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 NHDES'S LIMITED OBJECTION TO NCES'S MOTION FOR REHEARING

NCES submits the following reply to NHDES's limited objection to NCES's Motion for Rehearing.

I. Introduction

NHDES's objection to NCES's motion for rehearing proceeds on three grounds. First, it maintains that because NCES did not appeal the October 2020 permitting decision, NCES is precluded from asserting that NHDES's refashioning of RSA 149-M:11 to incorporate the "function of time" concept is unlawful and that the hearing officer's construction of RSA 149-M:11 is unconstitutional. This argument presupposes that NCES was obliged to appeal a decision in its favor and to challenge a rationale found nowhere in that decision. New Hampshire law is to the contrary.

Second, NHDES contends that its thirty years of application of RSA 149-M:11 has produced no discernible administrative gloss on the statute. As if it were not the agency that made the six decisions analyzed in NCES's motion, NHDES quibbles with the conclusions NCES has drawn from the public regulatory record but offers no explanation of its own for those decisions. It seeks refuge in its "current position" that it has discretion with no observable limits when it comes to determining public benefit. While it is true that inconsistent applications of the statute can be explained by unfettered discretion, reading a statute as granting such authority is constitutionally suspect.

Third, NHDES argues that a statutory scheme that explicitly discriminates against waste originating out of state and ties disposal facility permitting solely to the needs of New Hampshire is not facially discriminatory against out-of-state waste because the general court did not prohibit the disposal of such waste in the state. The fact that the legislature is sufficiently aware of the dormant commerce clause not to burden interstate commerce in the most brazen way possible, however, does not save the statute from constitutional infirmity.

II. Argument

a. Preclusion Argument

NHDES argues that NCES cannot proceed in challenging the department's actions or the legality of RSA 149-M:11 because it "did not timely appeal the NHDES Permit decision" to the council. NHDES Obj. at 1. In short, NHDES faults NCES for failing to appeal a decision in its favor. It further argues that the permittee was obliged to raise concerns about the department's departure from long-standing practices, and constitutional considerations to the council's decision, when it obtained the permit at issue in this case. *Id.* at 2.

The department's argument contravenes New Hampshire law. The New Hampshire Supreme Court addressed an analogous circumstance in *City of Portsmouth v. Schlesinger*, 140 N.H. 733, 735 (1996). In that case, 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. *Id.* at 734. In a lawsuit seeking to enforce the note, the City amended its answer to include the affirmative defense of illegality, arguing that the 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 agree to the conditions and thereafter to file an appeal on the ground that they were illegal" when its predecessor, too, had "procured exactly what it wanted," and thus was not an aggrieved party. *Id.* at 357-58.

In this case, NCES procured – after prolonged effort and discussions with NHDES – a permit for Stage VI of its facility. It was therefore not an aggrieved party, and thus it would have been "illogical" and "counterintuitive" for NCES to then appeal that decision to the council as unreasonable or unlawful. *See* RSA 21-O:14, I-a(a) (a person "aggrieved by a department decision may . . . appeal to the council having jurisdiction over the subject . . . and shall set forth fully in a notice of appeal every ground upon which it is claimed that the decision complained of is unlawful or unreasonable"). Until the hearing officer issued the May 11, 2022, order in this matter, NCES was not an "aggrieved party," but rather a permit holder seeking to defend its permit. Env-WMC 204.06(c)(3). NCES only became "aggrieved" when the hearing officer

issued this order rendering the department's decision unlawful as to the capacity need analysis. This is borne out by the statute governing motions for rehearing. *See* RSA 541:3 ("any person directly affected" by an order or decision of a state department or decision may file a motion for rehearing setting forth "fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable"); *see also Appeal of Richards*, 134 N.H. 148, 154 (1991) (a person has standing, for the purposes of motions for rehearing filed pursuant to RSA 541:3, if he is "directly affected" by the decision or "has suffered or will suffer an injury in fact" (quotations omitted)).

