STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WASTE MANAGEMENT COUNCIL

Docket No. 20-14 WMC

In re: Conservation Law Foundation, Inc. Appeal

**MOTION FOR LEAVE TO FILE REPLY TO OBJECTION**

Pursuant to Env-WMC 204.15, North Country Environmental Services, Inc. ("NCES") moves the council for leave to file a reply in response to CLF's objection to NCES's motion to stay. NHDES assents to the relief sought in this motion; CLF objects to this motion.

1. On September 21, 2022, NCES filed a motion to stay the council proceedings in this matter pending the resolution of a declaratory relief petition filed in superior court on September 20, 2022. CLF objected to NCES's motion on September 26, 2022.

2. NCES respectfully seeks leave to reply to CLF's objection regarding this motion. The proposed reply is contained in Attachment A to this motion.

3. The council's procedural rules do not provide a mechanism or procedure for filing a reply in connection with a motion presented to the council. As noted in prior motions to the council, Env-WMC 204.15(f) permits a "response" akin to an objection by a party adversely affected by the ruling sought in a motion, but the rules do not address briefing beyond such a response. NCES thus seeks leave from the council to reply to the CLF's objection to ensure that the council has the benefit of NCES's response to CLF's arguments.

4. Permitting additional briefing will advance the interests of justice and fairness in this matter and ensure that the council has the benefit of comprehensive arguments when considering NCES's motion. With its proposed reply, NCES seeks to answer CLF's argument

and distinguish the superior court orders referenced in CLF's objection. NCES's reply also appends the actual orders that CLF relies upon to argue against NCES's motion.

5. Permitting NCES to reply to these objections is also consistent with the administration of this case to date, as the parties have routinely been permitted to file replies in motion practice throughout the case.

WHEREFORE, NCES respectfully requests that the council:

A. Permit NCES to file the reply set forth in Attachment A; and

B. Grant such other relief as justice requires.

Respectfully submitted,

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

Date: 10/3/22

By: _____

Bryan K. Gould, Esq. (NH Bar No. 8165)
gouldb@cwbpa.com
Cooley A. Arroyo, Esq. (NH Bar No. 265810)
arroyoc@cwbpa.com
Morgan G. Tanafon, Esq. (NH Bar No. 273632)
tanafonm@cwbpa.com
CLEVELAND, WATERS and BASS, P.A.
Two Capital Plaza, 5th Floor
P.O. Box 1137
Concord, NH 03302
Tel. (603) 224-7761
Fax (603) 224-6457

## CERTIFICATE OF SERVICE

I hereby certify that, in accordance with the Pre-hearing Order issued on this matter on June 8, 2021, the within document was this day sent by e-mail transmission to:

Jaime Martinez, Legal Coordinator (Jaime.E.Martinez@des.nh.gov)
Office of the Commissioner
NHDES Legal Unit
29 Hazen Drive, PO Box 95
Concord, NH 03302-0095

Michael Wimsatt, Director (Michael.Wimsatt@des.nh.gov)
NHDES Waste Management Division
29 Hazen Drive, PO Box 95
Concord, NH 03302-0095

K. Allen Brooks, Esq. (K.Allen.Brooks@doj.nh.gov)
NH Department of Justice
Office of the Attorney General
33 Capitol Street
Concord, NH 03301

Joshua C. Harrison, Esq. (Joshua.C.Harrison@doj.nh.gov)
Assistant Attorney General
Office of the Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301

Thomas F. Irwin, Esq. (TIrwin@clf.org)
Heidi Trimarco, Esq. (HTrimarco@clf.org)
Conservation Law Foundation
27 North Main Street
Concord, NH 03301

Date: 10/3/22

Cooley A. Arroyo, Esq.

ATTACHMENT A

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 MOTION TO STAY**

North Country Environmental Services, Inc. ("NCES") submits the following reply to CLF's objection to NCES's motion to stay.

What is conspicuous about CLF's objection to the motion to stay is its failure to confront the principal arguments NCES has made in support of the motion. By failing to acknowledge or explain its decision not to challenge Mt. Carberry's most recent approval, CLF tacitly admits that its objective is not the enforcement of the capacity need requirement but the targeting of individual disposal facilities, a goal that is incompatible with the uniform application of the law. Instead of addressing the merits of a stay under all of the circumstances of the case, CLF offers the diversionary claim that NCES has made inconsistent arguments in two other cases but does not make the slightest effort to establish that the two cases are analogous to this one. CLF maintains that NCES "could have" undertaken discovery or advanced certain arguments during the pendency of CLF's appeal but ignores both the limited jurisdiction of the council and New Hampshire law holding that the kind of preclusion CLF seeks to apply does not exist in cases like this.

