STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WASTE MANAGEMENT COUNCIL

Docket No. 20-14 WMC

In re: Conservation Law Foundation, Inc. Appeal

NCES'S REPLY TO CLF'S OBJECTION TO NCES'S MOTION FOR REHEARING

NCES submits the following reply to CLF's objection to NCES's motion for rehearing. This response also addresses the arguments set forth in CLF's papers regarding its motion to strike.

I. Introduction

CLF's objection to NCES's motion for rehearing is premised upon a fundamental misunderstanding of rehearing under RSA ch. 541 and of the change in the posture of the proceeding caused by the hearing officer's order. CLF equates motions for rehearing under RSA ch. 541 with motions for reconsideration in the state's trial courts when the two motions serve entirely different purposes. It also overlooks the fact that the hearing officer's order transforms NCES from the permittee defending its permit into the aggrieved party. This change in position presents NCES with completely different incentives, rights, and obligations than it had when it was defending the issuance of the permit.

CLF's motion further illustrates the peril of interest group litigation as a means of formulating policy. Here, at the behest of an organization having only an ideological interest in NCES's permit, a single hearing officer has overruled the determination made by the full council that the decision granting the Stage VI permit was lawful and reasonable and thereby disrupted the state's permitting regime. The hearing officer's decision does not relieve or mitigate any harm suffered by CLF, but it does advance CLF's political policy objective of preventing the

development of new landfill capacity and impeding the importation of foreign waste. CLF was able to persuade the hearing officer that RSA 149-M:11 can only be read one way despite (1) thirty years of NHDES's reading it entirely differently, (2) CLF's failure to discover and raise this purportedly plain reading of the statute in its 2018 appeal of the Turnkey permit, and (3) CLF's failure to appeal the approval granted to the Mt. Carberry facility in April of this year even though that approval is entirely inconsistent with the legal principle that CLF claims in its objection is the only reasonable way to read the statute. The council is entitled to an opportunity to consider and correct its errors before further time is spent on appeal, and NCES urges the council to take that opportunity and evaluate the implications of its order by granting the motion for rehearing.

II. Argument

A. CLF's assertions of waiver and failure to preserve misunderstand the statutory requirements for rehearing and overlook the legal significance of NCES's transformation from permittee to aggrieved party.

NCES's motion is not a motion for "reconsideration." It is a motion for rehearing pursuant to RSA ch. 541[1], which governs motions filed by those aggrieved by the disposition of an administrative appeal. RSA 21-O:14, III. A motion for rehearing provides administrative agencies with "a chance to correct their own alleged mistakes before time is spent appealing them." *In re Hardy*, 154 N.H. 805, 811 (2007). Accordingly, RSA ch. 541 requires an aggrieved party to state "all grounds for rehearing," identifying "*every* ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:3 and 541:4

[1] Rehearings of and appeals from orders of the council are governed by RSA ch. 541. RSA 21-O:14, III. Env-WMC 205.16 provides standards for such motions, but they cannot grant rights or impose obligations that are inconsistent with RSA ch. 541. *See Appeal of Cover*, 168 N.H. 614, 621 (2016) ("[A]dministrative rules may not add to, detract from, or modify the statute which they are intended to implement.").

(emphasis supplied). As explicitly required by statute, NCES raised each argument that it claims renders the outcome of the council proceedings unlawful because failure to set forth such a ground at rehearing means it cannot be considered by the supreme court in an appeal from an administrative order. RSA 541:4; *see also In re Walsh (New Hampshire Bd. of Tax and Land Appeals),* 156 N.H. 347, 351-52 (2007) (three of five claims not properly preserved for appeal because they were not included in motion for rehearing). Unlike in the state's trial courts, then, an issue is not preserved for appeal by raising it and obtaining a ruling on it during the course of the proceeding. Instead, the party aggrieved by the outcome of the proceeding must identify each error committed by the administrative tribunal during its pendency and choose which of those errors it wishes to preserve for appeal to the supreme court by including them in a motion for rehearing. Consequently, CLF's complaint that NCES's motion is to some extent a "rehash" of prior arguments on which the hearing officer has ruled misapprehends the purpose of rehearing under RSA ch. 541 which requires inclusion of *all* arguments of which the party plans to appeal.

