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

CONSERVATION LAW FOUNDATION'S
LIMITED SURREPLY IN SUPPORT OF OBJECTION TO NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.'S MOTION FOR REHERAING

Conservation Law Foundation ("CLF") submits this limited surreply in support of CLF's Objection to North Country Environmental Service's ("NCES's") Motion for Rehearing and in response to limited issues raised in NCES's Reply to CLF's Objection. As set forth below and in CLF's Objection, NCES has failed to demonstrate good cause for rehearing, and its motion should be denied.

NCES's References to RSA 541 and Faulty Characterization of NCES Embodying an Entirely New Legal Posture Do Not Constitute Good Cause for Rehearing or Preserve Legal Theories NCES Waived

1. As preliminary matter, NCES defends its continued repetition of prior arguments by asserting that its motion is a motion for rehearing under RSA 541, not a motion for reconsideration. NCES Reply at 2-3. This focus on semantics fails in substance, as it is improper for a party to simply reiterate prior arguments in a motion for reconsideration or rehearing.[1]

2. Moreover, the statute's unexceptional specification that a motion for reconsideration set forth every ground for rehearing does not mean that whatever grounds NCES

[1] *See* Env-WMC 205.16 ("No distinction shall be made between the terms 'reconsideration' and 'rehearing.'"); *see also Town of Hampton*, N.H. Public Utilities Comm'n, Order No. 26,287, 2019 WL 3890228, at *2 (Aug. 14, 2019) ("Pursuant to RSA 541:3, the [Public Utilities] Commission may grant rehearing or reconsideration when a party states good reason for such relief."); *Town of Hampton*, 2019 WL 3890228, at *2 (the "standard for rehearing" is not met when a party "repeat[s] the same arguments it made" in previous filings).

complains of are good cause for rehearing. *See* RSA 541:3 and 541:4. There is no good cause for rehearing for arguments that have been fully litigated (capacity need and standing) or that NCES has waived (administrative gloss and the dormant commerce clause).

3. Similarly unavailing is NCES's argument that it is somehow in a different legal posture now than over the course of this appeal, and because of that, NCES should be allowed to now develop its administrative gloss and dormant commerce clause arguments that it chose not to pursue during the appeal.[2] *See* NCES Reply at 3-6. On the contrary, NCES's legal posture – defending the permit – has not changed. The only change is that the Waste Management Council ("Council") was not persuaded by NCES's arguments regarding DES's capacity need analysis. The result of the Final Order may be grievous to NCES, and that is the natural result of NCES losing on an issue, it does not transform NCES into an entirely new legal posture of an "aggrieved party." Notably, NCES does not cite to any support for this novel proposition – that a party, having lost on an issue, is converted into a new legal posture as a so-called aggrieved party.

4. To support its argument that NCES has not waived its administrative gloss and dormant commerce clause theories, NCES relies on two cases that are easily distinguished from this matter. NCES Reply at 4-5 (citing *N. Country Envtl. Servs., Inc. v. Town of Bethlehem*, 146 N.H. 348 (2001); *City of Portsmouth v. Schlesinger*, 140 N.H. 733 (1996)). Neither address the issue at hand here: NCES's waiver of its administrative gloss and dormant commerce clause arguments because NCES elected not to develop them in this appeal. Rather, both cases take up

[2] Over the course of this appeal NCES identified its administrative gloss and dormant commerce clause arguments but chose not to pursue them. NCES's position as to these issues remains the same. *See, e.g.*, NCES Motion to Dismiss, June 30, 2021 at n. 6 (alleging that DES changed its approach to its capacity analysis); NCES Prehearing Memorandum at 17 (discussing NCES's dormant commerce clause concerns).

whether a party challenging the lawfulness of a zoning action in a subsequent matter is barred from pursuing that challenge as a result of the party having not appealed an earlier permit.

