

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 REPLY
IN SUPPORT OF MOTION TO STRIKE

Conservation Law Foundation ("CLF") submits this Reply in Support of CLF's Motion to Strike exhibits attached to North Country Environmental Services' ("NCES") Motion for Rehearing.¹

1. NCES uses its objection and concurrent reply to eschew yet another opportunity to identify its proposed exhibits, lay a foundation for the exhibits, and explain why they should be admitted under Env-WMC 205.16(c).²

2. Notably, NCES *does not identify or describe* each exhibit (or the underlying documents that together make up each exhibit) *or attest to their accuracy*. In response to CLF calling into question the accuracy and origin of the exhibits, NCES describes them collectively and generally: "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." NCES Reply at 14. Instead of describing the

¹ In response to CLF's Motion to Strike and separate memorandum of law, NCES filed an Objection and separate memorandum of law entitled NCES's Reply to CLF's Objection to NCES's Motion for Rehearing ("NCES Reply").

² NCES makes broad reference to the proffered exhibits coming in under Env-WMC 205.16(c)(3), but rather than explaining how that provision applies to each exhibit, NCES takes issue with the application of the Council rules. NCES Reply at 15 (" . . . CLF focuses too narrowly on the council rules that attempt to constrain the council's consideration of issues on a motion for rehearing."); at 16 (" . . . the council need not contort itself into the confines of this rule.").

exhibits, NCES directs the Council to search through the exhibits to glean any particulars. *See* NCES Reply at 14-15 (“NCES has provided the name of the facility in each exhibit and the NHDES correspondence identifying the relevant permit number and application data.”).

3. Without any support, NCES asserts that portions of its proposed exhibits are “self-authenticating public records” because they contain “excerpts of solid waste permit applications and NHDES permitting decisions.” NCES Reply at 14. This is a gross misapplication of the rules of evidence pertaining to self-authenticating documents. The New Hampshire rules of evidence specify fourteen instances where the authenticity of documents is so apparent that the evidence is self-authenticating. N.H. R. Evid. 902. NCES’s proposed exhibits do not meet these standards. For example, public documents must be sealed, signed, and/or certified. N.H. R. Evid. 902.1, 902.2, 902.4; *see also Deutsche Bank Nat’l Trust Co. v. Kevlik*, 161 N.H. 800, 803-04 (2011) (trial court erred in admitting uncertified copies of public records and documents without a properly executed affidavit). The rules regarding self-authentication do not apply to NCES’s proposed exhibits, which apparently include individual pages of public documents, taken out of their original context and merged with other documents and a table created by NCES for its motion for rehearing. NCES proposed exhibits A-F and H are creations of NCES and not self-authenticating. NCES has not properly identified or laid a foundation for these exhibits, and the Council should strike them from the record.

4. The Council should strike NCES’s proposed Exhibit G because it is not an appropriate record of the hearing.³ The Council’s rules control what constitutes the hearing record, which includes a tape recording of the hearing. Env-WMC 205.05. The rule allows a

³ NCES states that it is not submitting Exhibit G as evidence but as a memorialization of the hearing. NCES Reply at 15.

party to request that a transcript of the hearing be prepared *by a qualified stenographer* and requires that party to bear the expense. Env-WMC 205.05(b). NCES did not request a stenographer, and it cannot substitute an affidavit prepared by its own legal team in lieu of a transcript prepared by a qualified stenographer. *See id.*; *see also Rand v. Aetna Life & Cas. Co.*, 132 N.H. 768, 772 (1990) (improper to submit affidavit of attorney to memorialize testimony in lieu of a stenographic record). NCES is free to state what occurred at the hearing without proposed Exhibit G.

5. NCES's assertion that it had no need for evidence regarding DES's capacity need determination earlier in the appeal belies credibility. *See* NCES Reply at 16. DES's capacity need determination has been a central issue in this appeal from the start. *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. Any attempt to introduce additional evidence on this topic, including proposed Exhibits A – F and H, at this extremely late date, long after discovery, motion practice, and the hearing, would greatly prejudice CLF.

6. Moreover, as discussed in CLF's Limited Surreply at 4-5, a motion for rehearing to consider new evidence will not be granted absent a showing that the evidence could not have been introduced at the hearing. *See Appeal of Sloan*, 2017 WL 1373597 at *2 (Feb. 15, 2017). NCES could have introduced this evidence over the course of the appeal, and chose not to. NCES cannot now introduce it through a motion for rehearing. *See id.*


7. The burden lies with NCES to lay a foundation for its proposed exhibits and to demonstrate relevancy and compliance with the Council rules. NCES has not met that burden, and its proposed exhibits should be stricken from the record.

For the reasons stated above and those set forth in CLF's Motion to Strike and Memorandum in Support at pages 3-11, CLF respectfully requests that the Council strike from the record, and not consider, the exhibits accompanying NCES's Motion for Rehearing.

Dated: July 18, 2022

Respectfully submitted,

CONSERVATION LAW FOUNDATION
By its attorneys,



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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.



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