Similarly, CLF disregards the change in legal posture undergone by NCES as a result of the hearing officer's order. It contends that NCES has waived its administrative gloss and dormant commerce clause arguments because it did not "develop" those arguments during the hearing. CLF Mem. of Law in Support of Obj. to Mot. for Rehearing and Mot. to Strike (6/24/22) ("CLF Mem.") at 4. Until the hearing officer's May 11 order, however, NCES was defending its permit and the NHDES decision granting it. CLF's appeal presented a discrete set of alleged errors that NCES sought to refute. It had no reason to attack the "function of time" concept because it had received its permit notwithstanding NHDES's creation of that concept thirty years after enactment of the statute.

The New Hampshire Supreme Court has recognized more than once that an appeal is not an abstract exercise in which the parties are bound to consider and present argument on all of the underpinnings of the decision on appeal. A party that has received an approval is not required to seek review of what it believes to be legal errors in the decision for the simple reason that the errors have not yet harmed the party. In *City of Portsmouth v. Schlesinger*, 140 N.H. 733 (1996), the City and a group of developers entered into an agreement concerning a real estate development in Portsmouth. The City enacted a special ordinance permitting the construction of additional condominium units on a property, and the developers executed a promissory note in favor of the City. In a lawsuit seeking to enforce the note, the developer amended its answer to include the affirmative defense of illegality, arguing that the parties' contract was void and the note unenforceable because the creation of a special zoning district was an *ultra vires* act by the City. *Id.* The City objected to this defense as untimely, given that it was raised some five years after the parties entered into their agreement, but the supreme court disagreed. The court observed:

> …[T]he city attempts to fault the developers for failing to appeal the city's action in crafting the "zoning for payment" deal. The developers, however, had no reason to challenge the zoning arrangement, which was mutually agreeable to both sides. It would have been counterintuitive for the developers to have accepted the city's proposal and thereafter file an appeal on the ground that the proposal was illegal. Rather than being aggrieved parties, the developers had procured exactly what they sought-a special zoning overlay ordinance in exchange for the $2,500,000 payment. To maintain that the developers failed to follow the proper appeal procedure suggests that they had a grievance to appeal. Because they did not, RSA 677:2 and RSA 677:4 do not apply to bar the developers' affirmative defense of illegality in this separate cause of action.

Id. at 735. The supreme court extended this same logic in a subsequent case in which a town argued that NCES was barred from litigating conditions to a 1985 special exception when its predecessor did not appeal them when they were first imposed. *N. Country Env. Svcs., Inc. v. Town of Bethlehem*, 146 N.H. 348, 357 (2001). Applying *Schlesinger*, the court concluded that it

"would have been illogical for [the predecessor] to have agreed to the conditions and thereafter to file an appeal on the ground that they were illegal" when NCES's predecessor, too, had "procured exactly what it wanted," and thus was not an aggrieved party. *Id.* at 357-58. The court further concluded that the predecessor "had no duty to appeal" the decision when it was not an aggrieved party. *Id.* at 358.

The circumstances here are the same. NCES sought and obtained a permit from NHDES. It did not agree with the antecedent logic and determinations NHDES used to formulate the "function of time" concept as memorialized in the letter withdrawing the original Stage VI application (Hearing Ex. Permittee-2) and the public benefit demonstration of NCES's subsequent Stage VI application (Hearing Ex. Permittee-1 at 1) so the council was aware of it, but NCES had ultimately obtained what it sought: a permit to operate a new stage of the landfill. Challenging that decision before the council on CLF's appeal would have been counterintuitive and against NCES's interests because it would have jeopardized the very permit it was attempting to sustain in responding to CLF's notice of appeal.

Until the hearing officer issued the order determining that the department acted unlawfully in issuing the permit, then, NCES had not been aggrieved. That decision converted NCES from a permittee defending its permit to one aggrieved by the disposition of an administrative appeal. The hearing officer's order not only relied upon the "function of time" concept but extended it beyond NHDES's application of it with the result that it found NCES's approval unlawful. Having applied the function of time concept *to NCES's legal disadvantage* for the first time on the appeal, NCES became the aggrieved party and then had an incentive to and interest in attacking the conceptual predicate of the hearing officer's order.

