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

REPLY 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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I. DEPARTMENT'S REPLY TO THE NCES BRIEF

A. Issues Raised by NCES that Attempt to Collaterally Attack the Permit or the Department's Process Related to Issuance of the Permit Have Not Been Properly Preserved

North Country Environmental Services, Inc. ("NCES") asserts that the Hearing Officer's Final Order transformed it into an "aggrieved party." NCES Br. pg. 19 and 39. To the extent that NCES argues that being aggrieved by the decision of the Hearing Officer allows it to raise new issues designed to undermine the permit or the New Hampshire Department of Environmental Services ("Department") process in issuing the permit not contained within a timely notice of appeal, the Department disagrees. RSA 21-O:14 allows appeals of anyone "aggrieved by a *department* decision." RSA 21-O:14, I-a (emphasis added). Except in the limited and unusual event that they provide a defense to issues raised by the appellant (in this case, Conservation Law Foundation, Inc. ("CLF")), claims that attempt to undermine a permit or the process the Department used to issue a permit must be raised in a notice of appeal. *Id*.

However, to the extent that NCES merely argues that issues created by the Hearing Officer's decision may be challenged pursuant to RSA 541, the Department agrees with NCES. RSA 21-O:14 provides as much. RSA 21-O:14, III ("Persons aggrieved by the disposition of administrative appeals before any council established by this chapter may appeal such results in accordance with RSA 541"). Furthermore, the Department agrees that the Hearing Officer's decision in this case creates a new methodology;

one that creates novel issues. These issues could not have been raised in the notice of appeal because they did not exist at the time of appeal. The appropriate process for issues created for the first time by the Hearing Officer's decision consists of a request for rehearing followed by an appeal to this Court. RSA 541:4.

B. NCES Wrongfully Relies on Administrative Gloss

1. NCES's Argument Regarding Administrative Gloss Was Not Properly Preserved.

As stated above, issues with a permit must be raised in a timely notice of appeal. RSA 21-O:14. NCES did not raise administrative gloss in a notice of appeal. In fact, it did not appeal the Department's decision at all. NCES's argument evolved to include administrative gloss only at a late stage in the proceeding, after the evidentiary proceeding ended, at which point the Hearing Officer properly refused to consider it.

NCES cites two cases to support its claim that it can raise issues at any time: *City of Portsmouth v. Schlesinger*, 140 N.H. 733 (1996) and *North Country Env. Svcs. v. Town of Bethlehem*, 146 N.H. 348 (2001). *Schlesinger* involved both a regulatory action, i.e., creation of a special zoning district, and a bargained-for exchange requiring the developer to pay money as an "impact fee." *Schlesinger*, 140 N.H. at 734-735. This "impact fee" formed the basis of a *quid pro quo* related to the creation of the special zoning district. In that case, the developer did not challenge the creation of the district within the statute of limitations related to zoning board decisions. In fact, the developer never challenged the creation of the special district at all. The special district was the very thing the developer wanted. Instead, the developer later challenged the terms of the bargain

related to payment of the fee as unlawful. *Schlesinger*, 140 N.H. at 734. The city argued that anything related to the special district should have been challenged pursuant to RSA 677:2 within the time limited provided by statute. *Id*. at 734-35. This Court disagreed finding that the issues raised "[were] not questions of administrative action," stating:

> We conclude that questions of the ordinance's legality and ultimately the binding effect of the promissory note are not questions of administrative action under RSA 677:2 and RSA 677:4, but affirmative defenses relating to the underlying legality of the legislative action.

Id. at 735.

Similarly, in *N. Country Envtl. Servs. v. Town of Bethlehem*, a predecessor to NCES received a special exception from the Town of Bethlehem zoning board. *Bethlehem*, 146 N.H. at 350. As part of a larger bargain to obtain the special exception, NCES's predecessor agreed to provide a discount from its tipping fee for in-town residents and to surcharge out-of-town waste. *Id*. at 350. NCES later alleged that "the tipping fee discount and surcharge for out-of-town waste were unenforceable." *Id*. at 357. The town argued that such a challenge should have been raised in an appeal of the special exception. *Id*. at 357. This Court sided with NCES for the same reasons articulated in *Schlesinger*; namely, that NCES was not challenging the special exception, it was challenging the outside financial bargain that induced the town to issue the special exception. *Id*. at 357-358. This bargain was not an "administrative action" that could be challenged.