Setting aside this argument regarding preclusion, a motion for rehearing is the appropriate vehicle for introducing these arguments. As explained above, these arguments only became necessary when the hearing officer issued his order reinterpreting RSA 149-M:11 and imposing different standards on the permitting provisions therein based on his analysis, essentially converting NCES from a permittee defending its permit into an aggrieved party. That is the decision NCES is now appealing. RSA ch. 541 controls appeals by "[a]ny person aggrieved by the disposition of an administrative appeal" before the waste management council. RSA 21-O:14, III. This statute requires a person aggrieved by such a decision to "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4. NCES raises its administrative gloss and constitutionality arguments now for that purpose: to explain *why* the contested order is unreasonable and unlawful. *See* RSA 541:4 (requirements for a motion for rehearing). Raising these arguments at this time is also necessary to preserve them for consideration by the supreme court. *See Appeal of Brown*, 171 N.H. 468, 470 (2018) (issues raised for the first time in untimely motion for reconsideration are not properly before supreme court for consideration); *see also In re Walsh (New Hampshire Bd.*

of Tax and Land Appeals), 156 N.H. 347, 351 (2007) (holding that three out of five claims were not properly preserved for appeal because they were not included in motion for rehearing). Indeed, a motion for rehearing may seek review of "any matter determined in the action or proceeding, *or covered or included in the order*." RSA 541:3. The arguments NHDES contests are covered by the order and only became necessary when it was issued.

b. Administrative Gloss

In its limited objection, NHDES effectively argues that it should enjoy unlimited discretion in the permitting process and that the exemplars of permitting decisions appended to NCES's motion only demonstrate that the department has done what it pleases over the years in assessing the capacity need analysis. Administrative agencies like NHDES do not enjoy boundless discretion. The department's discretion and authority are necessarily limited by the legislature and the constitutional doctrine of separation of powers. The legislature's delegating statute must "contain some standards or general policy to guide the administrative agency in exercising its rulemaking authority." *Petition of Strandell*, 132 N.H. 110, 118 (1989). It is settled law that rules and practices adopted by state agencies "may not add to, detract from, or in any way modify statutory law." *Kimball v. New Hampshire Bd. of Acct.*, 118 N.H. 567, 568 (1978). The agency may "fill in details" to effectuate the purpose of a statute, but taking steps beyond that is invalid. *Id.*

That constraining standard for determining capacity need is found in RSA 149-M:11, V. Rather than "fill in the details" for this standard, NHDES recently altered the analysis altogether, infusing a component of temporality that requires an assessment of *when* the shortfall will occur and the degree to which the facility's lifespan overlaps with that shortfall. The capricious application of that standard is demonstrated in the Stage VI permitting process that was

discussed at length in the hearing before the council. NCES submitted an application that was consistent with prior public benefit demonstrations submitted to and approved by the department, and the department concluded that it could not approve that application because the applicant did not propose operating *during* the projected shortfall period. NCES inquired as to how long it would be required to operate during the shortfall period to satisfy this requirement, and NHDES arbitrarily decided that a year was sufficient. NCES asserted its objections to this change in practice but withdrew the first application and filed a new one that proposed a year of operations during the projected shortfall period. In litigating this appeal, NHDES changed course again, arguing that "a facility could operate entirely before the shortfall occurs and still provide a public benefit." NHDES Obj. at 5.

The department's recent focus on when the shortfall will occur in connection with the public benefit analysis departs from the procedures prescribed by the legislature. The statute makes no reference at all to the lifespan of a facility and the projected date on which a shortfall might occur. *Compare id.*, *with* RSA 149-M:11, V. NHDES's "current position" thus oversteps its authority as an executive agency by adding concepts and terms to the statute that the legislature did not see fit to include. Indeed, NHDES's current claim that it is "charged with determining whether a proposed facility has a 'meaningful effect, short- and long-term, on the capacity' need" is indicative of this overreach in agency authority. NHDES Obj. at 3, *quoting* NHDES Limited Prehearing Memorandum, p. 4, as set forth in Order (5/11/22) at 7. Subjective analyses like whether a facility will have a "meaningful" or "positive" effect on capacity need are nowhere to be found in RSA 149-M:11, but now NHDES seeks to employ those ambiguous standards in reviewing applications and rendering permitting decisions. *See* NHDES Obj. at 3 (quoting prehearing memorandum). NHDES is not "filling in gaps;" it is unilaterally altering the

legislative scheme for determining public benefit, and the hearing officer has taken that effort one step further with an analysis that entirely reinterprets the statute without any action or instruction by the legislature.

In this regard, the thrust of NHDES's argument in its objection misses the point NCES is making regarding the doctrine of administrative gloss. NCES does not dispute that the department's decisions over the years have approved permits for facilities that would operate at different time periods in relation to the projected shortfall. NCES's Stage IV facility operated pre- and post-shortfall, while NCES's Stage V facility operated entirely at a time before the shortfall occurred and did so in a manner that provided a public benefit. The administrative gloss argument establishes that NHDES did not consider the timing of the crossover and when a shortfall might occur in its prior analyses of permit applications. The department seems to concede this in its objection, noting that it only began preparing and "refin[ing]" such charts plotting the projected crossover in relation to when the facility would operate in 2018, decades after the public benefit criteria were adopted by the legislature. NHDES Obj. at 5. The new requirement to present the lifespan of the facility in relation to the projected shortfall event was a departure from decades of practice, and that is the administrative gloss that NCES argues NHDES cannot abandon at this time.

