

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]he 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 NCEC 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. *See* 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 determines 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 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.