In this case, unlike *Schlesinger* and *Town of Bethlehem*, NCES

appears to have shifted its defense of the appeal to a direct challenge of the Stage VI permit. The Stage VI permit is the "administrative action" currently being appealed. Therefore, *Schlesinger* and *Town of Bethlehem* do not apply. To make matters more complicated, however, NCES does not appear to be challenging *that* the permit was issued but merely *why* it was issued. Yet NCES does not challenge any Department finding, instead focusing on conversations related to a different permit application that NCES voluntarily withdrew. Although ostensibly raised to rebut assertions of the appellant and findings of the Hearing Officer, its argument has morphed into a frontal assault on the Department and its decision-making. Having first staunchly defended the Department's actions, NCES ends up accusing the Department of "revanchism." NCES Brief, pg. 31; *see also* NCES Brief, pg. 14 (describing "NHDES's novel requirement") *but compare* State's BA 617, Lines 19-20 (wherein NCES asserts "the record is very clear in this case that DES followed each step of that statute to the T").[1] NCES's decisions regarding how and when to raise the issue of administrative gloss has made the process appear unnecessarily complicated. In truth, the process is relatively simple.

NCES's argument regarding administrative gloss could have been properly raised at the time of the initial hearing, not as a challenge to the permit, but as an alternate reason to uphold the permit. In other words, NCES could have made the equivalent of a "harmless error" argument, asserting that even if the Department made some mistake in its evaluation of the Stage VI permit, the permit should have been issued anyway because

[1] "State's BA" refers to the appendix filed with the State's Brief.

it satisfied the longstanding, and now controlling, policy of the Department. NCES raised no such argument at the hearing. Although it "reserved" its right to do so, it waited until rehearing to provide examples and argument that it believed supported administrative gloss. For the reasons discussed below, the examples raised by NCES fail to establish an administrative gloss. More importantly, as a procedural matter, the Hearing Officer did not abuse his discretion by not allowing a new hearing with new evidence on this issue.

2. The Facts as Alleged by NCES Do Not Establish Administrative Gloss.

The admissibility of the facts alleged and the documents submitted by NCES is currently being challenged. *See* CLF's Motion to Strike dated August 4, 2023. However, even if one were to consider the information submitted by NCES, this information does not support its argument that administrative gloss requires approval as long as a shortfall will occur any time within the 20-year planning period (the so-called "aggregated capacity" method). In other words, according to NCES, administrative gloss mandates, not just that a facility may be approved if its operation does not overlap with a shortfall, but that it must be approved if the Department identifies any shortfall within the 20-year planning period. CR2682-2710.[2]

In its June 10, 2022 Motion for Rehearing (CR2682-2710) which NCES incorporated into its brief, NCES looked to six past decisions on solid waste facility applications, and its own reformulated data, to support

[2] References to the Certified Record shall be made by "CR." The referenced pages show that the Department made this same argument in detail before the Council.

its argument on administrative gloss. NCES Brief, pgs. 29-34. However, NCES's information merely shows that at various points the Department granted permits to applicants to operate solid waste facilities solely before, solely after, or both before and after the beginning of a capacity shortfall.[3]

First, with respect to the 2003 Mt. Carberry Secure Landfill ("Mt. Carberry") decision, information provided by NCES merely demonstrates that the facility proposed to operate for at least the entire 20-year planning period (i.e., 2002 to 2022) with a projected shortfall beginning in 2011.[4] CR2614-2621 (Exhibit A). In other words, the facility would operate during eleven years of shortfall. The Department conditioned the permit to ensure this would occur.

Second, with respect to the 2003 NCES Stage IV decision, NCES again merely demonstrates that the Department approved a facility that would operate both before and during a shortfall. Specifically, of its total 10.5-year operating life, more than eight would occur during a shortfall. CR2622-2634 (Exhibit B).

Third, with respect to the 2018 TLR-III Waste Management of New Hampshire, Inc. decision, NCES's "reconstruction" (*id*. at 2645-2651 (Exhibit D)) is inaccurate. In that case, the Department determined, after reviewing the applicant's submitted data, that a shortfall would occur in 2020 (contrary to NCES's reconstructed data, which finds the shortfall

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[3] At the Council, NCES attempted to use its own statements and statements of other applicants, not the Department's statements, to support its arguments. CR2569-2679.

[4] The Department accepts NCES's reconstructed data as true for the purposes of this reply only.

occurring in 2024)). *See* CR2682-2710 (Exhibit 1 to Department's June 24, 2022 Limited Objection to NCES Motion for Rehearing). Operations for TLR-III would not begin until 2021. Accordingly, the TLR-III decision approved operation of the facility entirely after the projected beginning of the shortfall.

Fourth, NCES cited to the 2019 Mt. Carberry decision in Exhibit E of its Motion for Rehearing. CR2652-2658. This decision cannot demonstrate that the alleged "aggregated capacity" method was used. Here, too, the Department approved the 2019 application for operation both before and after an identified shortfall, which does not indicate that the alleged "aggregate capacity" method was used.

With respect to the Stage V NCES permit (CR2635-2644 (Exhibit C)), even if one accepted NCES's reformulated data as accurate, it shows only that the Department did in fact approve proposed capacity for operation entirely outside of the period of a projected shortfall. However, although the Department seemingly did not demand an overlap in this case, this does not establish that the Department consistently implemented a policy of automatic approval whenever a shortfall existed within the 20-year planning period.

