THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2022-0690

Appeal of New Hampshire Department of Environmental Services

Rule 10 Appeal From Administrative Agency
(New Hampshire Waste Management Council)

BRIEF OF APPELLANT
NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.

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QUESTIONS PRESENTED

1. Did the hearing officer for the waste management council err
   (a) in determining that CLF had standing to pursue an appeal before the council based on the alleged future impacts of the challenged NHDES permitting decision on just two of CLF's members (Certified Record ("CR") at Tab ("T") 76, 2607-12);
   (b) in denying NCES's request for an evidentiary hearing on CLF's claimed basis for standing (CR at T76, 2611); and
   (c) in determining CLF's standing without obtaining rulings from the council on the factual issues underlying CLF's claim of standing as required by RSA 21-M:3, IX(c)-(e) (*Id.*)?
2. Did the hearing officer for the waste management council err in
   (a) ruling that NHDES cannot find the existence of "capacity need" as required by RSA 149-M:11, III(a) and V to support issuance of a permit for new waste disposal capacity unless all of the new capacity will be used only after there is a projected shortfall of capacity for New Hampshire-generated waste[1] (CR at T76, 2586-2597);
   (b) setting aside the council's determination on February 22, 2022, that NHDES acted reasonably and lawfully in finding that there was a need for NCES's Stage VI capacity as required by RSA 149-M:11, III(a) and V (CR at T76, 2605); and

[1] Included in this issue is the subsidiary question of whether the hearing officer's construction of the statute is unlawful because it would render it unconstitutional under the federal dormant commerce clause.

(c) refusing to apply the decades-old administrative gloss NHDES has given RSA 149-M:11 since its adoption (CR at T76, 2590-2591)?

STATEMENT OF THE CASE

On October 9, 2020, NHDES granted a permit for the Stage VI expansion of NCES's municipal solid waste landfill in Bethlehem. CR at T1, 2.[2] On November 9, 2020, CLF appealed that permitting decision to the New Hampshire Waste Management Council pursuant to RSA 21-O:14, claiming that NHDES improperly determined that the capacity of Stage VI satisfied the public benefit requirements enumerated in RSA 149-M:11. *Id*. at T1, 3-5.

Because CLF's notice of appeal did not substantiate how it would be directly and adversely affected by NHDES's permitting decision, NCES filed a motion to dismiss the appeal for lack of standing. *Id*. at T8. CLF's objection to the motion included affidavits from two of its members claiming that they anticipated being adversely affected by the operation of Stage VI. *Id*. at T11, 77-80. NCES's reply challenged the sufficiency of alleged harm to a token number of members to establish an organization's standing, included an affidavit from its facility manager contesting the harms forecasted by CLF's two members, and sought an evidentiary hearing before the council to adjudicate the issues of fact created by the competing affidavits. *Id*. at T12, 112-13. The hearing officer denied NCES's request for an evidentiary hearing, determined that the contested

[2] NCES references the certified record utilizing "T" and Bates numbering to identify the corresponding tab of materials filed with the court by the council. "CR at T1, 2," for example, refers to Tab 1, Bates-numbered page 2 of the certified record.

affidavits of CLF's two members established CLF's standing, and denied NCES's motion to dismiss. Addendum at 44-46.

On June 30, 2021, NCES filed a motion to dismiss the appeal for failure to state a claim. CR at T22. The hearing officer granted the motion in one respect, dismissing CLF's capacity need claim on the ground that RSA 149-M:11, V does not "provide for a further temporal or other inquiry into whether a given proposal is 'substantial' or not." *Id*. at T30, 434-36. CLF sought reconsideration of the dismissal, arguing among other things that the capacity need element of the appeal raises questions of fact that could not be resolved by the hearing officer on a motion to dismiss. *Id*. at T32, 447-48. The presiding hearing officer retired, and a newly appointed hearing officer granted CLF's motion for reconsideration. *Id*. at T27 and T40.

The council held a two-day hearing on the merits of the appeal on February 18 and 22, 2022. At the conclusion of the hearing, the council deliberated publicly with the hearing officer on each claim in the appeal and ruled against CLF. Transcript[3] ("Tr.") at Day 2, 59-171. The council found, among other things, that NHDES measured, and acted reasonably in measuring, the short- and long-term need for Stage VI and acted lawfully and reasonably in determining that there was a capacity need for Stage VI. *Id*. at 95, 102, 112-13.

The hearing officer issued a written order on May 11, 2022, which was consistent with the council's determinations as to all but one of the claims. Addendum at 52-71. While the council determined that NHDES

[3] Order (5/19/23) on Joint Motion for Leave to File Corrected Transcript**.**

acted lawfully and reasonably in finding a capacity need for the NCES facility, the hearing officer determined that NHDES acted unlawfully in reaching that conclusion. *Id*. at 57-66. NCES and NHDES moved for rehearing pursuant to RSA ch. 541 (CR at T73 and T76), and NCES also moved to supplement the record on rehearing with documents that supported the administrative gloss argument set forth in its motion for rehearing[4]. *Id*. at T93. CLF objected to each of these motions and moved to strike the documents NCES sought to include with the record. *Id*. at Tabs 80-82. On November 3, 2022, the hearing officer issued separate orders denying the motions for rehearing and granting CLF's motion to strike the exhibits accompanying NCES's motion for rehearing. Addendum at 72-89; CR at T103, 105.

NCES and NHDES separately sought supreme court review of the hearing officer's order denying rehearing of the May 11, 2022 order. Following its denial of CLF's motion for summary affirmance, this court consolidated NHDES and NCES's appeals into the above-captioned docket.

[4] The administrative gloss argument was essentially that NHDES used an unprecedented and overly narrow standard to determine capacity need in the permitting decision. For reasons discussed in more detail below, NCES raised but did not argue administrative gloss at the merits stage because as the recipient of the permit it was defending the permitting decision, not engaging in an academic examination of its legal soundness. As noted below, this is entirely consistent with New Hampshire law. *Post* at 28-34.

STATEMENT OF FACTS

Permitting of waste disposal facilities in New Hampshire is carried out pursuant to a rigorous, comprehensive statutory and regulatory scheme. *See generally* RSA ch. 149-M; N.H. Code Admin R. Env-Sw 300 (permitting rules), 800 (landfill-specific rules), 1000 (requirements applicable to all facilities), and 1100 (additional facility requirements). One aspect of this regulatory regime is the requirement that NHDES determine that a proposed facility provides a "substantial public benefit" before granting a permit. *North Country Env. Svcs, Inc. v. Town of Bethlehem*, 150 N.H. 606, 612 (2004). In making this determination, NHDES must "consider, among other things, '[t]he . . . need for a facility of the proposed type, size and location to provide capacity to accommodate solid waste generated within the borders'" of New Hampshire. *Id*., *quoting* RSA 149-M:11, III(a). This "capacity need" is to be "identified as provided in paragraph V" of RSA 149-M:11. *Id*. RSA 149-M:11, V, sets forth the methodology for determining capacity need over a projected twenty-year planning period and provides that if a "shortfall" in disposal capacity is found after employing the methodology, "a capacity need for the proposed type of facility shall be deemed to exist to the extent that the proposed facility satisfies that need." RSA 149-M:11, V (a) and (d). The meaning and application of RSA 149-M:11, III and V are at the heart of the controversy on this appeal.

Landfills are typically developed in cells, with each successive cell both abutting and overlying the previous cell or cells. Any landfill owner who proposes an expansion that will provide disposal capacity that has not

received previous approval by NHDES must demonstrate that the new capacity will meet the "capacity need" element of the public benefit requirement. NHDES consistently employed the same analysis to evaluate this element since its enactment in 1991, but in 2020, it unilaterally changed course. Where it previously evaluated whether projected waste generation exceeded permitted capacity during a 20 year planning period, it altered its approach by inquiring *when* a shortfall would occur. The hearing officer took this a step further, impermissibly construing the statute to prohibit new capacity unless *all* of it will be provided after a shortfall occurs.

