

STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

Conservation Law Foundation, Inc. Appeal

Docket No. 20-14 WMC

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

NOW COMES the State of New Hampshire Department of Environmental Services (“NHDES”), by and through its counsel, the Office of the Attorney General (collectively, the “State”), and hereby submits its Motion for Reconsideration of the Waste Management Council’s April 11, 2022 Final Order on Appeal (“Final Order”). In support hereof, NHDES states as follows:

NHDES’s Motion for Reconsideration is limited to Section C of the Final Order. Generally, the theme of Section C of the Final Order is well taken.¹ The Final Order contains many interpretations with which NHDES agrees. For instance, NHDES agrees with the Final Order’s interpretation of RSA 149-M:11, V as being “designed to...ensure New Hampshire’s waste facilities provide effective and proportional capacity to New Hampshire’s waste needs.” Final Order, page 10. NHDES also agrees that the statute “inexorably links a finding of shortfall with a finding of capacity need.” *Id.* NHDES further does not dispute that the word “satisfies” from RSA 149-M:11, V in this context could be interpreted to mean “resolves.” *Id.* at 9.

Next, the Final Order properly summarizes NHDES’s position with respect to RSA 149-M:11, III(a) and V:

Though not explicitly articulated by NHDES, its current arguments 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 the facility

¹ References to “Final Order” in this motion should be interpreted to relate to Section C, which is the section subject to this motion for reconsideration.

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.

Final Order, page 8. Put another way, NHDES believes that it can make a finding of substantial public benefit if the capacity provided by a facility alleviates a capacity shortfall even if the shortfall occurs after the facility's capacity is brought on-line, i.e., made available. For instance, capacity brought on-line this week may be available to accept waste next week whereas, without it, there would be insufficient capacity next week. Even if the permitted facility's capacity is used before next week, this use could have freed up capacity at another, existing landfill.² It is up to NHDES to determine if the proposed facility actually will "resolve" what would otherwise be a future shortfall.

Importantly, there is nothing novel about looking to the impact on future capacity needs. In fact, this is exactly what the statute requires and what practical regulation of solid waste facilities dictates. As noted by the Final Order, the "(a) criteria" focuses on both "short- and long-term need," and paragraph V of RSA 149-M:11 specifically requires NHDES to use a 20 year planning period. After summarizing the NHDES position, however, the Final Order reasons that in order to accept the NHDES position, "the (a) criteria must either not require a finding of capacity need or, if it does, the (a) criteria must not be requisite for a finding of substantial public benefit." *Id.*

First, NHDES respectfully disagrees with this threshold analysis. NHDES believes that what the Final Order calls the "(a) criteria" *does* require a finding of capacity need and that

² As noted in the Final Order, NHDES asserted that a "proposed facility...could have a substantial effect on a later identified shortfall..." Final Order, page 7.

NHDES *does* use the “(a) criteria” to determine if there is a substantial public benefit. NHDES finds no inconsistency between these propositions and its position stated above.

Second, NHDES respectfully requests that the Hearing Officer reconsider the resulting holding. By disagreeing with the NHDES interpretation above, the Final Order essentially finds that NHDES cannot determine that a facility “provide[s] capacity to accommodate solid waste generated within the borders of New Hampshire” 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. RSA 149-M:11, III(a). Stated differently, the Final Order would invalidate a permit, even if NHDES definitely proved that the facility will “provide effective and proportional capacity to New Hampshire’s waste needs.” Final Order, page 10. This contradicts the Final Order’s reasoning discussed above and is not what the statute requires.

The real disconnect appears to relate solely to timing, not whether the “(a) criteria” apply. The Final Order asserts that because the word “satisfies” is in the present tense, the time when capacity is made available and the time of a predicted shortfall must be strictly contemporaneous, i.e., both happening in the present tense. However, nothing contemplated by the statute happens in the present tense. None of the statute requires a relationship between a need that exists today and a satisfaction of that need at the moment of permitting. As stated above, the statute’s terms look to the future by discussing short- and long-term need and a 20-year planning window. Everything occurs in the future.

No statutory provision specifically identifies the operating period of the facility as the factor for measuring public benefit. Rather, RSA 149-M:11, III(a) and V only require that the facility “satisf[y] that need” without regard to when that satisfaction occurs. To only evaluate the operating life of the facility, as the Final Order’s interpretation seems to require, would affect

the requirement that NHDES consider the “short- and long-term need” for the facility as well as the requirement that NHDES measure and analyze the projected shortfall and resulting need within the 20-year planning period. The legislature would not have required NHDES to undertake a 20-year planning period analysis or evaluate short- and long-term need for each application when NHDES may only base its need determination on whether the facility resolves the need during the proposed life of the facility alone. The Final Order’s interpretation of the word “satisf[y]” would render the “short- and long-term” phrase and the “20-year planning period” phrase nugatory. *See Marceau v. Concord Heritage Life Ins. Co.*, 149 N.H. 216, 219 (2003) (declining to construe a statute in a way that would render a phrase “virtually meaningless”); *see also State v. Moore*, 173 N.H. 386, 390 (2020) (construing a statute such that “every word...should be given effect”).

