

THE STATE OF NEW HAMPSHIRE  
WASTE MANAGEMENT COUNCIL

Docket No. 20-14 WMC

Appeal of North Country Environmental Services, Inc.'s Type I-A Permit Modification for  
Expansion (Permit No. DES-SW-SP-03-02) by Conservation Law Foundation

**OBJECTION OF CONSERVATION LAW FOUNDATION TO  
STATE OF NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES'  
MOTION FOR RECONSIDERATION**

Conservation Law Foundation (“CLF”) hereby objects to the State of New Hampshire Department of Environmental Services (“DES”)’s Motion for Reconsideration (“DES Motion”) pertaining to the Waste Management Council’s Final Order on Appeal dated May 11, 2022 (“Final Order”) and requests that the Waste Management Council (“Council”) deny such motion. In support of its objection, CLF respectfully states:

**INTRODUCTION**

The Council, in Section C of its Final Order, correctly interpreted RSA 149-M:11, III(a) and V to require a capacity need for New Hampshire-generated waste for the permitting of landfill facilities and their operations. In doing so, the Council properly rendered a determination – in full conformance with RSA 21-M:3 – regarding the unlawfulness of DES’s permit decision as it relates to criteria (a) of RSA 149-M:11.

DES now moves for reconsideration of the Council’s decision by reiterating an argument – interpretation of the statute’s capacity need provision – that DES has already made, and lost, before the Council. Moreover, DES chose not to develop this argument at the final hearing. Despite DES’s failure to develop its position at the final hearing, DES now asks the Council for an opportunity to present additional information. DES’s request is untimely and has been waived.

DES's motion for rehearing is without merit and should be denied.

**STATUTORY PROVISION**

New Hampshire's solid waste management statute's public benefit requirement, RSA 149-M:11, is well established in this matter. To grant a permit for a solid waste facility, NHDES must first determine that the facility will provide "a substantial public benefit." RSA 149-M:11, III. A public benefit is defined as "the protection of the health, economy, and natural environment of the state of New Hampshire consistent with RSA 149-M:11." RSA 149-M:4, XVIII.

To find that a facility will provide a substantial public benefit, DES must make three findings – a capacity need determination, a state hierarchy and goals determination, and a state solid waste plan determination. RSA 149-M:11, III (a), (b), (c), *see also* Final Order at 2-3. The only criteria at issue in the pending motions for reconsideration is the capacity need criteria in RSA 149-M:11, III (a), which states:

III. 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.

RSA 149-M:11, III (a).

The formula for determining capacity need in paragraph V states:

V. In order to determine the state's solid waste capacity need, the department shall:

(a) Project, as necessary, the amount of solid waste which will be generated within the borders of New Hampshire for a 20-year planning period. In making these projections the department shall assume that all unlined landfill capacity within the state is no longer available to receive solid waste.

- (b) Identify the types of solid waste which can be managed according to each of the methods listed under RSA 149-M:3 and determine which such types will be received by the proposed facility.
- (c) Identify, according to type of solid waste received, all permitted facilities operating in the state on the date a determination is made under this section.
- (d) Identify any shortfall in the capacity of existing facilities to accommodate the type of solid waste to be received at the proposed facility for 20 years from the date a determination is made under this section. If 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.

RSA 149-M:11, V.

### **ARGUMENT**

#### **I. The Council Should Deny DES's Motion Because It Improperly Reiterates Issues That Have Been Fully Litigated.**

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). It is not an opportunity for a party to reiterate arguments it has already raised – and lost – before the Council. DES's Motion simply restates arguments it has made already. DES presents no new argument or basis for reconsideration and has failed to demonstrate good cause for rehearing as required by RSA 541:3. Accordingly, DES's motion should be denied.

DES asks the Council to reconsider the Final Order's capacity need analysis under RSA 149-M:11, III(a) and V. DES Motion at 1-6. DES provided its full analysis of the statute's capacity need requirement in its Prehearing Memo. NHDES Limited Pre-Hearing Memorandum at 3-6. DES's instant Motion simply reiterates those arguments DES already made regarding capacity need. The final hearing in February 2022 addressed the statute's capacity need provision and the Council's Final Order correctly determined that New Hampshire's solid waste

management statute requires that a proposed solid waste facility must satisfy a capacity need during the operating life of the facility. Final Order at 12. Without presenting any points of law or fact that the Council overlooked or misapprehended, DES simply recycles its prior argument regarding capacity need and asks the Council for a different result.