In January of 2019, NCES filed an application for a landfill expansion designated as "Stage VI." CR at T62, 1025. Consistent with the manner in which NHDES had determined capacity need since the legislature adopted the public benefit requirement in 1991 (see *post* at 31), NCES's application projected the total expected waste generation in New Hampshire over the statutory twenty-year planning period[5], deducted the amount of existing permitted disposal capacity available over the same period, and determined that there would be a minimum 3,800,000-ton shortfall during the period. CR at T62, 1053. Because Stage VI would provide total disposal capacity of less than the amount of the shortfall (CR at T62, 1053), there was a capacity need as defined by RSA 149-M:11, V(d). This methodology of determining capacity need – comparing total projected waste generation to total permitted capacity over the planning

[5] By statute, the twenty-year planning period begins when NHDES is expected to issue the permit sought by the application. RSA 149-M:11, V(d).

period and concluding that there is a capacity need to the extent there is a shortfall in capacity – is referred to herein as the "aggregate capacity need approach."

NHDES determined that the Stage VI application was complete, undertook a detailed technical review of the application's compliance with the agency's rules, and held a public hearing on the application. CR at T62, 1025-27. As the statutory deadline for a decision was approaching, and nearly one year after NCES submitted the application, NHDES notified NCES that it was contemplating denying the application for failure to satisfy the capacity need requirement of RSA 149-M:11. CR at T60, 893-94. NHDES maintained for the first time since the legislature adopted the public benefit requirement in 1991 that there can be no finding of capacity need unless the proposed facility will provide disposal capacity during that *portion* of the twenty-year planning period in which there is a shortfall in capacity. *Id*.

In its application, NCES had proposed to operate Stage VI for 2.3 years between 2021 and 2024, providing more than 915,000 tons of disposal capacity. *Id.* at T62, 1056. NHDES – again for the first time in making a determination of capacity need – calculated the point *during the twenty-year planning period* at which projected in-state waste generation would exceed the statewide permitted disposal capacity. *Id.* at T62, 1055-56. NHDES prepared a chart depicting this crossover point as occurring in April of 2025. *Id.* at 1055. NHDES informed NCES that it could not find a capacity need because all of the proposed Stage VI capacity would be exhausted before the crossover point. *Id.* at T60, 892-94. NCES disputed this construction of the capacity need requirement, pointing out that

historically NHDES had always determined capacity need based on *whether* there was a shortfall over the twenty-year measuring period, not *when* a shortfall occurred during that period. *Id.* NCES also reminded NHDES that it had approved its earlier Stage V application even though its capacity would be exhausted before there was a projected shortfall in statewide capacity. *Id*. NHDES nonetheless gave NCES the choice of a denial of its application or withdrawal of the application followed by submission of a new application proposing to operate Stage VI past the projected crossover point. *Id*. NHDES suggested that if NCES proposed to operate Stage VI for at least a year after the crossover point the agency could find a capacity need. *Id.* NHDES's novel requirement that an applicant provide disposal capacity for some period after the crossover point as a condition of approval is referred to herein as the "partial function of time approach."

Under protest, NCES withdrew its application (*id.*) and in March of 2020 submitted a new Stage VI application proposing to provide the same amount of disposal capacity but extending the facility's operating period to the end of 2026. CR at T62, 1073. On October 9, 2020, NHDES approved the new Stage VI application, concluding that the operation of Stage VI for one year after the crossover point satisfied the capacity need requirement. *Id.* at T1, 8. [6] On October 15, 2020, NCES received construction approval

[6] NHDES again prepared a chart depicting the crossover point. CR at T62, 1114**.** This chart illustrates the "partial function of time" approach, demonstrating the crossover in projected waste generation and permitted capacity and the overlap of the proposed facility's operations with the shortfall event. Under the hearing officer's construction of the statute, a permit is unlawful unless all capacity is provided after the crossover event.

for Phase 1 of Stage VI, and on March 19, 2021, NCES received operating approval for Stage VI, Phase 1, and began accepting waste in the new cell.

On November 9, 2020, CLF appealed the Stage VI approval to the waste management council. The only grounds on which CLF challenged NHDES's capacity need determination were that (1) NHDES had not "sufficiently explained" why it was prepared to deny the first Stage VI application but granted the second, (2) there was only a capacity need for one year, and (3) "a substantial portion" of the waste that would otherwise be disposed of in Stage VI could be diverted through other strategies (collectively, "CLF's capacity need claim"). *Id.* at T1, 3-5. Notably, CLF did *not* allege that there could be a finding of capacity need only if a proposed facility provided disposal capacity *entirely* after a period of capacity shortfall. By statute, "[o]nly those grounds set forth in the notice of appeal shall be considered by the council." RSA 21-O:14, I-a.

Pursuant to RSA 21-M:3, VIII, the attorney general appointed David Conley, Esq., as the appeal's hearing officer. CR at T6, 27. NCES filed a motion to dismiss CLF's appeal for lack of standing on February 8, 2021. *See id.* at T8. NCES argued that CLF's reliance in the notice of appeal upon predicted harms to just two of its unnamed members was insufficient to establish its standing. *Id.* at T8, 37-40. In its objection, CLF supplied affidavits from two of its members alleging that they would experience harm in the future from Stage VI operations. *Id.* at T11, 77-80. NCES filed an affidavit from the manager of its landfill contesting the factual basis on which CLF's two members alleged they would be harmed. *Id*. at T12, 116-18. Because of the disputed issues of fact created by the contradictory affidavits, NCES requested an evidentiary hearing before the

council. *Id*. at 113; *see also* RSA 21-M:3, IX(c)-(e) (council decides issues of fact, hearing officer decides issues of law, and council and hearing officer deliberate over mixed questions of law and fact). On March 17, 2021, the hearing officer denied NCES's request for an evidentiary hearing before the council[7] and its motion to dismiss, holding that the contested affidavits of CLF's two members established their standing and that under the rules of the other environmental councils and federal law, a single member of an organization who is adversely affected by a permitting decision confers standing on the entire organization. Addendum at 45-46. NCES sought reconsideration of this ruling, but the hearing officer denied the motion. *Id*. at 48-51; *see* CR at T16.

On June 30, 2021, NCES moved to dismiss CLF's appeal for failure to state a claim. CR at T22. After the motion was briefed, Mr. Conley granted the motion only with respect to one claim: CLF's capacity need claim. *Id*. at T30, 434-36. He concluded that "substantial public benefit," as a "matter of statutory interpretation," is defined by RSA 149-M:11, V, and while it "is obvious that [Stage VI] has been designed to fill a need only briefly for disposal capacity, the legislative scheme does not currently provide for a further temporal or other inquiry into whether a given proposal is 'substantial' or not." *Id*. at T30, 436.

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[7] This ruling was inconsistent with council practice. *Cf*. *Appeal of Goldstein*, Docket No. 10-22 WMC, Decision and Order on Notice of Appeal (9/15/11) (dismissing appeal for lack of standing following evidentiary hearing on motion to dismiss). This order is available at https://www4.des.state.nh.us/Legal/index.html?jump=Appeals/Waste%20Management%20Council.

CLF sought reconsideration of Mr. Conley's dismissal of its capacity need claim, and NCES objected. *Id*. at T32 and T33. During the pendency of the motion for reconsideration Mr. Conley retired, and the attorney general appointed Zachary Towle, Esq., a lawyer in the attorney general's office, to serve as the hearing officer. *Id*. at T27. Mr. Towle granted CLF's motion for reconsideration, reinstating its capacity need claim. *Id*. at T40.