CLF's objection sidesteps one of the most compelling reasons for a stay, and that is the immediate risk of unequal application of the law. CLF represented to the council that it has standing to bring this appeal in part because its members, "as New Hampshire citizens," are

adversely affected by the state's "failure to meet its waste reduction goal and waste management hierarchy" and the permitting of a landfill that "does not satisfy the substantial-public benefit requirement." CLF Obj. to Mot. to Dismiss (2/19/21) at ¶8 (quoting Notice of Appeal). Much as CLF may wish to portray itself as a private attorney general, however, in fact its litigation strategy is driven by its ideology, not any altruistic interest in the rule of law. This is borne out by its decision not to appeal the Mt. Carberry facility's most recent expansion approval despite NHDES's use of exactly the same capacity need methodology as CLF has persuaded the hearing officer is unlawful in this appeal. The fact that CLF has appealed the most recent approvals received by Waste Management of New Hampshire and NCES but not the approval obtained by the Mt. Carberry facility reflects its opposition to privately-owned waste disposal facilities and preference for publicly-owned facilities[1]. Rather than seek to persuade the legislature that disposal capacity should be publicly owned on policy grounds, CLF has attempted to use the council appeals process to accomplish the same thing indirectly. It is understandable that CLF would want the validity of waste disposal facility permits to depend on whether CLF chooses to appeal an individual permit, but that is antithetical to the fundamental principle that the law must apply equally to identically situated parties. *See In re Sandra H.*, 150 N.H. 634, 637 (2004).

CLF has created the circumstance in which NCES's Stage VI approval is at risk as a result of the hearing officer's decision, yet Mt. Carberry's 2022 approval remains unclouded for the time being despite NHDES's use of the identical capacity need methodology it employed to grant the Stage VI approval. This means that NCES faces the prospect of losing the right to operate Stage VI because NHDES did not use the pure function of time approach in granting the

[1] The Mt. Carberry facility is owned by the Androscoggin Valley Regional Refuse Disposal District ("AVRRDD"), a municipality under New Hampshire law. The facility is regulated as a commercial landfill because it does not restrict the waste it receives to that generated by the communities comprising AVRRDD. *See* RSA 149-M:11, VII.

Stage VI permit but, absent a separate challenge to its most recent expansion approval, Mt. Carberry will be able to construct and operate its next expansion notwithstanding that NHDES did not use the pure function of time approach in granting Mt. Carberry's permit. These irreconcilable outcomes also contribute to significant uncertainty for future applicants like Granite State Landfill, LLC ("GSL"), in terms of how to satisfy the capacity need requirement. Only the courts have the jurisdiction[2] to resolve such conflicts and declare the law in a manner that results in all similarly situated parties being treated equally.

Similarly, instead of addressing the merits of a stay in terms of the need for an authoritative construction of the law in the face of four competing interpretations, the existing disparate application of the capacity need requirement, the insufficiency of rehearing as a means to litigate newly created issues, and the conservation of judicial resources, CLF argues emphatically that NCES "could have"[3] contended that the NHDES decision at issue in the appeal applied the wrong capacity need standard. *See* CLF Obj. (9/26/22) at 2-6. The evident purpose of this argument is to suggest that NCES is somehow precluded from making that contention now. To make this argument, however, CLF must disregard both the narrow appellate

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[2] CLF devotes much of its objection to arguments maintaining that the superior court lacks jurisdiction over the declaratory relief action. That, however, is not an issue within the council's authority to decide. Even if, as CLF posits, the superior court has no jurisdiction over the declaratory relief claims, the stay NCES has requested would expire upon dismissal by the superior court, and the council could immediately resume its consideration of the other motions pending before it. If, on the other hand, the superior court finds, as NCES expects, that it has exclusive statutory jurisdiction to declare the meaning and constitutionality of RSA 149-M:11, V, CLF identifies no prejudice to itself from deferring a hearing and ruling on the motion for rehearing until the council has the benefit of the superior court's construction of the statute.

