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December 5, 2022

HAND-DELIVERED

Waste Management Council
c/o DES Legal Unit
Pamela G. Monroe, Legal Unit Administrator
29 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095

Re: Docket #20-14 WMC
Conservation Law Foundation, Inc. Appeal

Dear Administrator Monroe:

Enclosed for filing is NCES's Motion for Rehearing. Pursuant to the Prehearing Order issued June 8, 2021, we are enclosing an original and 13 copies and have served all interested parties via e-mail.

Thank you for your assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "Morgan G. Tanafon", written over a horizontal line.

Morgan G. Tanafon, Esq.

MGT:bmb/Encs.

cc: Michael Wimsatt, Director, NHDES Waste Mgmt. Div. (via e-mail)
K. Allen Brooks, Esq., NH Department of Justice (via e-mail)
Joshua C. Harrison, Assistant Attorney General (via e-mail)
Thomas Irwin, Esq. & Heidi Trimarco, Esq., Conservation Law Foundation (via e-mail)

STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WASTE MANAGEMENT COUNCIL

Docket No. 20-14 WMC

In re: Conservation Law Foundation, Inc. Appeal

**MOTION OF NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.
FOR REHEARING OF ORDERS ON MOTIONS TO STRIKE AND SUPPLEMENT
AND OF NEW DISCLOSURES ON MOTION FOR REHEARING**

Pursuant to RSA ch. 541, North Country Environmental Services, Inc. (“NCES”), moves the council for rehearing on the hearing officer’s November 3, 2022, orders granting CLF’s motion to strike and denying NCES’s motion to supplement the record with additional information to support its motion for rehearing. NCES also seeks rehearing of any conclusions of law reached by the hearing officer in his ruling on NCES’s motion for rehearing based upon factual disclosures made for the first time in the ruling on the motion for rehearing. This motion rests on the following grounds.

I. Introduction

Without citing authority from RSA ch. 541, the Administrative Procedure Act on the council’s rules, the hearing officer issued an order on November 3, 2022, purporting to strike from the record exhibits accompanying NCES’s motion for rehearing. This was error because the hearing officer has no authority to strike evidence offered by a party on rehearing. The hearing officer also denied NCES’s motion to supplement the record with documents received from NHDES demonstrating that the agency’s long-standing construction of RSA 149-M:11, V differs from that adopted by the hearing officer. This was error because this evidence is material and relevant to NCES’s motion for rehearing, and there is no basis to exclude it from the record. Finally, the hearing officer’s order on NCES’s motion for rehearing disclosed for the first time

that the council had allegedly approved the order on rehearing in some fashion. To the extent that the order on rehearing relied upon this alleged approval in reaching any legal conclusion, NCES seeks rehearing because any such approval was not legally obtained.

II. Statement of Facts

Pursuant to RSA ch. 541, NCES sought rehearing of the hearing officer's May 11, 2022 order, which opined that NHDES acted unlawfully in granting NCES's permit for the Stage VI expansion. In support of this motion, NCES argued that the hearing officer's order violated the doctrine of administrative gloss, as NHDES's longstanding interpretation of RSA 149-M:11 cannot lawfully be altered absent legislative action. To substantiate this argument, NCES included exhibits with its motion for rehearing demonstrating NHDES's historical application of the public benefit criteria in RSA 149-M:11. Without citing authority, CLF moved to strike these exhibits, claiming that NCES had "waived" its administrative gloss argument when it did not advance that theory during the hearing on the issues raised in CLF's notice of appeal.

After filing its motion for rehearing, NCES received a set of documents from NHDES pursuant to a public records request. These documents included internal NHDES communications establishing that the agency had considered and rejected use of the "function of time" element in determining capacity need decades ago. NCES moved to supplement the record on rehearing to include these documents to further support its administrative gloss argument. NCES also requested an evidentiary hearing, arguing that such a proceeding was necessary to address CLF's objections and give the council an opportunity to consider the evidence. CLF objected to this motion.

