department shall hold at least one public hearing in the host municipality, or in the case of an unincorporated town or unorganized place in the host county, in order to take testimony to identify those concerns.

(b) The economic viability of the proposed facility, including but not limited to, its ability to secure financing.

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.

VI. All applicants under this chapter shall provide any information requested by the department. If an applicant declares that any information requested under this section should be considered exempt under RSA 91-A:5, IV, the attorney general shall determine the reasonableness of such declaration and, if the attorney general agrees, shall direct the department to treat it as confidential information which shall be considered exempt under RSA 91-A:5, IV.

VII. Any proposed solid waste facility to be owned and controlled by a solid waste district, or a member municipality on behalf of its solid waste district, shall be deemed to fulfill the requirements of subparagraph III(a), provided that it is built within the district and shall serve only the capacity needs of that district. Any permit issued for a facility which fulfills the public benefit requirement by relying on this paragraph shall state that the facility is limited to receiving solid waste generated within that district.

VIII. Each applicant for a solid waste permit under this chapter shall have the burden of demonstrating that a proposed solid waste facility provides a public benefit by showing

how the proposed facility satisfies the criteria listed under paragraph III. Such demonstration shall be included as part of each application for a solid waste permit.

IX. If the department determines that an applicant has failed to demonstrate that it satisfies the criteria listed under paragraph III, it shall notify the applicant in writing that its application has been denied, and provide a written explanation of the reasons for that determination.

X. If the department determines that an applicant has demonstrated that it satisfies the criteria listed under paragraph III, it shall state that determination in any permit issued.

XI. Facilities permitted under this chapter shall be operated so as to provide a substantial public benefit consistent with the information submitted as part of the application concerning how the facility accommodates New Hampshire capacity needs. If a permittee cannot demonstrate consistency with information submitted in its permit application, and where it no longer meets needs identified in the state solid waste management plan and one or more solid waste management plans submitted to and approved by the department under RSA 149-M:25 due to circumstances beyond its control, as determined by the commissioner and the attorney general, the department shall not enforce this paragraph based solely upon such inconsistency.

N.H. RSA 149-M:11 (2023)