[3] CLF draws exactly the opposite conclusion from NCES's reservation of rights as it should have. It is true that NCES reserved its right in its prehearing memorandum to argue that the partial function of time approach is contrary to the language of the statute and its historical interpretation, but the reason NCES *reserved* that argument is because the issue before the council was the lawfulness and reasonableness of the decision to *issue* the Stage VI permit, not the meaning of RSA 149-M:11, V, as an abstract proposition.

jurisdiction of the council and decisional law to the contrary. Again, the council's jurisdiction is limited to whether – on the grounds asserted by the appellant in the notice of appeal – a specific decision by the Department is unlawful or unreasonable. RSA 21-O:14, I-a(a). CLF's notice of appeal challenged NHDES's use of the partial function of time approach (Notice of Appeal (11/9/20) at 3), and NCES defended the agency's decision. CLF offers no reason why the recipient of a permit would challenge the agency's rationale underlying the permit on appeal, and it cites no authority for the notion that in defending its permit a permittee must advance or lose arguments that would undermine the permitting decision. Rather, CLF simply ignores New Hampshire law holding that a party that receives a permit has no legal interest or obligation to challenge legal errors in the permitting decision. *See City of Portsmouth v. Schlesinger*, 140 N.H. 733, 735 (1996) (no obligation to raise a defense or take a "counterintuitive" position when a party procured approval it sought); *see also Beaudette and Graham Co. v. Therrien*, 81 N.H. 117, 118 (1923) (a party is "not called on to object or except" until aggrieved by a ruling, direction, or judgment).

Much the same is CLF's contention that NCES "fully participated" in this appeal from the outset and thus had opportunity to obtain discovery and build a record to support the arguments NCES has made on rehearing in response to the hearing officer's order. CLF Obj. (9/26/22) at 5. Again, what controls the scope of a council appeal is the decision reached by NHDES and the particular challenges the appellant raises in the notice of appeal. *See* RSA 21-O:14, I-a(a) (requiring appellant to list "every ground upon which it is claimed that the decision complained of is unlawful or unreasonable"); Env-WMC 204.02(b) (listing requirements for notice of appeal).

CLF offers no explanation of how the constitutionality of RSA 149-M:11 and the administrative gloss on the capacity need criterion were relevant to CLF's claims in its notice of appeal, which challenged the Department's capacity need finding where "for the majority of the Permit's operating period DES found no capacity need, and only determined there to be a capacity need for one year, and then not until 2026." Notice of Appeal (11/9/20) at 3. The question on appeal was whether NHDES's application of the capacity need criteria with the partial function of time standard was lawful and reasonable, *not* whether the pure function of time approach is required by statute or whether the statute is constitutional. Those issues only became germane when the hearing officer issued his order declaring that the partial function of time test does not satisfy RSA 149-M:11, V.

CLF asserts that NCES has argued against the exercise of the superior court's jurisdiction in two previous actions. CLF Obj. (9/26/22) at 6. While that is true, the courts' orders in those cases, which CLF did not see fit to include with its objection, make clear that the rationale for the courts' rejection of CLF's claims has no application here. In the Grafton Superior Court proceeding, for example, CLF sought to enjoin NCES's Stage VI operations pending the resolution of this council appeal. *See CLF v. NCES*, Order (5/14/21), Grafton Superior Court, Docket No. 215-2021-CV-19 (Exhibit A) at 2. CLF attempted to utilize the judicial process to impede all operations of the NCES expansion pending the outcome of this appeal before the council by seeking injunctive relief. The court's analysis considered two superior court orders in which the court exercised equitable jurisdiction despite the availability of administrative alternatives when "the issue presented by the party is a pure question of law or where a potential due process violation has occurred." *Id.* at 6. The court could only grant the injunction by deciding the likelihood of success on the merits of the council appeal, and thus it appropriately

recognized that CLF "ask[ed] the court to essentially step into the shoes of the WMC to determine the merits of its appeal and to supplant the authority of the DES to issue permits." *Id.* at 3 and 8. It therefore denied the motion for injunctive relief.

None of the factors that justified NCES's arguments against superior court jurisdiction in that action apply here. The court is not asked to evaluate a question of fact that was presented to the council, nor are the court's equitable powers invoked to resolve the lawfulness or reasonableness of a "department decision." Instead, the court is asked to declare the meaning and constitutionality of the statute, something it is uniquely positioned to do. *See Claremont School Dist. v. Governor*, 143 N.H. 154, 158 (1998) (acknowledging the court's duty to "interpret the constitution and say what the law is"). Any ancillary factual issues in the declaratory relief action, like the existence of an administrative gloss, can be resolved by the court without encroaching on the jurisdiction of this council, as such questions are beyond the limited jurisdiction of the council as described in RSA 21-O:14, I-a.