NCES's administrative gloss and dormant commerce clause arguments flow directly from the hearing officer's strict construction of the function of time concept to invalidate NCES's permit. If, as NCES has demonstrated, NHDES's latter-day addition of that concept to its permitting regime is contrary to thirty years of administrative gloss then the hearing officer's reliance on that concept as the rationale for his ruling is misplaced. And if the hearing officer's order is a correct reading of RSA 149-M:11 then its facially discriminatory language and intent is no longer being mitigated by NHDES's application of the statute, and NCES has been harmed by that facial discrimination. Until the hearing officer's order NCES had no interest in making or incentive to make these arguments. Under *Schlesinger* there can be no waiver of arguments undermining the challenged decision until there is an event that harms the party making the arguments. CLF's contention that there has been a waiver of NCES's arguments is therefore contrary to New Hampshire law.

B. The council's order errs in its interpretation of the capacity need criterion.

CLF's objection endorses the hearing officer's determination as to the capacity need criterion by essentially reciting the conclusions of the order. CLF Mem. at 12-13. As for CLF's objection to NCES's specific arguments, it claims that the statute "requires" NHDES to "examine capacity need as a function of time," citing only the portion of the statute referencing the 20-year planning period to advance that argument. *Id.* at 15. The statute's reference to a time period begins and ends with that reference to the planning period, yet CLF and the hearing officer incorporate other words and concepts into the statute that are nowhere to be found in its text. The statute does not inquire as to *when* a facility would operate and *whether* that operating period has any "overlap" or proximity to the shortfall. Indeed, the hearing officer's analysis

reflects a vigorous effort to weave such a concept into the statute with selected definitions and grammatical concepts like verb tense.

Even if the hearing officer was correct that the statute required some period of operation during a shortfall, his order goes a step too far by concluding a facility could never operate for any period before that shortfall event. This prohibition is nowhere to be found in the statute, and the council does not address the fact that the hearing officer's construction of the statute could still be realized even if a facility operates for a time before the shortfall occurs. The legislature *could* have written RSA 149-M:11 to state that capacity need exists "to the extent that the proposed facility satisfies that need *during the projected shortfall*," or that "no capacity shall be permitted before a shortfall occurs," but it did not do so. Nonetheless, the hearing officer and CLF read language and terms into the statute that the legislature did not see fit to include.

The fact that the May 11 order is "consistent" with the department's 2020 shift in implementing RSA 149-M:11 is irrelevant to whether good cause exists for rehearing. CLF Mem. at 15. The department abandoned its administrative gloss in the absence of any new legislation or rulemaking, and the hearing officer took it a step further by engaging in further statutory construction that abandoned the prior interpretation altogether. CLF argues that the administrative gloss doctrine does not apply because NCES "concedes" that the statute is unambiguous, *id.* at 16, but NCES made this argument to demonstrate why the hearing officer's lengthy statutory analysis was unnecessary. The statute is clear in what is required for the public benefit analysis, and it limits considerations of "time" to the 20-year planning period. *See* RSA 149-M:11, V. NCES raises the administrative gloss argument in the alternative; in other words, if the hearing officer is correct and the statute *is* ambiguous, the solution is not a statutory analysis that wholly reimagines the scope and application of the public benefit criteria, but rather

an examination of how the department tasked with administering the statute has carried out that responsibility for nearly thirty years. *In re Kalar*, 162 N.H. 314, 321 (2011).

Whether the administrative gloss doctrine "applies" is determined from the circumstances: "Administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." *Id.* (citation omitted). NCES's motion establishes that these requirements are satisfied, as the department consistently applied the public benefit in a manner that never specifically examined the "lifespan" of a facility in relation to the shortfall for decades, and despite having the opportunity to do so, the legislature never interfered with that application.[2]

CLF argues that the administrative gloss doctrine "does not preclude" the department from "adapting its practices over time." CLF Mem. at 17. In reaching this conclusion, however, CLF overlooks the central facts of the case on which it relies. In *Appeal of Public Service Co. of N.H.*, 141 N.H. 13 (1996), the court considered a statute that directed the Public Utilities Commission ("PUC") to grant permission for public utility companies to operate when the permission "would be for the public good, and not otherwise . . . ." *See* RSA 374:26. The supreme court determined that the statute was unambiguous and thus the administrative gloss doctrine did not apply. *Id.* at 22. It then acknowledged that the PUC may "chang[e] its mind" in the context of determining the public good pursuant to the statute "based on changing concepts