The council held a two-day evidentiary hearing on CLF's appeal on February 18 and 21, 2022. CR at T28, 428. Mr. Towle presided over the hearing. Tr., Day 1 at 2. NCES, having received the Stage VI approval it had sought, defended the lawfulness and reasonableness of NHDES's decision granting the permit. *Id*. at 17-32. It expressly reserved its right, however, to contend that NHDES's use of the partial function of time approach was overly restrictive and contrary to the language and established construction of RSA 149-M:11, V. CR at T60, 894.
At the conclusion of the hearing, the council deliberated in public and in consultation with the hearing officer on each of CLF's claims on appeal. Tr., Day 2 at 59-171. The council passed unanimous motions finding that NHDES acted lawfully and reasonably in finding a capacity need for Stage VI. *Id*. at 95, 102, 112-13. The hearing officer participated in the discussions with the council and did not object to any of the council's decisions or rule them ultra vires. *Id*. Instead, the announced public result of the council's deliberations and decisions was that CLF's appeal was denied in its entirety, including its capacity need claim. *Id*. at 172-73.

Nearly three months later, however, the hearing officer issued an order setting aside one of the council's determinations without any explanation or acknowledgment that he was overruling it. Addendum at 52-

71. Notwithstanding that CLF's notice of appeal made no such argument, the hearing officer held that NHDES could not find that a proposed facility will satisfy a capacity need unless *all* of the facility's capacity is provided during a time when there is a shortfall in capacity for waste generated in New Hampshire. *Id*. at 57-66. The hearing officer did not disturb the council's determination that NHDES had acted *reasonably* in finding a capacity need for Stage VI; indeed, he included that finding in his order. *Id*. at 66-67. He nevertheless ignored the council's February 21 determination that NHDES had acted *lawfully* in finding a capacity need, holding instead that NHDES can find a capacity need only when a proposed facility's disposal capacity will be used entirely after the crossover point. *Id*. at 57-66. This brief refers to this interpretation of the statute as the "pure function of time approach."

In light of the hearing officer's decision that NHDES had acted unlawfully in finding capacity need, he remanded the permitting decision to NHDES for further action as contemplated by RSA 21-O:14, I(b). Pursuant to RSA 541:3, NCES filed a motion for rehearing of the hearing officer's decision. CR at T76. NCES contested the hearing officer's ruling that NCES was not entitled to an evidentiary hearing on its motion to dismiss the appeal for lack of standing, that a token number of an organization's members alleging harm is sufficient to establish the organization's standing, and that the future, predicted harms on which CLF's two

members relied were immediate and direct enough to support a finding of standing[8]. *Id*. at T76, 2607-12 .

Because the effect of the hearing officer's order was to transform NCES from a party defending a permitting decision in its favor into a party aggrieved by the order, the grounds on which it challenged the order were different from the grounds on which it had defended the permitting decision. As this court has recognized more than once[9], for issue preclusion purposes a party that has received an approval it sought has no incentive and is not required to attack the legal soundness of the approval. When the hearing officer invalidated NCES's approval, however, as a newly aggrieved party NCES had incentive to challenge the hearing officer's decision on every available ground, including the argument that NHDES's use of the partial function of time approach to determining capacity need was overly narrow and contrary to the administrative gloss NHDES had given the statute since its adoption. *Id*. at T76, 2590-96. Under the council's enabling legislation NCES's only means to challenge the decision was by motion for rehearing. RSA 21-O:14, III.

Accordingly, NCES's motion, together with its subsequent filings in support of its motion, not only argued that NHDES had given RSA 149-M:11, V, an administrative gloss consistent with the aggregate capacity need approach but also submitted evidence to substantiate that argument.

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[8] Although the hearing officer's rulings on NCES's motion to dismiss for lack of standing were made in March of 2021 (Addendum at 44-47), all issues a party wishes to preserve for appeal to this court must be set forth in a motion for rehearing once there is a final order in the proceeding. RSA 541:4.

[9] *Post* at 39-40.

Id. at T76, 2590-96, 2615-76; T93. That evidence included documents produced by NHDES in response to a public records request shortly after NCES filed its motion for rehearing. *Id*. at T93, 2845-88. Those documents established that NHDES had explicitly considered the function of time approach to determine capacity need in 2000 but rejected it in favor of the aggregate capacity need approach when it granted NCES's Stage III permit. *Id*. at T93, 2846, 2849-50, 2854-55, 2859. NCES also submitted evidence illustrating that NHDES had consistently granted permits for landfill expansions that were inconsistent with the function of time approach and could only be reconciled with the aggregate capacity need approach. *Id*. at T76, 2615-76. NCES noted that the legislature had not amended the language found in RSA 149-M:11, III or V since it was first adopted in 1991, leaving NHDES's administrative gloss undisturbed. *Id*. at T76, 2589. NCES requested an evidentiary hearing before the council to present the factual evidence supporting administrative gloss. *Id*. at T93, 2840-41.

NCES challenged two additional errors in the hearing officer's order. The first was the hearing officer's usurpation of the council's authority to participate in the resolution of mixed questions of law and fact (see RSA 21-M:3, IX(d)) by setting aside the council's determination at the conclusion of the hearing on the merits that NHDES had correctly found a capacity need for Stage VI. *Id*. at T76, 2602-07. The second was that the hearing officer's construction of the capacity need requirement – which, again, CLF itself had not even argued for in its notice of appeal – rendered RSA 149-M:11 violative of the dormant commerce clause by precluding permitting of privately owned waste disposal facilities except to the extent they are used for the disposal of waste generated in the state. *Id*. at T76,

2597-2602. NCES observed in its motion that NHDES's use of the aggregate capacity need approach had avoided a commerce clause violation for over twenty years and that the hearing officer's interpretation of the statute had undone that balance of interests, making the statute a stark and facially invalid discrimination against waste originating from outside New Hampshire. *Id*. at T76, 2599. In a press release celebrating the hearing officer's decision, CLF described the effect of the decision as preventing the permitting of landfills unless they are "needed to satisfy New Hampshire's disposal needs" and as "prevent[ing] the continued influx of out-of-state waste." *Id*. at T76, 2581-82.

On November 3, 2022, the hearing officer denied NCES's motion for rehearing. Addendum at 89. He not only rejected NCES's administrative gloss argument as irrelevant (*id*. at 74-76), he granted CLF's motion to strike the evidence supporting the existence of administrative gloss accompanying the motion for rehearing and denied NCES's motion to supplement the record with the evidence of NHDES's rejection of the function of time approach to assessing capacity need in 2000.[10] *Id*. at T104, 3023-24 andT105, 3026-27. He also denied NCES's request for an evidentiary hearing. CR at T104, 3024.

The hearing officer also rejected the commerce clause argument as untimely and noted summarily that he found no commerce clause violation in any event. Addendum at 77-79. He maintained that he had not usurped the council's authority by ignoring the council's February ruling that

[10] NCES filed a timely motion for rehearing of the order denying its motion to supplement. CR at T108. The hearing officer has yet to rule on this motion for rehearing.

NHDES had lawfully found the existence of a capacity need, claiming in a footnote that the council had approved of his decision implicitly overruling the council's determination. *Id*. at 80, n.5. The factual and legal accuracy of this claim is before this court in Docket No. 2023-0221.

This appeal followed.

SUMMARY OF THE ARGUMENT

CLF lacks standing to challenge the Stage VI permitting decision. As a threshold matter, the hearing officer should have granted NCES's request for an evidentiary hearing because there was a dispute of material fact regarding CLF's claimed basis of standing and the hearing officer has no statutory authority to determine issues of fact. On their face, moreover, the affidavits presented by CLF to support its standing do not meet the requirement of direct actual harm necessary to establish standing under the New Hampshire constitution because they rely exclusively on predictions of future harm. Furthermore, alleged harm to two members of CLF does not confer standing on the organization. This court has never recognized that an organization has standing where only a token number of its members are allegedly harmed by the challenged decision, and the authorities relied upon by the hearing officer in denying dismissal are inconsistent with New Hampshire law. Hence, the hearing officer's rulings on CLF's standing should be reversed and the case remanded for an evidentiary hearing or a dismissal.