In the Merrimack Superior Court litigation CLF sought particularly draconian relief: precluding NHDES from issuing solid waste permits until NHDES adopted a new state solid waste plan. *CLF v. NHDES*, Order (5/14/21), Merrimack Superior Court, Docket No. 217-2021-CV-0092 (Exhibit B) at 1 and 6. It sought (among other things) a declaration that NHDES was violating statutory solid waste planning and regulatory requirements. *Id.* at 1. GSL intervened in that litigation, along with Waste Management of New Hampshire and AVRRDD, to challenge the relief sought by CLF's papers. *Id.*

Although the court observed that the statute requires updates to the plan, and NHDES conceded that it had failed to make such revisions, the court's analysis for the declaratory relief claim turned on ripeness. *Id.* at 15. While declaratory judgment is proper where the "question is

one peculiarly suited to judicial rather than administrative treatment and no other adequate remedy is available," the court determined that CLF had an adequate remedy through the appeals process, as it could raise the issue in an appeal (as, indeed, it already had in this appeal) and advance the matter to the state supreme court.[4] *Id.* at 15-16. To this end, while the questions were "fit for judicial determination," the hardship to the parties was insufficient in view of the remedies available to CLF. *Id.* at 16 (brackets and ellipses omitted).

This rationale for the court's rejection has no application here. The remedy of an administrative appeal is no remedy at all for NCES and GSL. Unlike CLF in the two superior court cases, NCES and GSL face an extant disparity in the application of the capacity need requirement (*ante* at 1-3), and both are submitting applications to NHDES in the near term (in the case of NCES) without any conclusive determination of the status of the Stage VI permit that will support an application to construct Phase II of Stage VI or (in the case of GSL) without a construction of the statute that will enable it to discern or meet the capacity need requirement so that it can receive a standard permit for its proposed landfill in Dalton.

Even if the hearing officer's order survives rehearing it provides no finality, as the council lacks authority to actually make a declaration or compel further action by NHDES. *See* RSA 21-O:14, I-a(b). Instead, the council can only remand the decision for further action to be consistent with its determination, which leaves NCES's permit in a state of uncertainty pending a supreme court appeal and places a cloud on existing and future approvals. *Id.*, RSA 21-O:14, I-a(c).

[4] Of course, the council ultimately determined that NHDES did not act unlawfully or unreasonably by issuing the permit in reliance on the 2003 solid waste plan. Order (5/11/22) at 18-20.

For the reasons set forth in this reply and the motion, NCES respectfully requests that the council grant its motion to stay these proceedings pending the resolution of the declaratory relief petition in the superior court.

Respectfully submitted,

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

Date: 10/3/22

By: _____

Bryan K. Gould, Esq. (NH Bar No. 8165)
gouldb@cwbpa.com
Cooley A. Arroyo, Esq. (NH Bar No. 265810)
arroyoc@cwbpa.com
Morgan G. Tanafon, Esq. (NH Bar No. 273632)
tanafonm@cwbpa.com
CLEVELAND, WATERS and BASS, P.A.
Two Capital Plaza, 5th Floor
P.O. Box 1137
Concord, NH 03302
Tel. (603) 224-7761
Fax (603) 224-6457

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with the Pre-hearing Order issued on this matter on June 8, 2021, the within document was this day sent by e-mail transmission to:

Jaime Martinez, Legal Coordinator (Jaime.E.Martinez@des.nh.gov)
Office of the Commissioner
NHDES Legal Unit
29 Hazen Drive, PO Box 95
Concord, NH 03302-0095

Michael Wimsatt, Director (Michael.Wimsatt@des.nh.gov)
NHDES Waste Management Division
29 Hazen Drive, PO Box 95
Concord, NH 03302-0095

K. Allen Brooks, Esq. (K.Allen.Brooks@doj.nh.gov)
NH Department of Justice
Office of the Attorney General
33 Capitol Street

Concord, NH 03301

Joshua C. Harrison, Esq. (Joshua.C.Harrison@doj.nh.gov)
Assistant Attorney General
Office of the Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301

Thomas F. Irwin, Esq. (TIrwin@clf.org)
Heidi Trimarco, Esq. (HTrimarco@clf.org)
Conservation Law Foundation
27 North Main Street
Concord, NH 03301

Date: 10/3/22

Cooley A. Arroyo, Esq.

EXHIBIT A

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 215-2021-CV-19

Conservation Law Foundation, Inc.

v.

North Country Environmental Services, Inc.

ORDER

The plaintiff, Conservation Law Foundation, Inc. ("CLF"), brought this civil action against the defendant, North Country Environmental Services, Inc. ("NCES") seeking injunctive relief related to NCES's operation of a landfill located in Bethlehem, New Hampshire. (Index #1.) Subsequently, the New Hampshire Department of Environmental Services ("DES") filed a motion for limited intervention, (Index #7), which the court granted on February 16, 2021. Presently before the court is CLF's expedited motion for preliminary injunctive relief and memorandum in support thereof, (Index #2), NCES's objection and memorandum in support thereof, (Index #14), the State's limited objection, (Index #8), CLF's reply to NCES's objection, (Index #17), and NCES's surreply to CLF's reply, (Index #20.)[1] The court held a hearing via WebEx on March 10, 2021, at which counsel for CLF, NCES, and DES were present and CLF and NCES submitted exhibits. (Index #15.) Based on the parties' pleadings, the relevant facts, and the applicable law, the court finds and rules as follows.

