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)

REPLY OF APPELLANT NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.

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ARGUMENT

I. RSA 149-M:11 is ambiguous and subject to NHDES's administrative gloss.

The principal issue of statutory construction presented by this case is the meaning of "a capacity need for the proposed type of facility shall be deemed to exist to the extent that the proposed facility satisfies that need" as provided by RSA 149-M:11, V(d). NCES maintains – as it has since NHDES informed NCES that it was contemplating denying the first Stage VI application – that if, for example, NHDES found a capacity shortfall of ten million tons over the twenty-year planning period, it could approve a facility's proposal to provide eight million tons of capacity during the planning period, but it could not approve new capacity of twelve million tons because that would exceed the "extent" of the shortfall by two million tons. That is how NHDES construed the statute for decades before consideration of the first Stage VI application.

CLF claims that the statute is unambiguous and that its plain meaning supports the hearing officer's construction. As a threshold matter, CLF's after-the-fact characterization of the statute is contradicted by its own papers and proceedings in this appeal. In its notice of appeal, CLF challenged the capacity need determination where NHDES "only determined there to be a capacity need for one year, and then not until 2026." Certified Record ("CR") at Tab ("T") 1, p. 4. CLF did not claim the capacity need criterion was unlawful or unreasonable because some capacity would be consumed before a period of shortfall, as the hearing officer concluded; rather, CLF challenged the permit decision because it contended the portion of operations during the projected shortfall period

was not long enough in proportion to the operating period. *Id.* Only when the hearing officer issued an order declaring, for the first time, that RSA 149-M:11 requires *all* capacity to be provided during a shortfall period did CLF adopt this position that the statute unequivocally demands such an interpretation.

A statute is ambiguous if its "language is subject to more than one reasonable interpretation." *Att'y Gen'l v. Loreto Publications, Inc*., 169 N.H. 68, 74 (2016). The statute cannot have only one reasonable interpretation when – in addition to omitting that interpretation from its notice of appeal before the council – CLF's brief acknowledges the interpretations NHDES has given the statute in recent years. CLF Brief at 22-23. NCES also supplied evidence on rehearing to document the Department's historically consistent approach to this criterion since its enactment, but rather than engage on the significance of that evidence CLF sought to strike it from the record. *See* CR at T76, T80, T93. CLF may not agree with the interpretations advanced by NCES and NHDES regarding the capacity need criterion, but that is irrelevant to the question of statutory construction before this court.

CLF argues that NCES has conceded that RSA 149-M:11 is unambiguous, thus foreclosing its administrative gloss argument, yet disregards the context of that argument. NCES argued that the statute unambiguously requires NHDES to decline a permit when a facility would operate *beyond the 20-year statutory planning period* (referenced in NCES's papers as the "aggregate capacity method"). CR at T76, p. 2588. It was only if the hearing officer disagreed with this argument that NCES offered the alternate argument that the hearing officer's construction

violated the long-standing administrative gloss on the statute. The hearing officer acknowledged this as an alternative argument in a previous order. NCES Brief Addendum at 73, n. 3.

The hearing officer (and now CLF) construed "to the extent" to mean NHDES may only permit a facility when the *entirety* of its capacity will be utilized during a period of projected shortfall, but this construction of the statute would be ineluctable only if the legislature had modified the language in a way it did not see fit to do. RSA 149-M:11, V, makes the determination of capacity need based solely on the subtraction of permitted capacity from projected waste generation over twenty years. The legislature could readily have required NHDES to determine *when* in the planning period the shortfall would take place, but it did not do so. The rules of statutory construction prohibit consideration of words the legislature did not include in the text. *See Rankin v. South Street Downtown Holdings, Inc.*, 172 N.H. 500, 503 (2019) ("[The court] interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." (Citation and quotation omitted.)).

The most reasonable construction of RSA 149-M:11, V, is that a facility's proposed capacity may not exceed the "extent" of the twenty-year shortfall calculated under the statute. The hearing officer concluded, however, that the legislature intended that NHDES determine when during the planning period there would be a shortfall and permit new capacity only to the degree it will be used to accommodate New Hampshire waste during the shortfall. Even if the hearing officer's interpretation of the statute were facially plausible, the language would remain ambiguous because "to the

extent" could mean either "equal to or less than the aggregate capacity need over the planning period" or "only at a time when there is a shortfall in capacity, and then only to the degree of that shortfall." This ambiguity makes NHDES's administrative gloss on the statute controlling, and NHDES has consistently construed the statute as requiring the aggregate capacity need approach.