The hearing officer's construction of the capacity need element of the public benefit requirement found in RSA 149-M:11 is contrary to the language of the statute, disregards thirty years of consistent administrative

gloss given to the statute by NHDES, and brought the statute into conflict with the dormant commerce clause of the United States constitution. For these reasons, the hearing officer's determination that the Stage VI approval was contrary to the capacity need requirement of RSA 149-M:11 should be reversed.

ARGUMENT

I. CLF failed to establish its standing to bring the appeal before the council.

a. Failure to grant evidentiary hearing

CLF had the burden of establishing its standing once it was challenged in a motion to dismiss. *Ossipee Auto Parts, Inc. v. Ossipee Planning Bd.*, 134 N.H. 401, 403-04 (1991). CLF attempted to establish its standing with affidavits by two members, and NCES responded with an affidavit contesting the facts set out in the members' affidavits. CR at T11, 77-80, 84-94; T12, 112-18. Where the resolution of a motion depends on determinations of contested facts, it is error for a tribunal to decide the motion without an evidentiary hearing. *Thomas v. Finger*, 141 N.H. 134, 138 (1996). In the past, the hearing officer and the council have adhered to this principle. Ante at 16, n.7. In this case, not only did the hearing officer refuse to grant an evidentiary hearing on the scant ground that "a 'he said / she said' evidentiary hearing on the veracity of these sworn statements is not warranted in these circumstances," he also chose to accept the controverted affidavits of CLF's members as fact despite his express lack of statutory authority to adjudicate issues of fact. RSA 21-M:3, IX(c) and

(d). Addendum at 46.[11] Hence, this case should be remanded for an evidentiary hearing before the council on whether there is a valid factual basis for CLF's claim of standing.

b. Misapplication of organizational standing principles

To establish standing, a party must demonstrate that it suffered direct harm caused by the contested action. *Appeal of Richards*, 134 N.H. 148, 154 (1991). It is this demonstration of concrete harm which separates a justiciable case from a prohibited advisory opinion. *Duncan v. State*, 166 N.H. 630, 640-41 (2014) (superseded on other grounds by constitutional amendment). For standing to exist the injury must be immediate, fairly traceable to the complained-of action, and concrete, meaning it cannot be based on mere speculation. *Carrigan v. N.H. Dep't of Health and Human Servs.*, 174 N.H. 362, 367 (2021); *Appeal of N.H. Right to Life*, 166 N.H. 308, 314 (2014); *Golf Course Investors of NH, LLC v. Town of Jaffrey*, 161 N.H. 675, 682-84 (2011). Standing is a prerequisite of subject matter jurisdiction; consequently, the council may not extend standing further than is allowed by the state constitution. *Duncan*, 166 N.H. at 640-44.

This court has recognized that a membership association or organization has standing where all its members have sustained the requisite injury from the challenged action. *See N.H. Banker's Ass'n v. Nelson*, 113 N.H. 127-29 (1973) (bankers' association had standing on behalf of its members to challenge a decision involving financial law); *Appeal of Richards,* 134 N.H. at 156-57 (finding organizational standing

[11] On rehearing, Mr. Towle overlooked the dispute between the affidavits entirely. Addendum at 87.

for ratepayer's organization where the challenged decision affected all members); *Appeal of Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000) (homeowner's organization established standing to oppose decision affecting member properties). In those circumstances, there is no meaningful distinction between the members and the organization which is simply the vehicle through which its identically situated members can jointly seek relief.

CLF sought to establish its standing on an entirely different ground. It did not contend that its entire membership was aggrieved by the Stage VI permit. It did not allege that CLF itself was harmed by the NHDES approval. Instead, it argued for what amounts to vicarious standing for itself based on alleged harm to two of its members. In effect, it contended that harm to a token number of members is imputed to itself. Nowhere in New Hampshire law is there authority for the proposition that direct, immediate, concrete harm can be imputed to a party that was itself unharmed. Yet the hearing officer held that an unharmed organizational party can be *deemed* harmed through the expedient of showing that a single member was aggrieved by a decision. Addendum at 49. Not only does this fly in the face of this court's consistent rulings that it is the plaintiff – not a proxy – that must show harm to establish standing, it is also contrary to the court's repeated admonition that an "interest in a problem" is insufficient to demonstrate standing. *See Caspersen v. Town of Lyme*, 139 N.H. 637, 640-41 (1995) (party's "general interest" in effect of zoning amendment on "divers[ity] of community" insufficient to create standing); *Goldstein v. Town of Bedford*, 154 N.H. 393, 394 and 396 (2006) (generic interest in seeing the law enforced does not confer standing); *N.H. Right to Life*, 166

N.H. at 314 ("[A]n association has no standing to challenge an administrative agency's decision based upon a mere interest in a problem.") (quotation omitted); *Golf Course Investors*, 161 N.H. at 684 (same); *Petition of Lath*, 169 N.H. 616, 621 (2017) (same). CLF's reliance upon vicarious harm is tantamount to a concession that it brought this appeal to further its policy objectives, which is another way of saying that CLF has a general interest in waste management priorities and methods. As a matter of law, such an interest is inadequate under the New Hampshire constitution to establish standing. *See* RSA 21-O:14, I-a (only person "aggrieved" has standing to pursue appeal before council); *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541, 543 (1979).

The hearing officer relied on two sources of authority for his denial of NCES's motion to dismiss. First, he cited the rules of other environmental appellate councils providing that an organization has standing if one of its members does. CR at T15, 139. Setting aside that the waste management council has adopted no such rule (*see, generally,* N.H. Code Admin R Env-WMC 200, *et seq.*), standing is a constitutional requirement that cannot be overcome by an administrative rulemaking. *See Duncan*, 166 N.H. at 640 ("Standing is a question of subject matter jurisdiction . . ."). Second, the hearing officer appeared to rely upon federal cases applying standing principles to plaintiffs suing under federal environmental protection statutes that explicitly authorize citizen suits to enforce their provisions. CR at T15, 139; *see also* CR at T16, 147-48

(distinguishing cases).[12] Whatever the liberalizing effect of these citizen suit provisions upon standing under federal law, there is no citizen suit provision in RSA ch. 149-M, the statute CLF relied upon as the basis of its appeal. The reasoning in these federal cases, then, has no application to whether CLF has standing under the New Hampshire constitution.

c. Insufficiency of Members' Allegations to Establish Standing

The affidavits of CLF's two members contended that they have historically experienced noise, odors[13], traffic, and unwanted views of the NCES landfill. CR at T11, 84-94. They then predicted that if Stage VI were constructed they would experience the same impacts in the future. *Id.* at T11, 77-80. In his order denying NCES's motion to dismiss, the hearing officer ruled that it was "reasonably foreseeable" that the past impacts the members allegedly experienced would continue with the construction of Stage VI. CR at T15, 140. A projection of future injury, however, is insufficient as a matter of law to meet the constitutional requirements for standing. Instead, an injury must be concrete, direct, and immediate. *N.H. Right to Life*, 166 N.H. at 314; *Hannaford Bros. Co. v. Town of Bedford*, 164 N.H. 764, 771-72 (2013); *Appeal of Campaign for Ratepayers Rights*, 142 N.H. 629, 632 (1998). Thus, a prospective plaintiff lacks standing to challenge a decision until the possible future harm actually occurs. In the context of this case, application of this principle undoubtedly frustrates

[12] The hearing officer disclaimed reliance on these cases when he denied NCES's motion for reconsideration (Addendum at 49, but his order nonetheless cited to CLF's surreply invoking those authorities. *Id.* at 45.

