

STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

DOCKET NO. 20-14 WMC

IN RE: CONSERVATION LAW FOUNDATION, INC. APPEAL

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

ORDER: MOTION DENIED

BACKGROUND

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

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

RELEVANT LAW AND RULES

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

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

A motion for reconsideration is permitted under Env-WMC 205.16 and RSA § 541:3.¹ A motion for reconsideration "allows a party to present points of law or fact that the [Council] has overlooked or misapprehended." Smith v. Shepard, 144 N.H. 262, 264 (1999), quoting Barrows v. Boles, 141 N.H. 382, 397 (1996). A motion for reconsideration which merely reiterates arguments previously raised should be denied. See Barrows, 141 N.H. at 397; Appeal of Northridge Env't, LLC, 168 N.H. 657, 665 (2016). The Council may grant a motion for reconsideration if "in its opinion good reason for the rehearing is stated in the motion." RSA § 541:3. The moving party bears the burden of persuasion. See Env-WMC 204.15(d).

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

/s/ Zachary Towle Date: 11/3/2022

Zachary N. Towle, Esq., NH Bar 270211
Hearing Officer, Waste Management Council

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