[2] The lack of legislative interference is particularly important given the legislature's attention to solid waste management over the years. It has not neglected or ignored solid waste issues, but despite creating multiple committees to examine solid waste management and bills intended to address solid waste management in the state, it has never revised RSA 149-M:11 to reflect the interpretation advanced in the May 11 order. *See, e.g.*, N.H. Session Laws ch. 133 (1993) (committee on recodification of solid waste laws); N.H. Session Laws ch. 251 (1996) (recodifying and revising solid waste laws but making no substantive change to RSA 149-M:11); N.H. Session Laws ch. 265 (2019) (establishing committee to study recycling and solid waste management in New Hampshire).

of what the public good requires." *Id.* Importantly, this analysis is tailored to the PUC and its unique statutory obligations. *Id.*

CLF's argument that the department can "evolv[e] its interpretation of the statute over time as it relates to the substantial public good" also extends the common law beyond its limits. CLF Mem. at 17. The "substantial public good" is a statutory consideration in the PUC matters at issue in *Appeal of Public Service Co. of N.H.,* but there is no corresponding consideration of the "public good" in the context of the public benefit analysis, which is limited to the criteria specifically enumerated by the legislature in RSA 149-M:11. To suggest that the administrative gloss doctrine also allows an agency to "evolve its interpretation" at any time robs the doctrine of all meaning, since this is exactly the sort of administrative changes to *de facto* policy which the doctrine stands guard against. CLF Mem. at 17.

C. CLF provides no grounds for denying NCES's motion as to the dormant commerce clause.

The threshold question of an inquiry regarding the dormant commerce clause is whether the statute is facially valid. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Oregon*, 511 U.S. 93, 99 (1994). In the context of the dormant commerce clause analysis, a facially unconstitutional statute is one that "cause[s] local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market." *Deere & Co. v. State,* 168 N.H. 460, 485 (2015) (*citing and quoting Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126, n.16 (1978). In gathering examples of these sorts of invalid state laws, the United States Supreme Court observed that the distinguishing characteristic was that "the offending local laws hoard a local resource – be it meat, shrimp, or milk – for the benefit of local businesses that treat it." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392 (1994). It is this *effect* that is the focus of the dormant commerce clause analysis, and that

effect is also the focus of NCES's motion in demonstrating how the hearing officer's construction of the statute subjects it to constitutional scrutiny.

CLF argues in a conclusory way that RSA ch. 149-M as read by the hearing officer is not facially unconstitutional, notwithstanding that it explicitly conditions permitting of commercial[3] disposal capacity upon the need to accommodate waste generated in New Hampshire. Like NHDES it seeks refuge in the possibility that, once permitted, there is no express prohibition on a commercial facility's acceptance of out-of-state waste (as if the legislature would be so flat-footed as to include such a ban), but that ignores the patently intended effect of limiting permitting to the needs of New Hampshire. It is simply implausible against the backdrop of the statute read as a whole to conclude that the capacity need requirement is neutral vis-à-vis waste originating out of state. The effect of the hearing officer's order is further underscored by other aspects of the statute, including its surcharge provision, which demonstrate an intent to treat differently waste originating from other states. RSA 149-M:6, XI; *see also Oregon Waste Sys.*, 511 U.S. at 108 (finding invalid a statute that imposed a surcharge on out-of-state waste).

Despite CLF's desire to use the more relaxed *Pike* balancing test to assess the validity of the statute, the supreme court has found that if such a surcharge is established, it is presumptively invalid, and must demonstrate, under strict scrutiny, that it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 101-02 ("Because the [state] surcharge is discriminatory, the virtually per se rule of invalidity provides the proper legal standard here, not the *Pike* balancing test."). As NCES has established, the statute cannot survive this strict review because it advances no such legitimate local purpose.

[3] Fortifying the conclusion that the statute discriminates on its face is the fact that municipally-owned facilities (i.e., those owned by a single city or by a regional waste management district) are exempted from the public benefit capacity need requirement so long as they agree to accept waste only from generators within their respective boundaries. RSA 149-M:11, VII.