[13] Again, NCES submitted an affidavit demonstrating that the members' historical claims of noise and odors were untrue. CR at T12, 112-18.

CLF's objective of preventing the construction of new landfill capacity, but its members' rights remain protected because they can still seek relief for any alleged harm Stage VI actually causes them.

Because CLF's members relied solely upon their predictions of future harm to establish their standing, they do not have standing as a matter of law. Accordingly, CLF lacks standing even under its vicarious standing theory, and its appeal of the Stage VI approval should be dismissed on remand.

II. The hearing officer erred by overruling the council and reinterpreting RSA 149-M:11 to invalidate the Department's capacity need determination.

a. Statutory interpretation and administrative gloss

RSA 149-M:11, III(a) provides that NHDES "shall determine whether a proposed solid waste facility provides a substantial public benefit based upon" three criteria, the first of which is "[t]he 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, V, contains a four-step test to determine whether there is, in aggregate, a need for new capacity over a twenty-year planning period. NHDES's final step in this analysis is to "[i]dentify any shortfall in the capacity of existing facilities to accommodate the type of solid waste to be received at the proposed facility for 20 years from the date a determination is made under this section. If such a shortfall is identified, a capacity need for the proposed type of facility shall be deemed to exist to the extent that the proposed facility satisfies that need." RSA 149-M:11,

V(d). These provisions further the legislature's declaration that "it must ensure that *adequate* capacity exists within the state to *accommodate* the solid waste generated within the borders of the state." Emphasis supplied. RSA 149-M:11, I(b).

The courts' objective in construing statutes is to effectuate the legislature's intent. *Avery v. Commissioner, N.H. Dep't of Corrections*, 173 N.H. 726, 733 (2020). This intent is expressed in the words the legislature chose, considered as a whole. *State v. Pinault*, 168 N.H. 28, 31 (2015). Thus, courts begin with the plain and ordinary meaning of the statute's language. *State v. Telles*, 139 N.H. 344, 346 (1995). If the legislature did not see fit to include language in a statute the courts will not read it into the law. *Monahan-Fortin Props. v. Town of Hudson*, 148 N.H. 769, 771 (2002). Where the legislative language is ambiguous, however, the courts will resort to extrinsic sources to determine intent. *State v. Lamy*, 158 N.H. 511, 515 (2009).

The hearing officer's adoption of the pure function of time approach to determining capacity need was based on his conclusion that the legislature intended to restrict permitting of capacity only to that necessary for disposal of New Hampshire generated waste. Addendum at 65-66. In fact, the legislature was careful to avoid imposing such a restriction. Rather than declaring, for example, that it was "reserving all capacity in the state for the disposal of New Hampshire waste" or "guarantying that only enough capacity will be permitted to satisfy the state's disposal needs," it described its obligation as ensuring that "adequate capacity exists within the state to accommodate" New Hampshire's waste. RSA 149-M:11, I(b). There is a substantial difference between ensuring that there is an adequate

supply of a resource for a consumer and limiting that supply to the amount necessary to meet the needs of that consumer.

In 2000, while considering another of NCES's permit applications, NHDES engaged in an internal debate over whether RSA 149-M:11, V(d), required the agency to consider when, during the 20-year planning period, a shortfall of capacity would take place. CR at T93, 2835-38.[14] A senior staffer argued for the pure function of time approach, contending that proposed capacity could satisfy a need only if it was to be used after a shortfall occurred in the planning period. *Id*. at T93, 2837. Another senior staff member maintained that the manner of determining capacity need was unclear and suggested consultation with counsel. *Id*. After NHDES conferred with the attorney general, it approved NCES's application for disposal capacity that would be exhausted before there would be a shortfall. *Id*.

This approval was possible only if NHDES adopted the aggregate capacity need approach and rejected the function of time approach. In the years that followed, NHDES consistently approved applications for new permitted capacity that were consonant only with the aggregate capacity need approach. CR at T76, 2572-76. This construction of the capacity need requirement by NHDES was in harmony with the language of RSA 149-M:11, I(b), III(a), and V because it ensured adequate capacity to

[14] The hearing officer denied NCES's motion to supplement the record with this evidence, concluding that the evidence is "immaterial" – despite being relevant to an argument raised on rehearing – where the hearing officer deemed the statute unambiguous. CR at T104. NCES timely sought rehearing of that order. CR at T108. The hearing officer has not yet ruled on the motion. For the reasons discussed *post* at 32-34, the court should nonetheless consider this evidence.

accommodate New Hampshire's waste without limiting capacity to only the amount necessary for disposal of that waste.

It was not until NHDES was concluding its consideration of NCES's first Stage VI application in early 2020 that it began an interpretive revanchism of the capacity need requirement. The language of RSA 149-M:11, III(a) and V has been identical since its enactment in 1991. CR at T76, 2589. It was incorporated verbatim in the 1996 enactment of RSA ch. 149-M (*id.*), and it remained unchanged even after a joint legislative committee evaluated the entire chapter and repealed and reenacted it in 1996. *Id.* at 2571. Despite a twenty-year history of approving applications for new disposal capacity that could only be reconciled with the aggregate capacity need approach and legislative acquiescence in that construction of the statute, NHDES reverted to the interpretation of the capacity need requirement it had rejected in 2000, refusing to approve the first Stage VI application because it would not provide capacity during a period of shortfall. CR at T60, 892-94. This function of time approach to assessing capacity need was unlawful because it was in derogation of the administrative gloss NHDES had given the statute.

"[W]here a statute is of doubtful meaning, the longstanding practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the legislative intent." *Hamby v. Adams*, 117 N.H. 606, 609 (1977). Where such an interpretation is consistently applied to similarly situated persons over a substantial period of time it is said to create an administrative gloss on the statutory language. *Anderson v. Motorsports Holdings, LLC*, 155 N.H. 491, 501-02 (2007).

This deference is enhanced when the legislature amends a statute but does not disturb the language in dispute. *Tessier v. Town of Hudson*, 135 N.H. 168, 171 (1991); *Petition of the State Employees' Assoc. of N.H.*, 161 N.H. 476, 482 (2011). "If an 'administrative gloss' is found to have been placed upon a clause, the agency may not change its *de facto* policy, in the absence of legislative action, because to do so would, presumably, violate legislative intent." *Petition of the State Employees' Assoc.*, 161 N.H. at 482 (brackets and quotation omitted).

The hearing officer's rejection of NCES's administrative gloss argument and his orders striking and refusing the submission of the evidence NCES offered to support it depend in large part on his conclusion that RSA 149-M:11, V(d), unambiguously requires the pure function of time approach to determining capacity need. CR at T104, 3023; T105, 3026. This conclusion cannot be squared, however, with NHDES's consideration and rejection of the function of time approach after consultation with the attorney general in 2000, NHDES's consistent approval of applications for new capacity for over twenty years without calculating or considering the crossover point between surplus and shortfall, and Mr. Conley's dismissal of CLF's capacity need claim because the statute does not include a "temporal" element (*ante* at 9). It also ignores the legislature's express declaration that the purpose of the public benefit requirement is to ensure adequate capacity to accommodate New

Hampshire waste and the absence of any language restricting approval to just that capacity necessary for disposal of New Hampshire waste.[15]

The language the hearing officer relies upon for his ruling that RSA 149-M:11, V(d), unambiguously requires the pure function of time approach is "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 supplied. Addendum at 57-66. As Mr. Conley noted in his order dismissing CLF's capacity need claim, however, this language says nothing about *when* during the twenty-year period the new capacity must satisfy the need. CR at T30, 436. The hearing officer's reasoning also ignores that NHDES apparently applied the "to the extent" language in 2013 to deny an application that sought approval of capacity *beyond* the twenty-year period. CR at T77, 2575. It is an entirely reasonable interpretation of the language on which the hearing officer relied that it simply prohibits approvals of new capacity "to the extent" it would be provided outside of the planning period.