In short, this case arises out of the State's approval of NCES's application, through the DES, for a Type 1-A Permit Modification and Waiver for Expansion (the "Permit") to

[1] Additionally, CLF moved to strike portions of NCES's surreply. (Index #21.) Because the court concludes that the information CLF seeks to strike does not materially alter the court's analysis, CLF's motion to strike is DENIED.

allow NCES to expand the landfill it owns and operates in Bethlehem (the "Landfill"). (Pl.'s Memo. at 1–2, Ex. B; Def.'s Memo. at 2.) DES approved the application on October 9, 2020. (Def.'s Memo. at 2.) In response to the approval of the Permit, CLF filed a timely appeal to the Waste Management Council ("WMC") on November 9, 2020, challenging the issuance of the permit as unlawful. (CLF's Memo. at 2; NCES's Memo. at 2.) That appeal is currently pending before the WMC. (*See* CLF's Memo. at 2.) During the pendency of CLF's appeal, NCES has moved forward with its plans to expand the Landfill, expending substantial time and resources in the process. (NCES's Memo. at 2.)

CLF now moves for expedited preliminary injunctive relief to enjoin NCES from beginning operation of the Landfill under the new permit and to "preserve the status quo" until its appeal before the WMC runs its course and NCES obtains a "final permit." (CLF's Memo. at 9.) NCES, on the other hand, argues that CLF cannot succeed on the merits because this court lacks jurisdiction to adjudicate the merits of CLF's claims because CLF failed to exhaust its administrative remedies. (NCES's Memo. at 7.) Moreover, DES submits that for purposes of issuing permits, there is no final or non-final permit and notes that the Permit in this case has been issued, and that the court should disregard further argument with respect to whether the Permit was final. (DES's Limited Obj. ¶¶ 8, 12.)[2]

Generally, "[t]he issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." *New Hampshire Dep't of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007). An injunction should not issue unless the plaintiff shows: (1) that it is likely to succeed on the merits; (2) that it has no adequate remedy at

[2] As a preliminary matter, the court accepts DES's representations concerning the finality of the Permit for the reasons laid out in DES's Limited Objection. (*See* Index #8.) Therefore, the DES permit issued on November 9, 2020 was a "final" permit, for the purposes of this action.

law; (3) that it will suffer immediate irreparable harm if the injunctive relief is not granted; and (4) that the public interest will not be adversely affected if the injunction is granted. *Id.*; *UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 13–15 (1987); *see also Kukene v. Genualdo*, 145 N.H. 1, 4 (2000) ("[I]njunctive relief is an equitable remedy, requiring the trial court to consider the circumstances of the case and balance the harm to each party if relief were granted."). "The granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." *DuPont v. Nashua Police Dep't*, 167 N.H. 429, 434 (2015).

This case turns on CLF's likelihood of success on the merits; specifically, whether CLF's lack of administrative exhaustion renders its claim futile. Ordinarily, "[w]henever a statute provides a procedure for appeal or review of administrative agency's decision, that procedure is exclusive and must be followed." *Frost v. Comm'r, N.H. Banking Dep't*, 163 N.H. 365, 373 (2012). "Thus, before an agency decision may be reviewed [by the court], administrative remedies must be exhausted." *Id.*; *see also Sutton v. Town of Gilford*, 160 N.H. 43, 52 (2010) ("Generally, parties must exhaust their administrative remedies before appealing to the courts."). However, this case poses a slightly different question, namely whether a party can seek an injunction from the superior court while its appeal is pending before an administrative body, rather than directly appealing the decision of an administrative body.

The court first turns to the relevant statute in this case, New Hampshire's Solid Waste Management statute, RSA chapter 149-M. RSA 149-M:8 provides that "[a]dministrative appeals from decisions of the department made under the provisions of this chapter shall be heard by the waste management council under RSA 21-O:9, V." In

turn, RSA 21-O:9, V provides that "[t]he waste management council shall hear all administrative appeals from department decisions relative to the functions and responsibilities of the division of waste management, and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14." To that end, 21-O:14, I-a provides that:

> Any person aggrieved by a department decision may, in addition to any other remedy provided by law, appeal to the council having jurisdiction over the subject matter of the appeal within 30 days of the date of the decision 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. Only those grounds set forth in the notice of appeal shall be considered by the council. On any such appeal, the council shall determine whether the department decision was unlawful or unreasonable by reviewing the administrative record together with any evidence and testimony the parties to the appeal may present.