A party cannot use a motion for reconsideration to simply reiterate arguments it has already made. *Barrows v. Boles*, 141 N.H. 382, 397 (1996). “A motion for rehearing must do more than merely restate prior arguments and ask for a different outcome.” *Freedom Energy Logistics*, N.H. Public Utilities Comm’n, Order No. 25,810, 2015 WL 5309868, at \*3 (Sept. 8, 2015) (denying motion for rehearing where motion presented no new information and commission did not overlook or misunderstand issues raised during the proceeding); *Town of Hampton*, N.H. Public Utilities Comm’n, Order No. 26,287, 2019 WL 3890228, at \*2 (Aug. 14, 2019) (“A successful Motion for Rehearing does not merely reassert prior arguments and request a different outcome.”); *id.* (the “standard for rehearing” is not met when a party “repeat[s] the same arguments it made” in previous filings).

Because DES’s motion simply reiterates arguments it has already made – and lost – regarding capacity need, DES’s motion should be denied.

**II. The Council Should Deny DES’s Request to Provide Additional Evidence at This Late Stage.**

DES concludes its Motion with a request to the Council for the opportunity to provide additional evidence:

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.

DES Motion at 6-7. DES's request to introduce new evidence at this very late stage of the proceedings is egregious. DES had ample opportunity to introduce evidence over the course of this appeal. Pursuant to the Pre-Hearing Orders, the parties were required to exchange discovery by September 1, 2021,<sup>1</sup> file pre-hearing memoranda identifying key legal and factual issues by February 8, 2022, and file all exhibits by February 16, 2022. Pre-Hearing Order, Jan. 27, 2022. DES could have presented information at the multi-day hearing held in February 2022, including through evidence and witness testimony, but elected not to. Even as the hearing came to an end, DES passed over opportunities to keep the record open to submit additional evidence. Pursuant to Rule Env-WMC 205.10, prior to the close of the hearing a party may request that the record be left open for a specific period of time in which to file evidence or arguments not available at the hearing. Env-WMC 205.10(b). Under Rule Env-WMC 205.11 DES could have requested that the Council: "reopen the record to consider testimony, evidence, arguments, or exhibits not previously considered." Env-WMC 205.11.

Critically, DES did not present *any* evidence at the hearing to develop its capacity need analysis, and did not ask *any* questions of any witness during the multi day hearing to advance DES's position. DES had ample opportunity to defend its permit decision and present its argument regarding capacity need under RSA 149-M:11, and DES elected not to do so. When a party fails to adequately develop arguments, those arguments are waived. *Ellis v. Currier*, No. 2014-0752, 2015 WL 11089466, at \*1 (N.H. Sept. 28, 2015). Having not taken advantage of the final hearing as an opportunity to present its position, DES cannot credibly now ask for an

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<sup>1</sup> On August 18, 2021 the Hearing Officer granted an Assented-To Motion extending the discovery deadline from August 18, 2021 to September 1, 2021.

additional opportunity to do so. DES's request to provide additional facts is untimely, has been waived, and should be denied by the Council.

**III. The Council Correctly Interpreted RSA 149-M:11, III(a) and (V).**

**A. The Council correctly interpreted RSA 149-M:11, III(a) and V to require a capacity need for New Hampshire-generated waste during the operating life of a proposed facility.**

The Council in the Final Order correctly determined that New Hampshire's solid waste management statute requires that a proposed solid waste facility must satisfy a capacity need during the operating life of the facility. Final Order at 12. This determination is based on the plain and unambiguous wording on the statute. Interpreting the statute, the Council determined that RSA 149-M:11, III(a) "does require a proposed facility to satisfy a capacity need during the lifespan of the facility . . . 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." Final Order at 12.

The Council's determination comes directly from the words of the statute. RSA 149-M:11, III (a) (the "a criteria") plainly requires DES to determine if there is a short- and long-term capacity need for the facility, and requires that capacity need to be identified according to RSA 149-M:11, V. RSA 149-M:11, III (a), Final Order at 8 ("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.").