But beyond the surcharge, RSA ch. 149-M is invalid because the text and implementation of the law under the hearing officer's order effectuates precisely what the supreme court defined as the central conceit of such invalid protectionist laws – it hoards a resource (solid waste disposal capacity) and attempts to preserve it for in-state interests, while disfavoring and impeding out-of-state waste from engaging on an even basis. As NCES has discussed, the statute only allows solid waste facility permits to be granted if the applicant can justify the facility based on an assessment of whether it will aid the state in achieving its waste reduction goals and how much in-state waste it will accept. Out-of-state waste disposal capacity is not considered as part of the calculus and can form no basis for the agency to decide whether or not to grant a permit. *See* RSA 149-M:11. Dormant commerce clause violations need not be overt – even second-order effects that damage the level playing field between in-state and out-of-state interests can render a law invalid. *See Carbone*, 511 U.S. at 389 ("It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow.").

The council's reinterpretation of the statute tilts the board even further in favor of in-state interests in that it prohibits any waste disposal capacity development not numerically linked to a projection of the *state's* needs. The council's order envisions a process whereby a permittee must only build a facility with exactly enough capacity to meet this projected need and only operate this facility exactly when that need occurs. Under the department's previous constructions of the statute, facilities could at least plan to develop additional capacity beyond what was required by the state for in-state interests, but under the new interpretation of the law, NHDES cannot legally grant a permit that provides such "excess" capacity.[4] It is possible that

[4] The council's authority on rehearing is limited, as it cannot find the statute to be unconstitutional or enjoin its enforcement, so the relief NCES can seek in this forum is limited. Because the order renders the statute facially unconstitutional, the council should have the opportunity to revisit its construction of the

facilities could still accept some amount of out-of-state waste during those periods in which they are allowed to operate to meet the state disposal needs, but this could not only expose the permittee to liability and enforcement actions, either based on the statute or the conditions of the permit, but would also throw the state's waste disposal capacity into crisis as a system designed to only develop precisely as much capacity as there is state need would be swiftly overwhelmed by the out-of-state consumption of part of that capacity. Such a foreseeable issue once again demonstrates that RSA ch. 149-M, now more strictly bound than ever to favor in-state interests, is facially invalid because it discriminates against out-of-state waste and thus impedes the free flow of interstate commerce. *Oregon Waste Sys.*, 511 U.S. at 100 ("[T]he fact remains that the differential [treatment] favors shippers of [in-state] waste over their counterparts handling waste generated in other States. In making that geographical distinction, the [statute] patently discriminates against interstate commerce.").

D. NCES's motion for rehearing as to standing is not untimely and must be granted.

For reasons discussed throughout this motion, NCES is required to raise arguments in a motion for rehearing before advancing an appeal to the supreme court. RSA 541:4. Accordingly, NCES raised its standing arguments again to provide the council with a final opportunity to reconsider its position in light of what it learned at the hearing and before the issue is escalated to the supreme court. *See NBAC Corp. v. Town of Weare*, 147 N.H. 328, 331 (2001) ("The purpose of the rehearing process is to provide the board with the opportunity to *correct any action it has taken*, if correction is necessary, before an appeal to court is filed." (Emphasis supplied.)). As NCES observed in its motion, standing is a constitutional question that can be raised at any time

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statute on rehearing before further proceedings take place to challenge the statute under the hearing officer's order.

in an appeal – including a motion for rehearing – and thus it is not an untimely issue in this context.

CLF suggests that NCES could have addressed the same issues it wanted to examine with an evidentiary hearing at the final hearing in February. CLF Mem. at 24. This argument is without merit. As a threshold matter, CLF would have certainly objected to any inquiry as to the nature and extent of its alleged harm as irrelevant following the council's orders on standing, which CLF recites in its objection to the motion for rehearing. CLF Mem. at 23. Moreover, though, CLF, as the appellant in this case, bears the burden of proving its standing, and NCES sought to question CLF's witnesses relative to standing long before the hearing but was denied that opportunity by the previous hearing officer. CLF claims this issue has been raised "well past the eleventh hour," but it was also raised and requested much earlier in the case, only to be summarily denied in the council's order on NCES's motion to dismiss for lack of standing, and again in the council's order on NCES's motion for reconsideration. Order (3/17/21) ("As Appellant argues, a "he said / she said" evidentiary hearing on the veracity of these sworn statement is not warranted in these circumstances."); Order (5/11/21) ("Permittee seeks reconsideration of the Council's conclusion that an evidentiary hearing should [sic] be held . . . [the CLF members'] affidavits were sworn statement given under oath . . . and are sufficient to establish standing."). Accordingly, NCES seeks rehearing as to this issue.