The WMC does not possess the statutory authority to issue injunctive relief, nor does the statute provide for a process to seek injunctive relief from the superior court. *See* RSA 21-O:9.

In matters of statutory interpretation, the court "first examine[s] the language of the statute, and, where possible, [the court will] ascribe the plain and ordinary meanings to the words used." *Horton v. Clemens*, 173 N.H. 480, 483 (2020). "When the language of the statute is clear on its face, its meaning is not subject to modification." *Id.* The court "will neither consider what the legislature might have said nor add words that it did not see fit to include." *Id.*

NCES contends that the framework laid out in RSA chapter 151 provides the exclusive remedy for parties aggrieved by administrative decisions, such as the

permitting decision at issue in the present case. (NCES's Memo. at 7.)[3] To that end, NCES argues that CLF cannot pursue an action seeking to "enjoin the enforcement of" a permitting decision of the DES. *See* RSA 541:22 ("No proceeding other than the appeal herein provided for shall be maintained in any court of this state to set aside, enjoin the enforcement of, or otherwise review or impeach any order of the commission, except as otherwise specifically provided.").[4] Conversely, CLF argues that because RSA 21-O:14, I-a allows parties to appeal to WMC "in addition to any other remedy provided by law," its concurrent claim for injunctive relief is explicitly allowed even while its appeal before the WMC is pending. (CLF's Reply at 2–3.)

While the Supreme Court has yet to rule on whether a party with an appeal pending before the WMC may also petition the superior court for injunctive relief, CLF points to two superior court decisions, *North County Envtl. Servs., Inc. v. N.H. Dep't of Envtl. Servs.*, No. 09-E-113, 2009 WL 2364093 (N.H. Super. Ct. June 10, 2009) and *Merrymeeting Lake Assoc. v. N.H. Fish & Game Dep't*, No. 99-E-160, 1999 WL 34975877 (N.H. Super. Ct. Oct. 1, 1999), to support the proposition that this court maintains jurisdiction to rule on its claim for injunctive relief. (*See* CLF's Reply at 2.)

In *North County Envtl. Servs.*, the court found that plaintiff's petition for preliminary injunctive relief was not barred despite the plaintiff having failed to exhaust

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[3] RSA 541:1 defines the word "commission" as "the public utilities commission, the milk sanitation board, or any state department or official concerning whose decision a rehearing or appeal is sought in accordance with the provisions of this chapter."

[4] The court declines to apply the procedure laid out in RSA chapter 541. While the Supreme Court has yet to specifically rule on whether chapter 541 provides the exclusive remedy for aggrieved parties under RSA chapter 149-M, the court notes that other statutes that apply chapter 541, *see e.g.*, RSA 397-A:7, II; RSA 541:4, VII, specifically reference RSA chapter 541 while RSA chapter 149-M does not. *See State Emps. Ass'n of N.H., SEIU, Loc. 1984 (SEA) v. N.H. Div. of Pers.*, 158 N.H. 338, 345 (2009) (quotation omitted) (noting that "where the legislature uses different language in related statutes, we assume that the legislature intended something different").

its administrative remedies before the WMC. *See* 2009 WL 2364093. The court in that case opined that because the plaintiff "presented questions of law . . . which are properly resolved by [the court,] . . . exhaustion of administrative remedies is not required in this matter because [the plaintiff] has set forth a colorable claim for injunctive relief, which can only be granted by the Court." *Id.* Similarly, in *Merrymeeting Lake Assoc.*, the court granted the plaintiff's petition for a preliminary injunction to prevent the defendants from initiating construction on a "boat access project" pending exhaustion of the plaintiff's administrative appeal before the wetlands council. *See* 1999 WL 34975877. The court concluded that:

> Although the court appreciates that it may not resolve substantive issues prior to administrative exhaustion, the court "may, however, intervene prior to entry of final judgment in exceptional circumstances where, as here, a party raises a due process violation that fundamentally impedes the fairness of an underlying proceeding resulting in immediate and irreparable harm to that party."

*See id.* The court identified the fact that the defendant could "commence construction pending the plaintiffs' agency appeal" as potentially implicating due process. *Id.*

In sum, these cases stand for the proposition that a party does not have to exhaust its administrative remedies before seeking an injunction in the superior court when the issue presented by the party is a pure issue of law or where a potential due process violation has occurred.[5] However, the court finds these cases, and the legal principles they exemplify, sufficiently distinguishable from the case at hand and, therefore, the court declines to follow in their footsteps.