Hence, the hearing officer was incorrect that RSA 149-M:11, V(d), unambiguously mandates that NHDES use the pure function of time approach. Because the interpretation NHDES has given the language for twenty years is reasonable and the legislature has not amended it over that period, the aggregate capacity need approach has become the administrative gloss on the statute. NHDES acted unlawfully in 2020 when it abandoned the aggregate capacity need approach, and the hearing officer acted

[15] It also contradicts the hearing officer's observations throughout the May 11, 2022 order acknowledging the ambiguity of other sections of the same statute. *See* Addendum at 55-66.

unlawfully when he refused to consider the administrative gloss on the statute and construed it in a manner inconsistent with that gloss. Because NCES's second Stage VI application inarguably satisfies the aggregate capacity need approach, the hearing officer's order should be reversed and remanded with instructions to dismiss CLF's appeal.

b. Dormant commerce clause

The hearing officer's order held that, on its face, RSA 149-M:11, V, unambiguously prohibits permitting of solid waste disposal facilities except to the extent the capacity of those facilities is necessary solely to the accommodation of waste generated in New Hampshire. Addendum at 63. If the hearing officer is correct about the meaning of the capacity need requirement of RSA 149-M:11, the statute is invalid under the dormant commerce clause of the United States Constitution.

The commerce clause states that Congress has the power to "regulate commerce . . . among the several States." U.S. Const. art. I, §8, cl. 3. The United States Supreme Court has determined that there is a "negative aspect embedded in this language – an aspect that prevents state and local governments from impeding the free flow of goods from one state to another." *Houlton Citizens Coalition v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999). This "dormant" commerce clause "prohibits protectionist state regulation designed to benefit in-state economic interests by burdening out-of-state competitors." *Grant's Dairy-Maine, LLC v. Comm'r of Me. Dep't of Agric., Food and Rural Res.*, 232 F.3d 8, 18 (1st. Cir. 2000).

The Supreme Court has established that the first step in determining whether a state law violates the dormant commerce clause is to determine if

the law is facially discriminatory. A state law is facially discriminatory when it effectuates "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Oregon*, 511 U.S. 93, 99-100 (1994); *see also Deere & Company v. State*, 168 N.H. 460, 485 (2015) (discrimination under the dormant commerce clause occurs when "the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market.") (quotation omitted). If the law is facially discriminatory, the court applies the test of *per se* invalidity: the law is invalid unless the state "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate public interest." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392 (1994); *see also Houlton*, 175 F.3d at 185 ("In the jurisprudence of the dormant commerce clause, a finding of facial discrimination is almost always fatal.").

Until NHDES notified NCES in January of 2020 that it was contemplating denying the first Stage VI application for failure to establish capacity need, the agency had consistently applied RSA 149-M:11, V, to mitigate the statute's potential discriminatory effect on interstate commerce. By tying approval of new disposal capacity to whether it would satisfy the needs of New Hampshire waste generators, the legislature explicitly gave greater priority to in-state waste than to out-of-state waste in permitting decisions. It avoided a facially discriminatory law, however, by framing the approval of new disposal capacity in terms of being "adequate" to "*accommodate* the solid waste generated within the borders of the state."

Emphasis supplied. RSA 149-M:11, I(b); *see also* RSA 149-M:11, III(a) and V(d). The legislature's use of the words "adequate" and "accommodate" expresses its intent that there must be *enough* capacity in the state to provide disposal for New Hampshire's waste, but that does not equate to limiting approvals to *only* that capacity necessary for disposal of such waste. For example, had the legislature intended to restrict new capacity to an amount needed for the state's disposal needs, it could have done so readily in RSA 149-M:11, III(a) through the addition of just one word: "(a) The short- and long-term need for a solid waste facility of the proposed type, size, and location to provide capacity to accommodate **only** solid waste generated within the borders of New Hampshire, which capacity need shall be identified as provided in paragraph V."

As noted *ante* at 30, NHDES considered early in the life of the statute whether the legislature intended to limit approvals of new capacity to those necessary for disposal of New Hampshire waste. After internal debate, NHDES decided to apply the aggregate capacity need method to determine public benefit. CR at T93, 2837-38. This approach met the requirement of ensuring adequate capacity to accommodate New Hampshire waste, limited the supply of disposal capacity to no more than twenty years, and avoided invalidation of the statute for violation of the commerce clause.

The hearing officer's order disregarded the careful word choices made by the legislature and NHDES's construction of the statute, holding that RSA 149-M:11, V, explicitly restricts permitting of new landfill capacity to that necessary to meet New Hampshire's waste disposal needs. Addendum at 63. CLF has acknowledged that the order has the practical

effect of preventing the importation of out-of-state waste. CR at T76, 2581. Restricting permitting in this fashion patently discriminates against out-of-state waste because a landfill owner cannot develop capacity that would be used for disposal of such waste.[16]

The hearing officer's construction of RSA 149-M:11, V, violates the dormant commerce clause because it explicitly favors in-state waste while disfavoring and excluding out of state waste, and the justification for this discrimination does not survive the struct scrutiny of the *per se* invalidity test. *Oregon Waste Sys.*, 511 U.S. at 93 (rejecting state's argument that statutory discrimination against out-of-state waste was justified because it was a compensatory tax or constituted resource protectionism). This is borne out by the hearing officer's observation that "[a]dding additional capacity via the proposed facility [operating before the shortfall] would . . . allow [other] 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." Addendum at 63.

The *Pike* balancing test is applied instead of the *per se* invalidity test only if the court determines in its initial analysis that the statute is not facially discriminatory. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The *Pike* test considers the law presumptively valid unless its burden on interstate commerce is clearly excessive relative to the benefit of the state. In this case, NHDES has successfully maintained adequate disposal

[16] The hearing officer's analysis contradicts the principle that, where possible, statutes should be interpreted to be consistent with constitutional requirements. *See Miller v. French*, 530 U.S. 327, 336 (2000) (constitutionally doubtful constructions should be avoided where fairly possible).

capacity for in-state waste for decades without applying the partial or pure function of time approach to capacity need. This demonstrates conclusively that the state can achieve the public interest in ensuring disposal capacity for New Hampshire waste without restricting permitting to capacity needed *only* for the state's waste. Thus, even under the less rigorous standard of the *Pike* balancing test, the hearing officer's interpretation of the law violates the dormant commerce clause and is thus invalid.

Accordingly, if the hearing officer's interpretation of the capacity need requirement is upheld, the second sentence of RSA 149-M:11, V(d), is unconstitutional under the dormant commerce clause whether or not the law itself is facially discriminatory, and this case should be remanded to the council with instructions to affirm NHDES's approval of the Stage VI permit.

c. Failure to consider arguments germane to NCES's legal interests

When NHDES granted NCES's second application for the Stage VI permit NCES received the approval it had sought. While NCES had informed NHDES in its second application that it disputed NHDES's adoption of the partial function of time approach (CR at T64, 1217), it decided to accept the extended operating period NHDES was requiring as a condition of finding a capacity need. Accordingly, NCES was unharmed by the approval of Stage VI.

On CLF's appeal of the Stage VI approval, NCES's legal interest lay in defending NHDES's decision. It had no incentive or interest in contesting any element of that decision. In fact, before the merits hearing

on CLF's appeal NCES notified the council in writing that it disputed NHDES's abandonment of the aggregate capacity need approach, reserved its right to contest the function of time approach, but argued for affirmance of the Stage VI approval. CR at T55, 743.