E. The hearing officer improperly resolved mixed questions of law and fact.

NCES's motion identified multiple issues concerning mixed questions of law and fact that were improperly resolved by the hearing officer in the May 11 order. *See* NCES Motion at 35-36. CLF generally dismisses these arguments and asserts that the hearing officer's order entirely focuses on the "lawfulness" of the department's analysis. CLF Mem. at 25. Aside from

this general characterization and an argument that the hearing officer acted in compliance with the statute that required him to determine whether consultation with the council was necessary, CLF does not address each of the issues that NCES argues constitute a mixed question of law and fact. It also does not address the fact that the council voted *unanimously* to approve the following motion: "Motion that DES was lawful in finding a capacity need during life of the permit." Audio Recording of Feb. 22, 2022 Deliberations at Time Stamp 1:56.04. The hearing officer was present for that vote; CLF did not assert any objection as to the council taking up that issue and reaching this decision, either at the hearing or in a subsequent motion for rehearing. The council, then, already made a determination as to the lawfulness of the capacity need criteria in the presence of the hearing officer, but he nonetheless improperly overruled that determination in Section C of the May 11 order.

F. CLF's motion to strike the exhibits appended to NCES's motion must be denied.[5]

NCES appended nine exhibits to its motion for rehearing. Seven of these exhibits contained excerpts of solid waste permit applications and NHDES permitting decisions, and six of those included tables prepared by NCES to summarize the information contained in those documents. *See* NCES Mot. for Rehearing (6/10/22) at Ex. A-F, H. The applications and permitting decisions are self-authenticating public records and clearly relevant. NHDES did not contest the validity or contents of these documents and instead provides a response as to each. *See* NHDES Limited Obj. to Mot. for Rehearing (6/24/22) at 4-6. NCES has provided the name of the facility in each exhibit and the NHDES correspondence identifying the relevant permit

[5] CLF filed a separate motion to strike but addressed the arguments for that motion in the body of its memorandum of law. *See* CLF Mot. To Strike (6/24/22) and CLF Mem. At 6-11. NCES takes up CLF's arguments in similar fashion within the body of this response to the memorandum of law and incorporates these arguments by reference in the separate objection to the motion to strike. *See* NCES Obj. to Mot. To Strike (7/6/22) at ¶6.

number and application data. CLF does not cite any evidentiary justification to warrant their exclusion.

Exhibit G is an affidavit prepared by a paralegal of the law firm representing NCES in this matter. NCES provided this affidavit to establish certain facts regarding the council's deliberations when NCES could not otherwise obtain a transcript or recording of the hearing and deliberations before the filing deadline for the motion for rehearing. CLF does not contest Exhibit G aside from an argument that NCES did not offer a "valid reason" for submitting "additional evidence" in the form of this affidavit. CLF Mem. at 7, n.1. This affidavit is not "additional evidence," but rather a memorialization of what occurred during deliberations in this matter. Phrased differently, it reflects what already happened, rather than providing new evidence or information never considered by the council, and thus CLF provides no reason for why this exhibit should be stricken. CLF also does not advance any argument as to why Exhibit I, an email from NCES's counsel to the appeals clerk, should be disregarded, though its motion seeks to strike all exhibits attached to NCES's motion.

The majority of CLF's arguments regarding the motion to strike focus on the tables and compiled permitting documents included in Exhibits A-F and H. CLF first argues that none of the justifications for providing new evidence in Env-WMC 205.16(c) applies to permit the consideration of these materials, CLF Mem. at 7, but here again CLF focuses too narrowly on the council rules that attempt to constrain the council's consideration of issues on a motion for rehearing. The statute governing such motions requires NCES to provide *every* justification for why the council's order was unlawful or unreasonable. RSA 541:4. Part of that demonstration requires marshalling evidence and information that was not relevant during the initial hearing, when NCES was defending its permit and demonstrating why the department acted lawfully in

the first instance; instead, this information is needed to fully explain why the council's order constitutes legal error and why rehearing is necessary. Even if the rule could be read to constrain what an aggrieved party can raise on rehearing, then Env-WMC 205.16(c)(3) would apply, as the information is submitted to request reconsideration of the denial of the permitting decision, but the council need not contort itself into the confines of this rule. The statute permits – and indeed *requires* – NCES to provide all of the information and arguments that it has to explain why good cause exists for a rehearing, and the contested exhibits are a component of that statutory demonstration.