NHDES offers no argument to explain why it can change its longstanding practices, aside from its conclusion that it can exercise its discretion at will and change those standards at its leisure. That cannot be the law, and it cannot survive judicial review, particularly where such unilateral shifts deprive the regulated community of an opportunity to understand what is expected of them and what must be presented to obtain a permit under state law. The department must act within the confines of its delegated authority to apply the law as it is written by the

legislature, rather than adding concepts or requirements never considered by the general court. To the extent the department and the hearing officer's order supplant the will of the legislature, then, NCES seeks a rehearing.

C. Dormant Commerce Clause

RSA ch. 149-M, read as a whole, is facially unconstitutional, as it explicitly discriminates against out-of-state waste and interests. NHDES's objection focuses on RSA 149-M:11, arguing that it is "evenhanded and without discrimination in purpose or effect," an unsupported conclusion that ignores other aspects of the statutory scheme, like RSA 149-M:6, XI, which requires the department to assess a "surcharge" on out-of-state waste, which shall then be used to fund expenditures for solid waste management. No similar "surcharge" is contemplated for in-state waste, thus giving an economic advantage to New Hampshire generators. The intent of the legislature is "expressed in the words of the statute considered as a whole," and thus a single part of RSA ch. 149-M cannot be considered in isolation.[1] *Petition of Carrier*, 165 N.H. 719, 721 (2013). Moreover, NHDES's focus on the legislature's intent misses the mark, as the measure of whether a statute violates the dormant commerce clause hinges on the law's effect, not solely the intent of the legislature. See *C and A Carbone Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 394 (1994) ("Though the [law] may not in explicit terms seek to regulate interstate commerce, is does so nonetheless by its practical effect and design."); *E. Kentucky Res. v. Fiscal Court of Magoffin County, Ky.*, 127 F.3d 532, 543 (6th Cir. 1997) ("Even though we do not find that the

[1] The principles of statutory construction similarly moot NHDES's observation that the legislature "could have used any metric" for determining when to permit capacity; what the legislature could have done or might have done is irrelevant, as the legislature's intent is determined based on the words it actually used. *See In re Town of Bethlehem*, 154 N.H. 314, 319 (2006) ("We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add words that the legislature did not include.").

challenged provisions are either facially or purposefully discriminatory, [the plaintiff] can nevertheless prevail if it can prove that the challenged provisions have a discriminatory effect.").

The statute as a whole betrays an effort to discriminate against out-of-state waste to the benefit of local interests in violation of the commerce clause. It has likely evaded litigation to date because of how the department has enforced it; NHDES has never sought to collect the surcharge contemplated by RSA 149-M:6, XI or otherwise overtly penalized out-of-state waste; and thus robbed of much of its discriminatory impact, no permittee was harmed to the extent they felt it necessary to challenge the statute. NCES's motion challenges the hearing officer's new interpretation of this statute. If he is correct, and NHDES's historical application of the statute, permitting capacity at any time in relation to the shortfall event (even before such a shortfall would ever occur), then that prior application was wrong, and the statute on its face is invalid. This motion for rehearing asks the hearing officer to examine his opinion in light of the arguments raised in the motion to determine whether he intended for his order to have such an effect, particularly where NCES is required to identify all reasons why that decision is unlawful or unreasonable. RSA 541:4.

The hearing officer's order of May 11, 2022, strips away the department's prior application of RSA 149-M:11 and brings the constitutional deficiencies of the statute into sharp relief. Under the hearing officer's interpretation of the order, new capacity can *only* be permitted if it will exclusively provide capacity during a period of shortfall, and such shortfall is calculated only with sole consideration for the generation of waste in New Hampshire. The State's argument that a facility could "presently take 100% out-of-state waste, leaving New Hampshire negatively impacted," is also somewhat misleading, given recent permitting decisions that routinely impose a permit condition requiring that the permittee "make available disposal

capacity for New Hampshire generated solid waste for the entire operating life of the facility." NHDES Obj. at 10; *see, e.g.,* NOA at Permit, page 8 of 11, Condition 27(c). Exclusive acceptance of foreign waste would violate that condition, putting the permit in jeopardy for enforcement action.

III. Conclusion

For the reasons set forth in this reply, NCES respectfully asks the hearing officer to grant the permittee's motion for rehearing.

Respectfully submitted,

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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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