5. The New Hampshire Supreme Court issued a limited holding in *City of Portsmouth* in response to a certified question from a federal court: whether a statute of limitation regarding zoning appeals applies to an affirmative defense raised in federal court in a separate matter. *City of Portsmouth*, 140 N.H. at 734. The court held that the zoning statute, RSA 677:2 and RSA 677:4, did not apply to the federal court matter. *Id.* NCES omits the critical holding in the court's decision: the appeal procedures in the zoning statute are *not applicable* to an affirmative defense in a separate matter five years later.[3] *City of Portsmouth* does not address the waiver of legal arguments within an appeal. *See id.*

6. The second case NCES relies on is similarly inapplicable and does not address the waiver of legal theories over the course of an appeal. *See N. Country Envtl. Servs., Inc.*, 146 N.H. 348. The New Hampshire Supreme Court held that NCES was not barred from challenging the lawfulness of a special exception a decade after its predecessor received the special exception, even though the predecessor did not challenge the lawfulness of the special exception when it was received. *N. Country Envtl. Servs., Inc.*, 146 N.H. at 357 – 58. The court noted that because the terms of the special exception were part of a negotiated settlement and the predecessor had no duty to appeal it, NCES was not barred from raising an affirmative defense of illegality ten

[3] In quoting the opinion, NCES omits the first – and critical – sentence from the paragraph: "As we have noted, RSA 677:2 and 677:4 set forth requirements and procedures for the rehearing and appeal of zoning related matters. They have no applicability in this case, however." *Id.* at 735. NCES further omits the court's conclusion: "We conclude that questions of the ordinance's legality and ultimately binding effect of the promissory note are not questions of administrative action under RSA 677:2 and RSA 677:4, but affirmative defenses relating to the underlying legality of the legislative action. . . . As such, we hold that the developers' illegality defense is not barred by the appeal provisions of RSA 677:2 and RSA 677:4." *Id.*.

years later. *Id.* Again the court did not address the situation at hand: NCES's tactical decision not to pursue theories of administrative gloss and the dormant commerce clause during the hearing and subsequent attempt to revive those theories in a motion for reconsideration. Neither *City of Portsmouth* nor *North Country Environmental Services* support NCES's last minute attempt to preserve the theories it has waived.

7. Because NCES chose not to pursue the administrative gloss and dormant commerce clause arguments, it cannot preserve them for appeal through a motion for rehearing. *See In re Alexander*, 163 N.H. 397, 405 (2012) (issue not preserved for appeal when raised for the first time in motion for rehearing); *see also Appeal of Working on Waste*, 133 N.H. 312, 315 – 16, 317 (arguments improperly raised for the first time in a motion for rehearing to the Waste Management Council are not preserved for appeal).[4]

NCES's Untimely Attempt to Introduce New Evidence is Not Good Cause for Rehearing

8. NCES has not presented any credible explanation for why it could not have presented the evidence attached to its motion for hearing at the original hearing. "A motion for rehearing to consider new evidence should not be granted, however, absent a showing that the evidence could not have been presented at the hearing." *Appeal of Sloan*, 2017 WL 1373597 at *2 (Feb. 15, 2017) (citing *Appeal of Linn*, 145 N.H. 350, 356 (2000); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981); *O'Loughlin v. N.H. Pers. Comm'n*, 117 N.H. 999, 1004 (1977)).

[4] NCES has previously made this exact argument to the Council, arguing that presenting new arguments for the first time in a motion for rehearing is not good reason for rehearing under RSA 541:3. NCES Objection to Motion for Rehearing, *In re: N. Country Envtl Servs, Inc.*, Docket #11-04 WMC, Nov. 2, 2011 at 1 (citing *Appeal of Working on Waste*, 133 N.H. at 317 for the proposition that "arguments made for the first time in a motion for rehearing not preserved for appeal.").

9. DES's capacity need determination has been a central issue in this appeal from the very beginning. *See e.g.*, CLF Notice of Appeal at 2, 3. NCES had every opportunity to present its case over the course of this appeal and at the hearing, and the information contained in NCES's proposed exhibits was available to NCES throughout that time. NCES does not demonstrate that it could not have presented its evidence at the hearing. NCES's last-ditch attempt to introduce the evidence is not good cause for rehearing, and NCES's motion should be denied.[5]

The Council Correctly Gave Full Effect to Every Word in the Statute's Capacity Need Provision, RSA 149-M:11(V)

10. 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. Final Order at 12. This determination is based on the plain and unambiguous wording on the statute.

11. The Council's determination properly gives meaning to every word in the statute's capacity need calculation provision, RSA 149-M:11, V, including the provision that, if a capacity 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(d). Every statutory word must be given its full effect, and that includes the "to the extent" provision. *See Town of Amherst v. Gilroy*, 157 N.H. 275, 279 (2008).