II. NCES did not waive arguments first raised on rehearing where the hearing officer's order turned NCES from a prevailing party into an aggrieved party.

NHDES[1] and CLF contend that NCES's arguments regarding the doctrine of administrative gloss and the dormant commerce clause are untimely where they first arose in NCES's motion for rehearing. CLF Brief at 29-34; NHDES Reply at 7-8. They maintain that NCES could have raised administrative gloss earlier in the proceeding, but that is not the question. Instead, the question is when NCES was required to raise administrative gloss on pain of waiving that argument. *City of Portsmouth v. Schlesinger*, 140 N.H. 733 (1996) and *N. Country Env. Svcs., Inc. v. Town of Bethlehem*, 146 N.H. 348, 357 (2001) stand for the common-sense

[1] NHDES devotes much of its reply to answering arguments and characterizing evidence described in NCES's brief, rather than CLF's. This is an improper use of the reply, which "may only be employed to reply to the *opposing party*'s brief." *Panas v. Harakis*, 129 N.H. 591, 617 (1987) (emphasis supplied); *see also* N.H. Supreme Ct. R. 16(7) (leave of court required for response not contemplated by Rule 16). NHDES's arguments regarding the import of the exhibits accompanying NCES's motion for rehearing are particularly egregious and inadvertently underscore the need for an evidentiary hearing below so that this court is not placed in the position of attempting to resolve factual issues regarding administrative gloss in the first instance.

proposition that it is illogical for a party to raise theories on appeal that call into question the legal soundness of a decision in its favor. Litigation is not an academic exercise. Where a party receives the approval it seeks from a regulatory body it would be contrary to its interests to argue that the approval was correct but the body's reasoning was not. There is no legal harm to a party whose approval rests on a more conservative reading of the law than the party believes is correct. Until the application of the law actually harms the party, there is no incentive or standing to attack the application.

The procedural context of *Schlesinger* and *NCES* is irrelevant to the applicability of these principles. NHDES offers no explanation why a party receiving a land-use approval need not challenge legal errors in that approval but a party receiving an NHDES approval must challenge such errors. Nor does NHDES explain why a party receiving an approval that is legally unsound need not appeal that approval (which is the holding of *Schlesinger* and *NCES*), but that if another person appeals that approval the party must raise that unsoundness or be foreclosed from doing so in the future.

Until the hearing officer's May 11, 2022, order NCES had no incentive or obligation to argue that NHDES had used an overly restrictive interpretation of RSA 149-M:11, V(d) in granting the Stage VI permit or that the hearing officer's construction of the statute rendered it violative of the dormant commerce clause. Under *Schlesinger* and *NCES*, then, NCES's assertion of these arguments on rehearing was not untimely.

CLF also misapprehends NCES's arguments concerning the dormant commerce clause. NCES's notice of appeal challenges the hearing officer's

construction of the statute as violative of the constitution; in other words, if the hearing officer is correct in his interpretation of the statute, then the statute is an unconstitutional restraint on interstate commerce. The hearing officer's construction of the law ties the development of disposal capacity directly to in-state waste and prohibits any consideration of waste originating from other jurisdictions in the public benefit calculation.

CLF's argument that NCES has not provided the necessary demonstration regarding the benefits and burdens of the hearing officer's construction of the statute is incorrect both on the facts and the law. CLF Brief at 37. *Smith v. N.H. Dep't of Revenue Admin.*, 141 N.H. 681, 696 (1997), which CLF relies upon for the proposition that NCES must provide the court a "record of burden or benefits" to prove the discriminatory impact of the law, is inapposite and inapplicable. In *Smith*, the court analyzed an admitted dormant commerce clause violation regarding a discriminatory tax. *Id.* at 684. In remanding to the trial court, then, the supreme court instructed it to determine if the petitioners could prove the extent of the monetary damages they claimed. *Id*. at 696. In contrast, this case's circumstances do not concern an admitted violation, nor a discriminatory tax law, nor is this dormant commerce clause claim one that requires a monetary remedy to make the affected parties whole. NCES has sufficiently demonstrated that the hearing officer's interpretation of RSA 149-M:11 is both facially discriminatory and has a discriminatory impact on the landfilling of out-of-state waste, and thus the hearing officer's construction is unconstitutional.