On November 3, 2022, the hearing officer denied NCES's motion to supplement and granted CLF's motion to strike nearly in its entirety.¹ Order on Mot. to Supplement (11/3/22); Order on Mot. to Strike (11/3/22). Relying on his concurrent ruling denying NCES's motion for rehearing, where he held that NCES's administrative gloss argument failed as a matter of law, the hearing officer concluded that various exhibits appended to the motion for rehearing were "immaterial" to the appeal, and thus it granted CLF's motion to strike Exhibits A-F and H to NCES's motion for rehearing. Order on CLF Mot. to Strike (11/3/22) at 2; Order on NCES's Mot. for Rehearing (11/3/22) at 4-5. That same logic led the hearing officer to deny NCES's motion to supplement the record on rehearing. The hearing officer concluded that the administrative gloss doctrine cannot apply because the statute is unambiguous, and thus he determined that the evidence appended to NCES's motion to supplement is immaterial. Order on NCES Mot. to Supplement (11/3/22) at 3. Without any explanation or analysis, the hearing officer also denied the request for an evidentiary hearing on this matter. *Id.*

The hearing officer's order denying NCES's motion for rehearing is silent as to whether the council took up NCES's motion at a meeting, despite being required by N.H. Code Admin. R. Env-WMC 205.16.(d). There was no public record of the council's consideration of the order at a public meeting, and in a footnote in the November 3, 2022, order on NCES's motion for rehearing the hearing officer disclosed for the first time that he and the council conferred in some way to discuss the merits of the appeal and the draft of the May 11, 2022 opinion. Order on NCES's Mot. for Rehearing (11/3/22) at 9, n.5. Because any approval by the council did not

¹ The hearing officer denied CLF's motion to strike only as to Exhibit G, which is an affidavit describing the council's hearing on the appeal and the deliberations thereafter. It was necessary as NCES did not yet have access to the audio recording of the proceeding when filing the motion for rehearing. NCES does not seek rehearing as to this portion of the order. Order on Mot. to Strike (11/3/22) at 2.

comply with RSA 91-A, NCES moves the council for rehearing of any conclusions of law² in the hearing officer's order on rehearing that were based on the council's alleged approval of the May 11, 2022, order.

III. Argument

A. Orders on CLF's Motion to Strike and NCES's Motion to Supplement

A motion for rehearing must identify each and every basis on which the order is unlawful or unreasonable. RSA 541:4. Such a motion is prerequisite to appealing that determination to the supreme court. *Id.* NCES moves the council for rehearing on the hearing officer's orders granting CLF's motion to strike and denying NCES's motion to supplement the record on rehearing, to preserve them for appeal to the supreme court.

The hearing officer cites no authority to establish that he has the authority to strike exhibits from the record. A hearing officer is permitted to "exclude" evidence, RSA 541-A:33, II and N.H. Code Admin. R. Env-WMC 205.07(b), or rule against its admissibility, but striking evidence eliminates it entirely from the record and thus would purport to prevent its consideration by the supreme court on appeal. RSA 541:14. Although the hearing officer would be within his authority to rule that NCES's evidence was inadmissible, the documents themselves should have remained part the record because they are material to the issues presented in NCES's papers. Moreover, a motion to strike is generally intended to address "redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The information appended to NCES's motions certainly does not fall into any of these categories. It was therefore error for the hearing officer to grant CLF's motion to strike.

² The order on rehearing is unclear as to whether the hearing officer relied upon the disclosures made in footnote 5 of his May 11, 2022, order to support any of the legal conclusions therein. NCES seeks rehearing on this issue out of an abundance of caution so its rights are preserved under RSA 541:4.

In his order denying NCES's motion for rehearing, the hearing officer concluded that RSA 149-M:11 is not ambiguous and thus there can be no administrative gloss on the statute. Order on Mot. for Rehearing (11/3/22) at 5. The hearing officer concedes that the exhibits appended to NCES's motion for rehearing are "relevant to NCES's administrative gloss interpretation" of RSA 149-M:11, Order on CLF Mot. to Strike (11/3/22) at 2, but because he determined there is no administrative gloss on the statute, he concluded that the documents included with the motion for rehearing and the motion to supplement are "immaterial." Order on CLF Mot. to Strike (11/3/22) at 2; Order on NCES Mot. to Supplement (11/3/22) at 3.