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[5] The court notes that these principles are clearly established in New Hampshire jurisprudence. *See, e.g., Thompson v. N.H. Bd. of Medicine*, 143 N.H. 107, 109–110 (1998) (noting that it is within the court's equity power to grant injunctive relief prior to a final agency decision where a potential due process violation has occurred); *Pheasant Lane Realty Trust v. City of Nashua*, 143 N.H. 140, 141–42 (1998) (finding that "[a] party is not required to exhaust administrative remedies where the issue on appeal is a question of law rather than a question of the exercise of administrative discretion").

First, with respect to *North County Envtl. Servs.*, the court reasoned that the plaintiff presented a pure question of law; specifically, "the constitutionality of certain agency rules." 2009 WL 2364093. The court does not question the well-settled principle that "[a] party is not required to exhaust administrative remedies where the issue on appeal is a question of law rather than a question of the exercise of administrative discretion." *Frost*, 163 N.H. at 373. Here, CLF is not challenging the constitutionality of RSA chapter 149-M or any related statute. Rather, it is factually challenging the way the DES applied the applicable statutory provisions to NCES's application. (*See* CLF's Mot. at 2.) Therefore, CLF's claim for injunctive relief is not based solely on an issue of law, but clearly implicates issues of fact which much be resolved by the WMC. *See* RSA 21-O:9, V (noting that the WMC "shall decide all disputed issues of fact").

Second, with respect to *Merrymeeting Lake Assoc.*, that case was decided under a statutory scheme that specifically allowed for a party to appeal to the Wetlands Council and, if denied, move for reconsideration and then appeal to the superior court if its motion for reconsideration was denied. 1999 WL 34975877. This framework has since been amended to allow for a party to "appeal to the wetlands council and to the supreme court as provided in RSA 21-O:14," which is substantially the same framework provided by the Waste Management Statute. *Compare* RSA 482-A:10, I *with* RSA 149-M:8 & RSA 21-O:9, V. This framework does not allow for a party to appeal directly to the superior court, nor does it allow a party to seek injunctive relief from the superior court while the administrative appeal is pending. Moreover, the court does not perceive a potential due process violation in allowing NCES to operate the expanded Landfill under a valid permit issued by the DES, a "final" permit for the purposes of this action. *See generally* DES's Limited Objection.

Most importantly, these cases go against the grain of the Supreme Court's precedent concerning parties seeking injunctions from the superior court without first exhausting administrative remedies under similar statutes. For example, with respect to decisions issued by zoning boards,[6] the Supreme Court concluded that "[e]xcept in rare instances, if a party aggrieved by the action of a city official in zoning matters fails to exhaust statutory remedies, a petition for injunctive relief will not lie." *Sutton*, 160 N.H. at 52. The Supreme Court stated that "[t]his rule is based on the reasonable policies of encouraging the exercise of administrative expertise, preserving agency autonomy, and promoting judicial efficiency." *Id.* (cleaned up). The Supreme Court further noted that the rule "is particularly applicable when substantial questions of fact exist." *Id.* (cleaned up). The same is true in the present case.

Here, CLF asks the court to essentially step into the shoes of the WMC to determine the merits of its appeal and to supplant the authority of the DES to issue permits. The court declines to do. *See, e.g., McNamara v. Hersh*, 157 N.H. 72, 76 (2008) (noting that issues of fact which are not particularly suited to judicial treatment, but are routinely addressed by a specialized administrative body, should be resolved by the administrative body and not the courts). If the legislature had intended the superior court to have the power to enjoin operation of the Landfill pending CLF's appeal before the WMC it would have done so. Moreover, this court declines to read the vague phrase

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[6] The relevant statutes with respect to appeals to the ZBA, RSA 677:15, I and RSA 676:5, III, when read together, establish two separate avenues of appeal from a local planning board's decision, depending on the nature of the claim. *Atwater v. Town of Plainfield*, 160 N.H. 503, 508 (2010). A party may appeal planning board decisions directly to the superior court pursuant to RSA 677:15, I. *Id.* at 509. However, when the planning board makes a decision "in the exercise of . . . a site plan review . . . based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance," RSA 676:5, III, a party must first appeal the decision to the local zoning board of adjustment. *Atwater*, 160 N.H. at 509. "Only after the board of adjustment has rendered a decision may the issue be appealed to the superior court pursuant to RSA 677:4." *Id.*

"in addition to any other remedy provided by law," *see* RSA 21-O:14, I-a, as specifically granting the superior court the power to issue an injunction that would undermine the statutory permitting process. *See State v. Gallagher*, 157 N.H. 421, 423 (2008) (noting that New Hampshire courts "do not presume that the legislature would pass an act leading to an absurd result" but "will consider other indicia of legislative intent where the literal reading of a statutory term would compel an absurd result").