III. CLF lacks standing, and NCES was entitled to an evidentiary hearing on that issue.

The question at the heart of NCES's appeal on the issue of standing is whether the alleged interest of two CLF members is sufficient to establish the standing of CLF as an organization to oppose the permit. There is no foothold in New Hampshire law for the proposition that an organization can derive its standing from two token members within its larger constituency. The environmental councils have attempted to expand the scope of constitutional standing in their rules, *see* CLF Reply at 45, n. 8, but that does not mean that those rules are lawful, sustainable or even applicable here. Indeed, an administrative agency enacting rules to enforce its legislative mandates cannot unilaterally expand the principles of constitutional standing through rulemaking. *See In re Anderson*, 147 N.H. 181, 183 (2001) (administrative rules may not "add to, detract from, or modify the statute which they are intended to implement"). Similarly, the fact that the council may have permitted CLF to proceed with an appeal in a different proceeding does not mean it is an established rule of law in New Hampshire. Indeed, neither NHDES nor the permittee in the 2018 appeal of Waste Management, Inc.'s Turnkey landfill permit challenged CLF's standing.

NCES's appeal asks this court to resolve the outstanding question of whether the State of New Hampshire accepts token standing to satisfy the jurisdictional requirement of standing: in other words, can an organization ground its standing on the alleged interests of a few members? If such a standard is permissible in this state, that will indeed have a liberalizing effect on standing, as public interest organizations will need nothing more

than a single member located in the target jurisdiction to proceed with litigation. CLF's argument that NCES would "turn the doctrine of standing on its head" by asserting that an injury for standing purposes does not exist until it occurs also overlooks this court's precedent, as the harm necessary to establish standing must be "direct and immediate," rather than a prospective event that may occur in the future. CLF Brief at 44; *Appeal of Campaign for Ratepayers Rights*, 142 N.H. 629, 632 (1998).

The question of CLF's standing is replete with factual issues, particularly where standing is a factual determination. *Golf Course Investors of NH, LLC v. Town of Jaffrey*, 161 N.H. 675, 680 (2011). The hearing officer erred in denying NCES's motion for an evidentiary hearing to question whether the token members even had standing at all in this case. The notion that NCES "waived" this by not proceeding to interrogate those witnesses at the hearing on the merits is misplaced. NCES challenged CLF's standing, shifting the burden on CLF to establish its standing, and standing is a question of subject matter jurisdiction that may be raised at any time. *In re Stonyfield Farm, Inc.,* 159 N.H. 227, 231 (2009). The hearing officer denied NCES's motion to dismiss and its motion for rehearing on the issue, CR at T15 and T19, so NCES had no obligation to unilaterally press that issue before the council. Instead, it proceeded in accordance with RSA ch. 541 and raised the issue to this court.

The denial of the request for a hearing is not a sustainable exercise of discretion. To the extent CLF suggests it was a reasonable decision because such a hearing would inconvenience the volunteer council members, that is unsustainable, particularly where NCES sought an evidentiary hearing on an issue that questioned whether the council has

jurisdiction at all based on CLF's standing. CLF Brief at 51. The council was presented with a question of fact as to whether the alleged harms described in the token members' affidavits had happened or were immediately likely to happen, and NCES produced contradictory evidence on that issue.[2] The hearing officer unilaterally decided there was no factual dispute and denied the motion in its entirety. That was error. Suggesting NCES suffered no prejudice by the council's failure to fully evaluate CLF's standing also ignores the fact that NCES then participated in a hearing on the merits that resulted in an order remanding its permit to NHDES for further consideration and converting NCES into an aggrieved party.

CONCLUSION

For the reasons set forth in this reply and in its brief, NCES respectfully asks the court to reverse the hearing officer's May 11, 2022 order and determine that NHDES acted lawfully in granting NCES its permit for the Stage VI expansion of the Bethlehem landfill.

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[2] NCES's request for an evidentiary hearing is not without precedent. In a previous appeal of an NCES permitting decision, for example, the council held an evidentiary hearing over the course of two days to receive testimony from the appellants, expert witnesses, and an NCES employee. Following that hearing, the council dismissed the appeal for lack of standing. *See* Decision and Order on Notice of Appeal (9/15/11), *Seth Goldstein et al. Appeal*, Docket 10-22 WMC, available online at the council website: https://www4.des.state.nh.us/Legal/index.html?jump=Appeals/Waste%20Management%20Council.

CERTIFICATE AS TO COMPLIANCE WITH WORD LIMIT

I hereby certify the within reply complies with the word limitation in Supreme Court Rule 16(11) of 3,000 words. This reply contains 2,527 words.

Respectfully Submitted,

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By Its Attorneys,
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Date: 9/6/23

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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: 9/6/23

/s/ Cooley A. Arroyo
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