NCES's sixth and final example is the 2013 Mt. Carberry denial. *Id*. at 2659-2667 (Exhibit F). In that case, the Department denied an application that proposed to operate until 2048, well beyond the 20-year planning period. This denial clearly does not support NCES's argument that the Department consistently approved any application for a facility as long as a capacity need existed during the 20-year planning period. For

these reasons, NCES fails to establish an administrative gloss supporting its "aggregate capacity" approach.

II. DEPARTMENT'S REPLY TO THE CLF BRIEF

A. This Court May Rely on Legislative History to Determine Legislative Intent

CLF asserts that the procedural history of the appeal forecloses consideration of extrinsic evidence because no party ever argued that the statute was ambiguous. CLF Brief, pgs. 18; 93-94. CLF cites to pages 4 and 5 of the Hearing Officer's November 3, 2022 "Order on North Country Environmental Services, Inc.'s Motion for Reconsideration" to support this assertion. CLF Brief, pgs. 93-94. In it, the Hearing Officer states: "none of the Parties have argued the relevant language in the statute is ambiguous." *Id*. He further elucidates this finding in a footnote. *Id*. at fn. 3. However, the relevant footnote merely provides another example of the Hearing Officer slicing an issue too finely.

First, in the footnote, the Hearing Officer appears to hold that a party must specifically use the word "ambiguous" to preserve any argument that relies on extrinsic evidence. Both the Department and NCES made arguments about proper interpretation of the statute. For its part, the Department asserted generally what it asserts now, that the statute provides the Department with discretion and must be interpreted to effectuate its terms. State's BA 105-108. New Hampshire law does not indicate any talismanic significance to uttering the word "ambiguous" when making such arguments. Generally, the tribunal will decide whether a statute contains an ambiguity and, therefore, whether extrinsic evidence will be allowed. *K.L.N. Constr. Co. v. Town of Pelham*, 167 N.H. 180, 187 (2014)

("because *we* do not find the term 'refund' ambiguous when read in the context of the entire statute, *we* do not consider the legislative history" (emphasis added)).

Second, in that same footnote, the Hearing Officer admits that NCES actually did argue that the statute was ambiguous, it simply did so in the alternative. The Hearing Officer found: "NCES asserted that *if* RSA § 149-M:11 is ambiguous, then administrative gloss must apply, but this statement is not an argument that the statute is ambiguous." CLF Brief, pgs. 94, fn 3 (emphasis original). Generally, litigants may make arguments regarding statutory construction in the alternative. For instance, in *State v. Surrell*, 171 N.H. 82 (2018), this Court noted that the defendant made two "arguments in support of [his interpretation]: (1) he assert[ed] that the plain language of the statute supports his interpretation; and (2) he argue[d] in the alternative that we should conclude that the statute is ambiguous and examine legislative history." *Id*. at 85. After ruling against the defendant's plain meaning argument, the Court addressed the alternative argument. *Id*. at 87 ("We next turn to the defendant's alternative argument").

Therefore, in this case, the information on administrative gloss proffered by NCES should not be considered, not because NCES failed to say the word "ambiguous" or argue solely in favor of an ambiguity, but because NCES introduced the information too late. Other information, whether properly introduced or of a type that courts normally consider as part of a public record, such as legislative history, may be considered by this Court if it determines that an ambiguity exists.

B. <u>CLF Mischaracterizes the Department's Position</u>

In a footnote on page 22 of its brief, CLF mischaracterizes the

Department's interpretation of the Hearing Officer's decision. CLF quotes the Department's statement that, according to the Hearing Officer, proposed capacity "must equal, both in time and amount, the projected capacity shortfall." CLF Brief, pg. 22, fn. 2. CLF then purports to refute this assertion by stating: "The Council [by which CLF means the Hearing Officer] determined that a facility can satisfy a capacity need by operating only when a need exists, not that a facility must continue to operate until a shortfall ends, or that a facility must address all of the state's waste needs during that time." CLF Brief, pg. 22, fn. 2. The Department never asserted that a facility must operate until a shortfall ends or address all waste. CLF takes the Department's quoted statement out of context. The Department's hypothetical addressed a case like this one, and cases similar to the hypotheticals described by the Hearing Officer, where an applicant seeks authorization for capacity beyond the time and amount of a projected shortfall. The Department emphasized that the Hearing Officer's decision functions as a strict limitation on both time *and* amount. The Hearing Officer asserted this repeatedly. State's Brief pg. 51 (Final Order pg. 10) ("if there is only X amount of shortfall, there can be only X amount of capacity need"). The Department asserts that this presents a highly rigid and unworkable methodology.

The other issues raised by CLF have already been addressed in the Department's brief. The Department will not restate those arguments here.

CONCLUSION

The Department asks that this Court grant the relief requested in the State's brief.

Respectfully submitted,

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August 24, 2023

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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 2,840 words exclusive of cover page, table of contents, and table of authorities.

August 24, 2023

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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.

August 24, 2023 /s/ K. Allen Brooks
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