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 OBJECTION TO NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.'S MOTION TO STAY

Conservation Law Foundation ("CLF") objects to North Country Environmental Service's ("NCES's") Motion to Stay and respectfully requests that the Waste Management Council ("Council") deny NCES's motion.

INTRODUCTION

NCES asks the Council, four months after the final order was issued, to stay this matter in conjunction with a separate declaratory judgment action NCES filed last week in Superior Court. NCES bases its request on two grounds. First, NCES asserts that a stay will allow the Superior Court to address the "procedural and substantive disparity" NCES alleges it suffered in this matter, and second, NCES argues that a stay will allow the Superior Court to "declare the meaning of RSA 149-M:11, V." NCES Motion, at 2.

The Council should deny NCES's latest attempt to skirt the effects of the Council's final order in this appeal. Since the Council issued the final order in CLF's favor in May, NCES has filed motions for rehearing, to supplement the record, and to hold an evidentiary hearing, and has attempted to submit exhibits that NCES neglected to present over the year-plus duration of this appeal. Unhappy with the Council's order, NCES is now seeking an end-run around that order by trying its arguments before the Superior Court. The Council, not the Superior Court, has jurisdiction over this appeal.

NCES's brazen claim that it was denied a full and fair opportunity to participate in this appeal before the Council is baseless. NCES's assertion that it now needs an opportunity to submit exhibits that it elected not to present during the appeal should be rejected. NCES made informed decisions over the course of this appeal, including its decisions not to pursue certain legal theories, not to introduce certain evidence, and not to make any discovery requests on the Department of Environmental Services ("DES"). NCES and its legal team have fully participated in the appeal and have litigated the issue of DES's capacity analysis from the beginning. This matter is appropriately and squarely before the Council, and NCES's Complaint in Superior Court is simply another attempt to avoid a Council decision unfavorable to NCES. The parties have invested considerable time and expense in this appeal over nearly two years. A final order has been issued and post-order motions are fully briefed before the Council. Based on the law, Council procedural rules, and basic principles of fairness, the Council should deny NCES's motion to stay.

ARGUMENT

I. The Council should deny NCES's motion to stay because NCES participated fully and completely in this appeal and has suffered no procedural or substantive disadvantages.

NCES's Motion relies on a legal fiction that NCES was denied a full and fair opportunity to participate in this appeal. NCES describes itself as "an applicant aggrieved by a decision of the council" with "enormous procedural and substantive disadvantage." NCES Motion, at 2. NCES explains its participation in this appeal as if it only joined this matter at the issuance of the final order, baselessly ignoring its active participation in the appeal from the matter's inception. According to NCES, where CLF "is given a plenary set of rights to formulate, discover, brief, and try its claims" NCES itself "is relegated to a bare motion for rehearing." *See* NCES Motion,

at 7. Inexplicably dismissing the almost two years the parties and the Council have dedicated to litigating this appeal, NCES describes itself as a party seeking rehearing with "no right to discovery, to submit evidence, or to receive a full evidentiary hearing." NCES Motion, at 6. NCES's utterly false characterization of its role in this appeal would be comical if it didn't represent such a serious attempt to undermine the jurisdiction of this Council.

As the Council is well aware, NCES and its legal team have fully participated in this matter since the notice of appeal was filed in November 2020. Among other things, NCES took part in developing the procedural schedule and agreed to a proposed scheduling order submitted to the Council. NCES engaged in substantive motion practice, including two fully briefed motions to dismiss. NCES exchanged discovery with CLF and chose not to serve any discovery on DES. NCES had over a year to prepare for the evidentiary hearing and then participated fully in that hearing. In short, NCES had *every* right and opportunity to conduct discovery, submit evidence, and to a full evidentiary hearing.

Despite the clear record to the contrary, NCES has the audacity to assert that it has been denied a full and fair opportunity to present its capacity need argument. NCES Motion, at 6 ("[U]nder RSA 21-O:14 NCES does not have a full and fair opportunity before the council to litigate its theory that capacity need is to be determined under the aggregate capacity need method."); *see also id.* at 11 ("Here, NCES does not have a full and fair opportunity under RSA 21-O:14 to discover, present evidence upon, and otherwise litigate its claims regarding the proper interpretation of RSA 149-M:11, V . . .").

