

STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

DOCKET NO. 20-14 WMC

IN RE: CONSERVATION LAW FOUNDATION, INC. APPEAL

ORDER ON CONSERVATION LAW FOUNDATION'S MOTION TO STRIKE

ORDER: MOTION GRANTED IN-PART

BACKGROUND

On May 11, 2022 the Waste Management Council (the "Council") issued its Final Order on Appeal (the "Final Order"), wherein the Council denied seven out of eight of Conservation Law Foundation's ("CLF") appeal claims regarding New Hampshire Department of Environmental Services' ("NHDES") issuance of a Type 1-A Permit Modification and Waiver for Expansion, Permit No. DES-SW-03-002 (the "Permit") to North County Environmental Services, Inc. ("NCES"). On June 10, 2022 NCES filed a Motion for Rehearing regarding the Council's decision to remand, which included nine exhibits (the "Exhibits") offered in support of NCES's Motion. On June 24, 2022 CLF filed a Motion to Strike the Exhibits; on July 6, 2022 NCES filed an objection; and on July 18, 2022 CLF filed a reply.

RELEVANT LAW AND RULES

The rules of evidence do not apply in adjudicative proceedings. See RSA § 541-A:33; Env-WMC 205.07. Relevant and material evidence shall be admissible, while evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded. Env-WMC 205.07. If a party is seeking to introduce new or additional evidence through its motion for rehearing, said party will specify whether it is seeking to present said evidence and, if so, the nature of the evidence to be offered. Env-WMC 205.16(b)(4). Pursuant to Env-WMC 205.16(c):

New or additional evidence shall be permitted when offered to: (1) Cure any deficiencies in the original notice of appeal or testimony; (2) Correct errors of form in the decision; (3) Request reconsideration of the conditions of the approval or of the denial; or (4) Challenge any facts of which official notice was taken.

DISCUSSION

In its Motion for Rehearing NCES does not assert that it intends to introduce new evidence nor does it describe the nature of the evidence to be offered. Instead, NCES appears to have provided the Exhibits to support NCES's administrative gloss argument (see NCES's Motion for Rehearing, pp. 19-20) and its argument the Hearing Officer inappropriately overruled a Council decision. See Id., at 37. It will be inferred that NCES intended to introduce the Exhibits as new evidence; NCES satisfied the description requirement of Env-WMC 205.16(b)(4) by providing the actual evidence being offered; and NCES offered such evidence in support of its request the Council reconsider its Final Order pursuant to Env-WMC 205.16(c)(3).

Exhibits A-F and H contain evidence which is relevant to NCES's administrative gloss interpretation of RSA § 149-M:11, III, but such evidence is ultimately immaterial to the appeal. The Council determined that NCES's administrative gloss argument fails as a matter of law because the relevant statutory language is not ambiguous. See Order on North Country Environmental Services, Inc.'s Motion for Reconsideration, pp. 4-5. NCES offered Exhibits A-F and H to support NCES's administrative gloss interpretation, but NCES has not argued that the relevant RSA § 149-M:11, III language is ambiguous thereby warranting an evaluation of the administrative gloss NCES argued should inform interpretation of the statute. As the statutory language has been deemed unambiguous and NCES did not argue it should be found ambiguous, Exhibits A-F and H are immaterial to whether the Council erred in its interpretation of RSA § 149-M:11, III in the Final Order, Subsection C. Accordingly, CLF's motion to strike Exhibits A-F and H is **GRANTED**.

Exhibit G was just a stopgap measure relied on by NCES to support its arguments regarding activity which occurred at the Hearing and during the Council's deliberations while the official audio recording of the Hearing and the Council's deliberations was inaccessible. While NCES could have continued to rely on Exhibit G to support its argument, NCES ultimately switched to relying on the official record once it became available. See NCES's July 6, 2022 Reply to CLF's Objection, p. 14. Exhibit G was ultimately relevant and material to NCES's arguments and, though it became redundant upon the release of the official recording, Exhibit G is not unduly repetitious. According, CLF's motion to strike Exhibit G is **DENIED**.

Exhibit I does not appear to support any arguments raised by NCES in its Motion for Rehearing, but is instead merely a reporting of the dates the Hearing Officer complied with RSA § 21-M:3, IX(f). Exhibit I is therefore immaterial and, accordingly, CLF's motion to strike Exhibits I is **GRANTED**.

CONCLUSION

For the above detailed reasons, CLF's Motion to Strike is **GRANTED IN-PART**.

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.