When the hearing officer held that the Stage VI approval was unlawful because it did not satisfy the pure function of time approach, NCES's legal interest and incentive shifted. It was no longer a party defending a permitting decision in its favor. Instead, NCES became a "party aggrieved by the disposition" of the appeal as contemplated by RSA 21-O:14, III. Its sole remedy was to appeal the decision "in accordance with RSA 541" (*id*.), which meant that it was required to seek rehearing on any basis it wished to appeal to this court. RSA 541:4.

As a newly aggrieved party, on rehearing NCES attacked the hearing officer's decision as violative of the dormant commerce clause. CR at T76, 2586-97. In his order denying NCES's motion for rehearing, however, the hearing officer declined to even entertain the dormant commerce clause argument when it did not pursue that argument at the hearing. Addendum at 77-79. This was error.

This court has recognized more than once that a party that has received an approval is not required to appeal or otherwise challenge legal defects in the decision for the simple reason that the errors have not yet harmed the party. *City of Portsmouth v. Schlesinger*, 140 N.H. 733, 735 (1996); *North Country Env. Svcs. v. Town of Bethlehem*, 146 N.H. 348, 357-58 (2001) ("illogical for [the party receiving the approval] to have agreed to the conditions and thereafter to file an appeal on the ground that

they were illegal" when the party had "procured exactly what it wanted" and was not aggrieved).

The hearing officer's ruling that the Stage VI approval was unlawful harmed NCES. Until then, NCES was not aggrieved by statutory interpretation or a commerce clause violation. It would have been illogical and contrary to NCES's interests to have challenged defects in the Stage VI approval on CLF's appeal. Accordingly, the hearing officer's ruling that NCES was precluded from presenting argument and evidence establishing a commerce clause challenge was error. The hearing officer's decision should be reversed and the case remanded for a hearing before the council on the merits of NCES's commerce clause challenge.

CONCLUSION

NCES respectfully requests that the court reverse the hearing officer's order denying an evidentiary hearing on its motion to dismiss for lack of standing and remand the case for such a hearing. In the alternative, NCES seeks a reversal of the hearing officer's ruling that CLF has standing when a token number of its members alleges harm and where that harm consists of predicted future events. Upon reversal, NCES seeks an order dismissing CLF's claims for lack of standing.

If the court does not remand or dismiss on the foregoing grounds, NCES respectfully requests for the reasons set forth in this brief that the court reverse the hearing officer's determination that NHDES's approval of the Stage V permit was unlawful and remand with instructions to affirm that approval.

ORAL ARGUMENT

Bryan K. Gould will argue the case for the Appellant, and 15 minutes are requested for this purpose.

CERTIFICATION OF SUBMITTAL OF APPEALED DECISIONS

Pursuant to Supreme Court Rule 16(3)(i), I hereby certify that each written decision being appealed is being provided with this brief. The Waste Management Council hearing officer's order on CLF's standing (3/7/21), the order denying reconsideration of the order on standing (5/11/22), the order on the merits (5/11/22), and the order on NCES's motion for rehearing (11/3/22) are included in the addendum to this brief.

CERTIFICATION PURSUANT TO RULE 26(7)

Pursuant to Supreme Court Rule 26(7), I hereby certify that every issue specifically raised herein (a) has been presented in the proceedings below and (b) has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading. I further hereby certify the within brief complies with the word limitation in Supreme Court Rule 16(11) of 9,500 words. This brief contains 9,483 words.

Respectfully Submitted,

NORTH COUNTRY
ENVIRONMENTAL SERVICES, INC.,

By Its Attorneys,
CLEVELAND, WATERS AND BASS, P.A.

Date: June 16, 2023

By: /s/ Cooley A. Arroyo

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CERTIFICATE OF SERVICE

I hereby certify that on this day, a copy of the foregoing pleading has been served via the court's e-filing system to counsel and all other parties having so appeared.

Date: June 16, 2023

/s/ Cooley A. Arroyo
Cooley A. Arroyo, Esq.

ADDENDUM

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STATE OF NEW HAMPSHIRE

WASTE MANAGEMENT COUNCIL

DOCKET NO. 20-14 WMC

RE: CONSERVATION LAW FOUNDATION APPEAL.
("APPELLANT")

DECISION AND ORDER
ON
PERMITTEE'S MOTION TO DISMISS

ORDER: MOTION DENIED

On February 8, 2021, the Permittee, North Country Environmental Services, filed a Motion to Dismiss this appeal for lack of standing. Appellant filed its Objection on February 19, 2021. Permittee filed a Reply to the Objection on March 1, 2021 and Appellant filed a Surreply to this filing on March 5, 2021.

The Permit under appeal authorizes the Permittee to expand its Bethlehem, NH landfill vertically and laterally and to increase its permitted disposal capacity by approximately 1.24 million cubic yards and to extend its operating life until 2026.

In brief, Permittee asserts that the Appellant lacks organizational standing to bring the appeal because only one or two of its members have alleged direct harm to their persons or property if the Permittee is allowed to proceed under the Permit; and allegations of noise, odor, traffic and view impacts currently being experienced by its members do not amount to direct and adverse injuries that can be anticipated to continue if the Permit is approved.

RSA 21-O:14, I-a provides that "[any] person aggrieved by a department decision may…appeal to the council having jurisdiction over the subject matter of the appeal…and set forth fully in a notice of appeal every ground upon which it is claimed that the decision complained of is unlawful or unreasonable." Env-WMC 204.02(b)(5) provides that an appellant is required to establish standing to bring the appeal, for example, by a showing "that it will suffer a direct and adverse affect as a result of the decision being appealed in a way that is more than

any impact of the decision on the general public." "Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case-by-case basis." *Golf Course Investors, LLC v. Town of Jaffrey*, 161 N.H. 675, 680 (2011).

There are no decided cases construing the language of RSA 21-O:14, I-a. However, there does exist a large body of New Hampshire case law addressing the standing analysis in other contexts involving similar language as that of the subject statute. According to that law, to establish standing, an appellant must show that the decision in question has caused the appellant to suffer an "injury in fact" and that he has been "directly affected" by it. *Appeal of Richards,* 134 N.H. 148, 154 (1991). A general interest in a problem is not a basis for finding standing. *Id.* at 156.

Appellant in this case bears the burden of proving that it in fact has standing to bring the Appeal. *Golf Course Investors of NH, LLC.* In order to meet that burden, the court noted that the appellant must do more than raise unsubstantiated allegations to establish standing, citing *Joyce v. Town of Weare,* 156 N.H. 526, 529 (2007).

"Organizational" standing for purposes of appeals brought before the Wetlands, Water and Air Resources Councils will be established if at least one member of the organization possesses standing. Env-WC 203.02(b); Env-WC 203.02(a)(6); and Env-AC 204.02(b)(5). Contrary to the Permittee's assertion that the number of aggrieved members matters here, there is no substantive basis for reaching a different result in an appeal before the Waste Management Council than before any of the other environmental councils. Permittee neither references these rules nor offers an explanation why different rules should apply to WMC appeals. (*See*, *also*, cases cited at ftnt. 2, *Surreply,* p.2)

Ms. Andrea Bryant, a member of the Appellant organization, submitted a sworn affidavit in support of Appellant's Objection to the Motion to Dismiss. She lives approximately one mile from the landfill. Ms. Bryant states that she has been directly and adversely affected by, *inter alia,* noise and odor emanating from the landfill that have forced her to keep her windows closed even in the summer. Moreover, she has a view of the landfill that negatively affects her

enjoyment, use and the value of her property. If the Permit is allowed to stand, she will continue to endure these adverse consequences. (Mr. Peter Menard, also a member, and who resides within two miles of the landfill, also submitted an affidavit under oath to the same effect.)