DES's capacity need analysis has been a critical issue in this appeal from the start. In CLF's Notice of Appeal, filed in November 2020, CLF notified the Council and NCES that CLF was appealing DES's public benefit determination in the permit on three grounds: 1) capacity

need, 2) implementation of the state's waste management hierarchy and waste reduction goals, and 3) advancing the state solid waste management plan. Notice of Appeal, at 2. Specifically regarding capacity, CLF noted that DES had originally determined there to be no capacity need for the permit and then reversed course, that for the majority of the permit's operating period there was no capacity need, and that DES only determined there to be a capacity need for one year, and even then not until 2026. *Id.* at 3. Accordingly, from the notice of appeal – the document initiating this matter – NCES was fully aware that DES's capacity need analysis would be a central and critical issue.

For its part, NCES litigated DES's approach to the capacity need analysis throughout this appeal. In June 2021 NCES filed a motion to dismiss, where NCES devoted five pages to a discussion of DES's capacity need analysis. NCES Motion to Dismiss, June 30, 2021, at 5 – 10. NCES laid out its capacity need argument, including NCES's concerns that DES had deviated from its supposed historic approach to capacity need. NCES Motion to Dismiss, June 30, 2021. NCES wrote:

> Before it decided to deny NCES's original Stage VI application, NHDES had never construed its rules to include a requirement that an applicant show a capacity shortfall during the lifespan of the proposed facility to establish public benefit. Rather, NHDES had applied the statutory language as written: if there was a shortfall in capacity over the twenty-year planning period and the proposed facility would be accepting waste during that period it was deemed to meet the capacity-need element. While this motion to dismiss does not challenge the lawfulness of this change in the construction of the statute, NCES reserves the right to do so if this motion is not granted.

Id. at n.6.

Importantly, NCES knew that DES's capacity need analysis was critical to the Stage VI application even *before* this appeal began. NCES was highly attuned to DES's capacity need analysis because DES had denied its first attempt at the permit application based on DES's

determination that there was no capacity need for the landfill expansion. *See* NCES Motion for Rehearing, at 9. In fact, NCES knew in early 2020 that DES's capacity analysis for Stage VI addressed whether Stage VI would operate during a time of capacity shortfall or not. *Id.* (noting that "NHDES informed NCES that the application would be denied because there would not be a shortfall capacity until 2025, after Stage VI ceased operations, and thus there was no public benefit for the proposed facility."). In February 2020, NCES withdrew its permit application, rather than have the permit denied by DES. At that time, more than six months before this appeal began and a full two years before the hearing, NCES voiced its opposition to DES's so-called "function of time" approach to the capacity need analysis. *Id.* ("In its withdrawal letter [dated February 11, 2020], NCES set forth its multiple objections to the departments insinuation of the 'function of time' element into the statutory scheme and pointed out that because it was not based on the statutory language it would be impossible for NCES to know how to satisfy it."). NCES could have submitted its public records request to DES at that time, but chose not to.

During this appeal NCES could have sought discovery regarding DES's capacity need approach, but it chose not to. Alarmingly, NCES implies that it did not have the opportunity to obtain records through discovery, describing documents proffered by NCES after the final order as "evidence NCES was able to gather only through a request for public records under RSA ch. 91-A *but not through the more comprehensive mechanisms of discovery.*" NCES Motion, at 8 (emphasis added). NCES implies that it was *unable* to gather this information through discovery. This is a misrepresentation. *NCES chose not to propound any discovery on DES.*

NCES could have pursued information from DES since at least February 2020, when NCES voiced its objections to DES's "function of time" capacity analysis and throughout the course of this appeal. NCES had every opportunity during this appeal to gather evidence and

present its arguments to the Council and suffered no procedural or substantive disadvantage. It cannot credibly claim otherwise as a basis for its requested stay, or as a basis for its action in Superior Court.

II. The Council should deny NCES's motion to stay this matter pending NCES's action in Superior Court because DES's public benefit determination and capacity analysis is properly before the Council.

This appeal is properly before the Council, which is charged with hearing "all administrative appeals from department decisions relative to the functions and responsibilities of the division of waste management . . ." RSA 21-O:9, V; *see also* RSA 21-O:14, I-a. NCES's action before the Superior Court is an attempt to substitute that court's jurisdiction for the Council's, but the Superior Court does not have jurisdiction over DES's permitting decision at issue in this appeal.