Section V, for its part, lays out the formula for calculating capacity need and determining if the proposed facility satisfies that need. RSA 149-M:11, V, Final Order at 9. After projecting the amount of solid waste to be generated within New Hampshire over a twenty-year planning period, DES is instructed to identify the types of waste that will be received by the proposed

facility and to identify, by type of solid waste received, all permitted facilities operating in New Hampshire. RSA 149-M:11, V (a), (b), (c). In the final provision, RSA 149-M:11, V(d), DES must make two determinations: first, whether there will be any shortfall in capacity for the type of waste for the proposed facility over the twenty-year planning period, and second, if there is such a shortfall, the extent to which the proposed facility satisfies that need. RSA 149-M:11, V(d) (“Identify any shortfall in the capacity of existing facilities to accommodate the type of solid waste to be received at the proposed facility for 20 years from the date a determination is made under this section. If 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.”)

The Council’s determination that a facility must satisfy a capacity need during the lifespan of the facility is based on the final provision of Section V(d), which states that if there is a shortfall, “a capacity need for the proposed type of facility shall be deemed to exist *to the extent the proposed facility satisfies that need.*” RSA 149-M:11, V(d) (emphasis added); *see* Final Order at 9-12. The Council correctly reached this conclusion by a plain reading of the statute. Using what the Council describes as a “plain reading of the word ‘satisfies’” it determined that: “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. . . . 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.” Final Order at 9.

DES argues that the shortfall can occur at any time over the twenty-year planning period. *See* DES Motion at 4. This position ignores plain statutory language. The statute plainly states that a capacity need exists “to the extent that *the proposed facility satisfies that need.*” RSA 149-

M:11, V(d) (emphasis added). Under New Hampshire law every statutory word must be given its full effect. *See Town of Amherst v. Gilroy*, 157 N.H. 275, 279 (2008) (“The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.”); *see also Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009) (quoting *Amherst* and adding that courts “also presume that the legislature does not enact unnecessary and duplicative provisions.”) (internal citations omitted). DES’s position that if a shortfall occurs at any time during the twenty-year planning period, there is a capacity need, would only makes sense if the statute did not include the words “to the extent that the proposed facility satisfies that need.” Critically, the statute *does* include those words. The legislature qualified the capacity need, providing that a capacity need only exists “to the extent the proposed facility satisfies that need.” RSA 149-M:11, V(d). The words “to the extent the proposed facility satisfies that need” must be given their full meaning and cannot be ignored. *See Town of Amherst*, 157 N.H. at 279.

The Council correctly determined that, because the statute requires that the proposed facility “satisfies” the capacity need, a present-action relationship must exist between the capacity need and the proposed facility. Final Order at 10. Stated another way, the facility operations and the capacity need must be contemporaneous.<sup>2</sup> *See id.* The Council reached this determination based on a plain reading of the statute. Final Order at 10-11 (“a plain reading of paragraph V(d) imposes a requirement that a proposed facility must presently satisfy capacity need . . .”).

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<sup>2</sup> This does not mean that the capacity need and facility operations cannot occur in the future, as suggested by DES. *See* DES Motion at 3-4. The capacity need and facility operations may occur in the future, as long as they occur at the same time.



**B. The Final Order is consistent with DES's own interpretation of the statute.**

As recognized in the Final Order, requiring facility operations and capacity need to occur contemporaneously is the exact position DES took when it denied NCES's first Stage VI permit application. Final Order at 11. DES now reverses course and suggests that a facility could satisfy a capacity need by addressing a future capacity shortfall. DES Motion at 3. As explained in the Final Order:

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.*

Final Order at 7.

Because the statute is unambiguous, and the Council correctly determined that New Hampshire's solid waste management statute requires that a proposed solid waste facility must satisfy a capacity need during the operating life of the facility, DES's Motion for Reconsideration should be denied.

**CONCLUSION**

As set forth above, DES has failed to demonstrate good cause for reconsideration and DES's Motion for Reconsideration should be denied.

Wherefore, CLF respectfully requests that the Council deny DES's Motion for Reconsideration.

Dated: June 24, 2022

Respectfully submitted,

CONSERVATION LAW FOUNDATION

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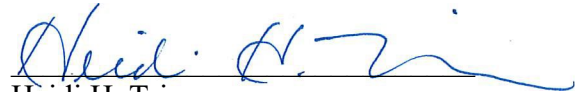
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CERTIFICATE OF SERVICE

I certify that the original and thirteen copies of the foregoing Memorandum was this 24<sup>th</sup> day of June, 2022 hand-delivered to the Waste Management Council and a copy of the foregoing is being sent by electronic mail to Joshua C. Harrison, Esq., Bryan K. Gould, Esq., Cooley Arroyo, Esq. and Morgan C. Tanafon, Esq.



Heidi H. Trimarco