Contrary to Permittee's suggestion, there is no New Hampshire case law establishing that noise or odor are not direct and adverse injuries to the peaceful enjoyment of one's property. Nor is it mere speculation that the currently experienced negative effects of living near the landfill will continue in the future if the Permit to expand the scope and extend the life of the landfill is implemented as now written. While proximity to the source of the alleged injurious conduct is a relevant factor in the decided cases addressing standing issues,(*see*, *e.g.*, *Weeks Rest. Corp. v. City of Dover,* 199 N.H. 541 544-545 (1979), enumerating several factors to be considered) no one factor is determinative. Here, living within sight and a mile or two of one of the largest landfill operations in the state can reasonably be presumed to be sufficiently proximate for standing purposes.

The alleged noxious odor, noise, and negative consequences to the value of the members' property stemming from operation of the landfill in its current state are not "generalized wrongs" to the public at large. Moreover, Ms. Bryant's and Mr. Menard's detailed affidavits of adverse consequences experienced by them as a result of living in the vicinity of the landfill, given under penalty of perjury, are not mere unsubstantiated allegations of direct and immediate harm. (Note that Ms. Bryant's assertions have been raised under oath in another litigated matter. *Surreply,* Ex. 1*)* It is reasonably foreseeable that these impacts will continue to be experienced as a result of future expansion and development of the landfill. As Appellant argues, a "he said / she said" evidentiary hearing on the veracity of these sworn statements is not warranted in these circumstances. Finally, unlike the facts in the *Appeal of Seth Goldstein, et al.*, Docket # 10-22 WMC, Appellant's members' allegations of harm in this case stem directly from the Permit now under appeal rather than one predating this DES decision.

Given the above, Permittee's Motion to Dismiss this appeal for lack of standing is Denied.

By Order of the Hearing Officer,

COPY

for David F. Conley, Esq.
(NH Bar # 130)

Date: 3/17/21

STATE OF NEW HAMPSHIRE

WASTE MANAGEMENT COUNCIL

DOCKET NO. 20-14 WMC

RE: CONSERVATION LAW FOUNDATION APPEAL.
("APPELLANT")

DECISION AND ORDER
ON
PERMITTEE'S MOTION FOR RECONSIDERATION

ORDER: MOTION DENIED

On February 8, 2021, the Permittee, North Country Environmental Services, filed a Motion to Dismiss this appeal for lack of standing. Appellant filed its Objection on February 19, 2021. Permittee filed a Reply to the Objection on March 1, 2021 and Permittee filed a Surreply to this filing on March 5, 2021.

The Permit under appeal authorizes the Permittee to expand its Bethlehem, NH landfill vertically and laterally and to increase its permitted disposal capacity by approximately 1.24 million cubic yards and to extend its operating life until 2026.

In brief, the Motion to Dismiss asserted that the Appellant lacked organizational standing to bring the appeal because only one or two of its members have alleged direct harm to their persons or property if the Permittee is allowed to proceed under the Permit. Moreover, allegations of noise, odor, traffic and view impacts currently being experienced by two of its members, Ms. Bryant and Mr. Menard, do not amount to direct and adverse injuries that can be anticipated to continue if the Permit is approved.

The Council denied the Motion to Dismiss by Order dated March 17, 2021. The Hearing Officer found as a matter of law, that organizational standing can be established when only one or two members of the organization have alleged the requisite harm to themselves and their property; and the sworn allegations of harm to person and property amount to direct and adverse injuries sufficient to establish standing under Env-WMC 204.02(b)(5).

Permittee filed its Motion for Reconsideration on March 26, 2021. Appellant filed an Objection on March 31st, and Permittee filed its Reply to the Objection on April 5, 2021.

Council Rule Env-WMC 205.16(b) provides in part that a motion for rehearing shall set out in detail the findings, conclusions or conditions to which the moving party objects; the basis for the objections; and the nature of the relief requested.

Permittee restates its position that under New Hampshire law, organizational standing cannot be established if only one or two members claim such status. *Mo. for Recon.* para. III A. It also argues that Appellant's reliance on federal case law dealing with environmental statutes granting citizen lawsuits is misplaced and should not have formed a basis for finding standing in this state law controversy. The Order rejected this argument, finding that there are no decided supreme court cases in this jurisdiction reaching that conclusion. Moreover, the Order observed that each of the other three environmental councils considering challenges to permit decisions by DES has an explicit rule granting standing to a single member of the organization, and found that there was no substantive legal reason why a different result should result in this appeal before the Waste Management Council. *Order*, p.2.

The Council found no legal error in the Order's reference to the organizational standing rules of the other environmental councils for purposes of this Council's interpretation of its own standing provisions. Moreover, the Order did not rely in federal case law in reaching its conclusion regarding organizational standing. Finally, contrary to its position, *Mo. for Recon.* p.6, Permittee has now had ample opportunity to address these arguments. The Council affirms the Order's decision on this issue.

Permittee next argues that Mr. Menard's affidavit should not have been considered in the Order because his claims of direct injury were not raised in the Notice of Appeal, citing RSA 21-O:14, I-a(a). *Mo. for Recon.* para. III C. The Appeal, however, does state that more than one member of the organization complains that it is adversely affected by the DES decision to issue the permit and a summary of the position of one of those unidentified complainants was included. *Appeal*, at 4. When Permittee's Motion to Dismiss challenged the Appellant to produce the specifics of these complaints, Appellant introduced the affidavits of two identified

members…Ms. Bryant and Mr. Menard. Under these facts, consideration of the Menard affidavit does not run afoul of RSA 21-O:14, I-a(a).

Permittee seeks reconsideration of the issue whether the affiants adequately allege that noise, odor and view impacts will cause a direct and concrete injury to their property values when they express their "concern" that those adverse consequences will result if the project is allowed to proceed, *Mo. for Recon.* para III D. While the affiants might have used other words to express their understanding that the project would adversely affect their property values, their intent was clearly to identify "some direct, definite interest in the outcome of the action or proceeding" as required by the court in *Golf Course Investors, LLC v. Town of Jaffrey,* 161 N.H. 675, 680 (2011). Nor are these allegations "speculative." In *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541 (1979) the court considered whether the petitioner had established a definite and direct injury if a proposed new Sambo's restaurant received a permit to locate near an existing Weeks restaurant because of a concern that increased traffic in the vicinity would adversely affect its business. The court concluded that standing was established, noting that "[t]raffic congestion and hazards created by the proposed restaurant *could* adversely affect Weeks' business." 119 N.H. at 545 (emphasis added). Reconsideration of this issue is not warranted under these circumstances.

Finally, Permittee seeks reconsideration of the Council's conclusion that an evidentiary hearing should be held on the question whether Mr. Menard and Ms. Bryant in fact experience negative affects due to noise and odor from the landfill. *Mo. for Recon.* para. III E. As noted in the Order, their affidavits were sworn statements given under oath and in Ms. Bryant's case, in more than one forum, and are sufficient to establish standing.

Permittee seeks reconsideration of this finding because its affiant, Kevin Roy, stated under oath that the appellants had made numerous similar noise and odor complaints over the course of many years. Permittee's Reply to CLF Obj. (3/1/21), Ex. A. He noted that those complaints had not been confirmed by investigations or from conversations with other property owners. Mr. Roy's affidavit does not provide evidence that Mr. Menard and Ms. Bryant have not personally experienced direct and definite adverse effects from the landfill. The Roy affidavit does not provide a basis for conducting an evidentiary hearing.

Given the above, Permittee's Motion for Reconsideration is Denied.

For the Council,

Date: 5/11/21

David F. Conley, Esq.
(NH Bar # 130)

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

ORDER: MOTION DENIED

BACKGROUND

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

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

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

RELEVANT LAW AND RULES

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ITEM 2: The Dormant Commerce Clause

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

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

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

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

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

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

NCES argued the Hearing Officer improperly resolved the following issues:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ITEM 4: CLF Lacks Standing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

Pursuant to RSA § 541, any party whose rights are directly and adversely affected by this decision may file a motion for reconsideration with the Council within 30 days of the date of the decision.