Importantly, NCES itself has argued in Superior Court that the Council has exclusive jurisdiction over challenges to DES permitting decisions. In 2021 Superior Courts in Grafton County and Merrimack County dismissed actions by CLF for equitable relief, holding that CLF had an alternative, adequate remedy in the administrative appeals process before the Council. *Conservation Law Found., Inc. v. North Country Envtl. Servs., Inc.*, No. 215-2021-CV-19 (May 14, 2021) (hereinafter "Grafton Superior Court Order 2021"); *Conservation Law Found., Inc. v. N.H. Dep't of Envtl. Servs.*, No. 217-2021-CV-0092 (May 14, 2021) (hereinafter "Merrimack Superior Court Order 2021"). In Grafton County CLF sought to enjoin NCES's operation of Stage VI while this appeal was pending. In Merrimack County CLF brought a declaratory judgment action, seeking a declaration that DES was violating statutory solid waste planning and regulatory requirements by issuing solid waste permits without updating the state solid waste plan, as required by statute.

NCES's motion to stay this appeal while it pursues declaratory relief in Superior Court contradicts NCES's prior positions in the Grafton and Merrimack Superior Court dockets. NCES opposed CLF's request for injunctive relief in Grafton County, stating that the Council, and not the courts, has exclusive jurisdiction over this appeal. NCES wrote: "This court has no jurisdiction over challenges to DES permitting decisions . . . . Appeals of a commission's decision must proceed in accordance with the procedure set forth in RSA ch. 541; this is the *exclusive* remedy of aggrieved parties." NCES Memo. in Support of Objection to CLF Expedited Motion for Preliminary Injunctive Relief, March 3, 2021, at 7 (emphasis in original). NCES warned against the Superior Court infringing on the Council's domain:

> Indeed, were the court to take up the question of the likelihood of success on the underlying merits it would be intruding upon the council's jurisdiction and become enmeshed in a determination of how the council is likely to rule. Thus, the plaintiff is specifically prohibited from maintaining an action in this court to enjoin the enforcement of DES's permitting decision. CLF's *only* remedy is to proceed with the appeal already pending before the WMC.

Id. at 7-8 (emphasis in original). Later, NCES wrote: "If CLF is concerned about an adverse order by the WMC, it is not without recourse; the organization can further exercise its due process rights by appealing that adverse decision to the New Hampshire Supreme Court." *Id.* at 10 (citing RSA 21-O:14; III; RSA ch. 541). In Merrimack County NCES's affiliate and co-plaintiff in Superior Court, Granite State Landfill, opposed CLF's declaratory judgment claim and described administrative appeals to the Council as the "exclusive statutory means by which a party with standing can seek review of whether DES permitting decisions are lawful and reasonable." Motion of Granite State Landfill to Dismiss, at ¶ 11 (citing RSA 21-O:14, I-a; RSA 541:6). NCES cannot credibly claim that the Council has exclusive jurisdiction over challenges to DES permitting decisions in one matter, and then ask the Council to stay its proceedings while NCES seeks judicial review of DES permitting decisions in a subsequent matter.

The Grafton Superior Court denied CLF's motion for an injunction while this appeal was pending, applying "the general rule that parties must exhaust their administrative remedies before seeking superior court intervention." Grafton Superior Court Order 2021, at 9 (citing *Huard v. Town of Pelham*, 159 N.H. 567, 572 (2009). Similarly, the Merrimack Superior Court determined that CLF's declaratory judgment claim was not ripe for judicial review, reasoning that CLF's claims should be addressed by the Council, and ultimately through appeals to the New Hampshire Supreme Court. Merrimack Superior Court Order 2021 at 16. It is likely that the Merrimack Superior Court will reach the same conclusion when considering NCES's newly filed declaratory judgment action. *See id.*

The Council is the proper venue to address DES's permitting decision under RSA 149-M:11, and the Council should deny NCES's request to stay this matter while NCES engages in forum shopping in an attempt to secure a more preferable outcome.

CONCLUSION

NCES has had a full and fair opportunity to participate in this appeal and to present its capacity need arguments to the Council. The parties and the Council have invested a great amount of time and resources into this appeal, and the Council should deny NCES's request to stay the appeal while NCES attempts to circumvent the Council's order in Superior Court. For the reasons set forth above, the Council should deny NCES's motion to stay.

Dated: September 26, 2022

Respectfully submitted,

CONSERVATION LAW FOUNDATION
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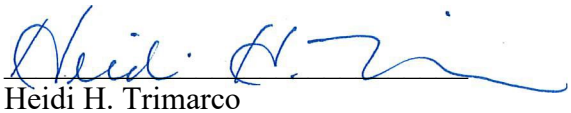
CERTIFICATE OF SERVICE

I certify that the original and thirteen copies of the foregoing Objection was this 26th day of September, 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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