Construing the council rules or the statute otherwise would hamstring a party seeking rehearing, as the aggrieved party would be tethered to the limited universe of documents and information adduced at the hearing, before the council ever issued the contested order, to explain why that order requires rehearing. To that same end, these exhibits are not "untimely." For the reasons described elsewhere in this reply, advancing the administrative gloss argument at the hearing would have been illogical and counterintuitive, both because NCES had no "grievance" with NHDES during the hearing in this matter and because the grievance giving rise to the motion for rehearing and justifying the submission of these exhibits did not occur until the council issued its order on May 11, 2022. Only then did NCES become aggrieved and require those exhibits to demonstrate the implications and effect of the hearing officer's statutory analysis regarding RSA 149-M:11. There was no cause for NCES to introduce that information earlier in the proceedings before it became an aggrieved party. *Supra* at 2-6.

CLF's suggestion that NCES is reversing course on prior objections or positions taken in discovery is unsupportable by the context in which these exhibits are being presented. CLF Mem. at 11. When answering CLF's discovery requests and seeking to exclude certain evidence

before the hearing, NCES raised objections as to relevance based on the claims and allegations set forth in CLF's notice of appeal. NCES asserted that prior permitting matters, like the Stage V permit materials, were irrelevant to the council's inquiry as to whether NHDES acted unlawfully or unreasonably in deciding the application before it for the Stage VI expansion, which was the subject of the appeal. NCES stands by that objection today, as that information had no bearing on whether the department acted lawfully on the permitting decision that was before the council at the February hearing. However, the information contained in the contested exhibits is directly relevant to an argument NCES has raised to seek rehearing and explain why the council's order is unreasonable and unlawful. NCES could not have known or anticipated that such information would have been needed at the close of the February hearing or any time before that order was issued, as only then was NCES on notice about the specific conclusions and analyses supporting the hearing officer's ruling, but the information is necessary now to demonstrate the errors and implications of the council's decision and to explain why rehearing is necessary before elevating the issue to the supreme court. For this reason, it is also relevant, as the information provided directly addresses the grounds and justifications on which NCES seeks a rehearing.

These exhibits are not "rife with problems." The "green triangles" described in CLF's motion are error-checking indicators, but they do not automatically indicate that the actual calculations are incorrect. For example, the triangles can alert a user that an adjacent column of data (like that containing "2015" or "2016" to indicate a year) is not included in a formula or that a formula from one row is pasted into another row using different increments.[6] Rather than devolve this objection into a tutorial on Excel, however, the most important point is that the math

[6] *See* https://support.microsoft.com/en-us/office/detect-errors-in-formulas-3a8acca5-1d61-4702-80e0-99a36a2822c1 and click "Turn error checking rules on or off" for a list of rules that may trigger the green triangle feature.

"checks out." The notes of each table explain where the numbers originated, and each exhibit includes the relevant pages from the permit application that supplied the numbers inputted into the table. The notes also explain the simple addition and subtraction utilized to generate the numbers in the colored columns, which in many cases reflect the same calculations conducted by the applicants in their applications. Green triangle or no, the actual addition and subtraction are accurate, and NCES has provided the relevant pages from which it drew the data.

CLF provides no justification for why these exhibits should be excluded from the council's consideration of NCES's motion, particularly where it is required by law to provide *all* reasons why the contested order is unreasonable and unlawful. These exhibits are necessary to demonstrate the administrative gloss argument, and thus they must be considered by the council in ruling on this motion. The motion to strike should therefore be denied.

III. Conclusion

For the reasons set forth in NCES's motion and this reply, NCES respectfully requests that the council grant the motion for rehearing concerning Section C of the May 11, 2022 order.

Respectfully submitted,

NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.,
By Its Attorneys,

Date: 7/6/22

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CERTIFICATE OF SERVICE

I hereby certify that, in accordance with the Prehearing 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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