Thus, the question is instead whether a facility providing capacity at a certain point can “resolve” a capacity shortfall that occurs sometime after this capacity comes on-line. This is a question of fact and not law.

The Final Order implicitly recognizes this as a factual question because the Final Order resolves it with a factual assertion. The Final Order says: “[i]t 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.” Final Order, page 11. Whether a facility can resolve a capacity need after it ceases operation, e.g., whether a facility operating today can resolve a need that will exist tomorrow, is a factual question.

The Waste Management Council must determine whether NHDES acted unreasonably in determining that the facility capacity being permitted will resolve a predicted capacity shortfall. The Waste Management Council found that NHDES did not act unreasonably in determining

that the need for capacity justified operation of the facility. Final Order, at 15. The Hearing Officer can override the Waste Management Council and decide this question as a matter of law if he or she finds that it is “without evidentiary support in the record.” RSA 21-M:3, IX(c). However, this is not what the Final Order does. The Final Order disposes of the question as one of statutory interpretation rather than fact. NHDES respectfully asks that the Hearing Officer reconsider its Final Order and treat this question as one of fact.

Next, NHDES notes that the Final Order refers to prior NHDES interpretations of RSA ch. 149-M multiple times to support its decision. For instance, it states:

This argument contradicts NHDES’s **finding** in its February 2020 Permit Application Review Summary which contains NHDES’s review of NCES’s initial application for its Stage VI expansion...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.’

Final Order, page 7 (emphasis added). And later:

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.

Id. at 11 (emphasis added). First, regarding the withdrawn January 2019 application and the corresponding draft February 2020 Application Review Summary, NHDES never made findings with respect to that application. Due to the process required for a decision of an agency to become final, the material cited within the Final Order were effectively pre-decisional opinions, not a decision of the agency. Before becoming an agency decision, these opinions must go through a formal level of approval and a decision must be made. This February 2020 draft document was not a document from which a party could appeal because there was no decision on the application. *See* RSA 21-O:14, I(a), (b), and (c). Had the agency made a decision, either

approving or denying the application, NCES or any other allowable party could have appealed that decision and challenged any assertion. Absent the chance to do so, the Permittee should not be held to these pre-decision documents.

Second, the Final Order seems to relate a prior interpretation in the draft February 2020 Application Review Summary to an alleged failure to produce evidence supporting its factual position in the appeal of the subject permit issuance. The Final Order states:

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 that argument at that time because the 'capacity need' identified by NCES would not manifest because other facility 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.**

Final Order, page 12 (emphasis added).

NHDES refines its interpretation over time based on experience, discussions with counsel, and other inputs. Notwithstanding Section D of the Final Order wherein the Waste Management Council determined "that NHDES did act reasonably in determining there was sufficient capacity need for the NCES Facility...", if the Hearing Officer feels that NHDES did not do enough to justify a result using the standards it articulated at the Waste Management Council hearing, NHDES respectfully requests that the decision be remanded to allow it to do so. In other words, if the decision is remanded, NHDES asks that it be allowed to attempt to provide facts in support of an application of its articulated

standard on remand rather than a standard that strictly requires a 1 to 1 temporal relationship between capacity provided and capacity needed and that the Waste Management Council review a subsequent determination and the supporting facts for reasonableness.

WHEREFORE, NHDES respectfully requests that the Hearing Officer reconsider the Final Order for the reasons provided herein.

Respectfully submitted,

State of New Hampshire
Department of Environmental
Services

By its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

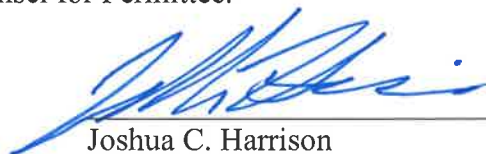
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Joshua C. Harrison, NH Bar #269564
Assistant Attorney General
Environmental Protection Bureau
Office of the Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679
Joshua.C.Harrison@doj.nh.gov

Certificate of Service

I hereby certify that a copy of the foregoing has been e-mailed this day to Thomas Irwin, Esq. and Heidi Trimarco, Esq., Conservation Law Foundation, Inc., counsel for the Appellant, and Morgan Tanafon, Esq., Cooley Arroyo, Esq., and Bryan Gould, Esq., Cleveland Waters and Bass, P.A., counsel for Permittee.



Joshua C. Harrison