This order misapprehends the meaning of materiality and the focus of such an analysis. While the hearing officer correctly notes that the rules of evidence do not apply in council proceedings, the council rules provide that evidence which is "relevant and material to the subject matter of the hearing" shall be admissible, while evidence which is irrelevant or "immaterial" may be excluded. N.H. Code Admin. R. Env-WMC 205.07(b). "Materiality is a necessary aspect of relevancy: evidence offered to prove a fact that is not in issue is immaterial." *Welch v. Bergeron*, 115 N.H. 179, 182 (1975). Here, where NCES submitted evidence that is relevant to its arguments, that evidence is material to the appeal.

The motion for rehearing put the administrative gloss doctrine directly at issue, as it asked the hearing officer to determine whether his May 11, 2022, order violated that doctrine by setting aside the Department's long-standing interpretation and application of RSA 149-M:11, V. The documents accompanying the motions, then, were relevant and material to prove the existence of an administrative gloss, but the hearing officer excluded them because he concluded that no such gloss could exist. NCES thus respectfully seeks rehearing on the order on the

motion to strike and that the evidence attached to the motion for rehearing be restored to the record. NCES also seeks rehearing of the order on the motion to supplement for the same reason.

B. Order on NCES's Motion for Rehearing

In response to NCES's argument on rehearing that he improperly reversed the council's decision regarding the lawfulness of NHDES's permitting decision during deliberations, the hearing officer suggests in a footnote that he met with the council and received its endorsement for the draft order on the merits. Order on NCES's Mot. for Rehearing (11/3/22) at 9, n.5. To be valid, such a meeting would have to be properly noticed between the hearing officer and the council and made open to the public. RSA 91-A:2, I, II. Documents produced to NCES on December 2, 2022, in response to a public records request demonstrate that no such meeting was held and in fact only some members of the council were available to comment by email on the proposed order. These documents also indicate that the council and the hearing officer deliberated on the proposed order via email; if true, this is a violation of RSA 91-A:2, I and II, which requires meetings concerning "matters over which the public body [like the council] has supervision, control, jurisdiction, or advisory power" must be open to the public. *See also* RSA 91-A:2, III(c) ("No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice."). For these reasons, NCES moves the council for rehearing as to any conclusions of law set forth in the November 3, 2022, order on NCES's motion for rehearing that were based on the council's purported approval of the order in absence of a public meeting. NCES also intends to institute an RSA ch. 91-A enforcement action this week to set aside any decision made without complying with the public meeting requirement.

Further, it appears from the text of the hearing officer's order on NCES's motion for rehearing that the hearing officer denied NCES's motion without consultation with the council. This is a violation of the council's rules, which require the *council* to reach a decision on whether to hold a hearing or dismiss the motion for rehearing. N.H. Code Admin. R. Env-WMC 205.16(d) states in relevant part: "The council shall, at its first scheduled meeting following receipt of such a motion [for rehearing], order a hearing or dismiss the motion." This is consonant with RSA 541:3, as well, which provides that "the *commission* may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion." (Emphasis supplied.) In other words, it is not the hearing officer's place to determine whether rehearing is necessary, but rather that is the council's decision to make.

The hearing officer's November 3 order is silent as to what role, if any, the council played in reaching a decision on NCES's motion for rehearing, or whether it even considered the motion at all. To the extent the hearing officer acted independently in ruling on this motion, then, that action violated the council's rules and the law governing consideration of motions for rehearing, and for these reasons NCES moves for rehearing of that decision.

IV. Conclusion

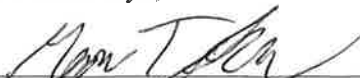
For the reasons set forth in this motion, NCES respectfully requests that the council grant rehearing, deny CLF's motion to strike, and grant NCES's motion to supplement the record on rehearing. NCES also moves the council to rehear any conclusions of law reflected in the hearing officer's order on NCES's motion for rehearing that were based on the council's alleged approval of the order without a public meeting, and to rehear the issue in light of the fact that the council apparently had no role in deliberating on NCES's motion for rehearing, in violation of the council's rules.

Respectfully submitted,

NORTH COUNTRY ENVIRONMENTAL
SERVICES, INC.,

By Its Attorneys,

Date: 12/5/22

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CERTIFICATE OF SERVICE

I hereby certify that, in accordance with the Pre-hearing Order issued on this matter on June 8, 2021, the within document was this day sent by e-mail transmission to:

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