[5] NCES has previously argued this exact position to the Council. In Docket #10-22, NCES opposed a motion for rehearing on the grounds that the introduction of new evidence is not good cause for rehearing. "RSA 541:3 permits rehearing only for 'good reason,' and case law makes clear that failure to present evidence at the initial hearing does not constitute a good reason for hearing unless there is some justification for the failure to present the evidence at the initial hearing." NCES Objection to Appellant's Motion for Rehearing, *In re: N. Country Envtl. Servs.*, Docket #10-22 WMC, October 24, 2011 at 8 (citing *Appeal of Linn*, 145 N.H. at 356; *Appeal of Gas Services, Inc.*, 121 N.H. at 801; *O'Loughlin v. N.H. Pers. Comm'n*, 117 N.H. at 1004).

12. NCES accuses CLF of reading words into the statute, but the reverse is true. The Council's Final Order gives meaning to every word in the statute. NCES would have the Council ignore words – "to the extent that the proposed facility satisfies that need" – from the statute. NCES's position, that a facility need not operate during a time of capacity need but can somehow address a past or future capacity need, only makes sense if the statutory language "to the extent that" is ignored. Because the words in the statute cannot be ignored, NCES has not demonstrated good cause for rehearing regarding DES's capacity need analysis.

NCES Has Not Demonstrated Good Cause for Rehearing Based on the Dormant Commerce Clause

13. NCES has failed to demonstrate that the solid waste statute is facially discriminatory, the first step in analyzing a statute against a dormant commerce clause challenge. *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994).

14. NCES does not identify any statutory provisions at issue in this appeal that is, on its face, discriminatory.[6] Statutes that are facially discriminatory contain clear discriminatory language, such as bans on out-of-state waste or surcharges imposed on out-of-state waste. *See, e.g.*, *Oregon Waste Sys.*, 511 U.S. at 99 ("obvious" that surcharge applied to out-of-state waste is discriminatory); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (statute banning the importation of out-of-state waste discriminates "on its face and in its plain effect.").

15. Unable to identify facially discriminatory language in the statute, NCES resorts to challenging the Council's *interpretation* of the statute as discriminatory, or the *downstream effects* of the statute as being discriminatory. *See, e.g.*, NCES Reply at 11 (discussing the

[6] NCES references RSA 149-M:6, XI, a statutory provision listing the responsibilities and authority of DES, including assessing a surcharge on out-of-state waste. That provision is not part of this appeal and has not been applied to NCES. NCES explains that the surcharge provision has never been enforced by DES. NCES Motion for Rehearing at 30.

Council's "reinterpretation of the statute"); at 10 ("there is no express prohibition on a commercial facility's acceptance of out-of-state waste . . . but that ignores the patently intended effect . . . "); at 11 (discussing RSA 149-M:11's capacity provision and stating: "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."). Facial discrimination is determined by the words of a statute, not by interpreting the effects of the statute. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 210 (2nd Cir. 2003) (district court erred in finding facial discrimination based on its interpretation of the statute's effects).

16. Failing to demonstrate that the statute is facially discriminatory, NCES must then demonstrate that the statute is discriminatory based on the *Pike* balancing test, and here again NCES does not meet its burden. Under the *Pike* balancing test: "nondiscriminatory regulations are valid unless the burden imposed on interstate commerce is 'clearly excessive in relation to the putative local benefits.'" *Oregon Waste Sys.*, 511 U.S. at 93 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 1970)).

17. NCES does not analyze RSA 149-M under *Pike*, however, and does not argue that the statute imposes a burden on interstate commerce that is excessive in relation to local benefits. Instead NCES dodges *Pike* by referring to the statute's surcharge provision, not at issue in this appeal. *See* NCES Reply at 10.

18. Because NCES has failed to show that the statute is facially discriminatory and has not even argued that the statute imposes a burden on interstate commerce that is clearly excessive in relation to local benefits, NCES has not demonstrated good cause for rehearing based on a dormant commerce clause challenge.

For the reasons stated above and in CLF's Objection to NCES's Motion for Reconsideration, NCES has failed to demonstrate good cause for rehearing and NCES's Motion should be denied. CLF respectfully requests that the Council deny NCES's Motion for Rehearing.

Dated: July 18, 2022

Respectfully submitted,

CONSERVATION LAW FOUNDATION
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CERTIFICATE OF SERVICE

I certify that the original and thirteen copies of the foregoing Memorandum was this 18th day of July, 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