Accordingly, because the legislature did not specifically authorize CLF to seek injunctive relief from the superior court while its appeal is pending before the WMC, the court applies the general rule that parties must exhaust their administrative remedies before seeking superior court intervention. *See Huard v. Town of Pelham*, 159 N.H. 567, 572 (2009) (noting that "[t]he general rule is that administrative remedies must first be exhausted before a party brings a matter to the courts," including claims for injunctive relief). Therefore, because CLF's appeal is currently pending before the WMC, CLF cannot succeed on the merits of its claims for injunctive relief because the court lacks jurisdiction to adjudicate such a claim.

For the foregoing reasons, CLF's expedited motion for injunctive relief is DENIED.

SO ORDERED, this 14th day of May 2021.

Lawrence A. MacLeod, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 05/14/2021

EXHIBIT B

# The State of New Hampshire

**MERRIMACK COUNTY** **SUPERIOR COURT**

CONSERVATION LAW FOUNDATION, INC.

v.

ROBERT R. SCOTT, COMMISSIONER,
NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES, et al.

Docket No.: 217-2021-CV-0092

## ORDER

The plaintiff, Conservation Law Foundation, Inc. ("Conservation Law"), brings an action for injunctive relief, declaratory judgment, and a writ of mandamus, in connection with the New Hampshire Department of Environmental Services ("DES")'s alleged failure to publish an updated solid waste plan pursuant to RSA 149-M:29, I. The defendants, Robert R. Scott, in his official capacity as Commissioner of DES, Granite State Landfill, LLC ("GSL"), Waste Management of New Hampshire, Inc. ("WMNH"), and Androscoggin Valley Regional Refuse Disposal District ("AVRRDD"), now move to dismiss. On April 9, 2021, the Court held a hearing on the motions to dismiss with counsel for the parties. In addition, the North Country Alliance for Balanced Change ("NCABC") submitted an amicus curiae brief in support of the plaintiff's action. For the following reasons, the defendants' various motions to dismiss Conservation Law's Complaint and Expedited Motion for Preliminary Injunction are, each, GRANTED.

## I. Standard

In reviewing a motion to dismiss, the Court assumes the truth of all well-pleaded facts of the nonmoving party and construes "all reasonable inferences in the light most

favorable" to the nonmoving party. Beane v. Beane, 160 N.H. 708, 711 (2010). The Court may also consider documents attached to the nonmoving party's pleadings, documents the authenticity of which is not disputed, official public records, or documents sufficiently referred to in the Complaint. Ojo v. Lorenzo, 164 N.H. 717, 721 (2013). However, the Court does not "assume the truth of statements . . . that are merely conclusions of law." Clark v. N.H. Dep't of Emp. Sec., 171 N.H. 639, 645 (2019). Rather, the Court determines, as a threshold matter, whether the facts alleged by the nonmoving party "constitute a basis for legal relief" when tested "against the applicable law." Grand Summit Hotel Condo. Unit Owners' Ass'n v. L.B.O. Holding, Inc., 171 N.H. 343, 345 (2018). "When a motion to dismiss 'challenges the plaintiff's standing to sue, the trial court must look beyond the plaintiff's unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief.'" In re Trust of Eddy, 172 N.H. 266, 272–73 (2019) (citing Ossipee Auto Parts v. Ossipee Planning Bd., 134 N.H. 401, 403–04 (1991)) (emphasis added).

## II. Background

Conservation Law is a not-for-profit corporation of nearly 5000 members incorporated under the laws of the Commonwealth of Massachusetts and dedicated to solving environmental problems that threaten the people, communities, and natural resources of New England residents. (Compl. ¶ 1.) It has maintained an advocacy center in Concord since 1998. (Id.)

In April 2003, DES published the New Hampshire State Solid Waste Plan ("2003 Solid Waste Plan"), which it described at the time as intended to "provide . . . an overview of the courses of action that will be pursued by [DES] in solid waste

management over the next several years." (Compl. ¶ 16, Preface to Ex. 1.) DES added that, "as such, the [p]lan is constantly evolving" and "ambitious" in nature. (Id.) In addition, the text of the 2003 Solid Waste Plan provides DES's primary goals were to:

1. Reduce the volume of the solid waste stream;
2. Reduce the toxicity of the solid waste stream;
3. Maximize the diversion of residential and commercial/industrial solid wastes;
4. Assure disposal capacity for New Hampshire; and
5. Assure that solid waste management activities are conducted in a manner protective of human health and the environment.

(Id. ¶ 17, Ex. 1, at 1.) DES describes the first three goals as reflecting its commitment to minimize "solid waste . . . when possible and manage[] [waste] as a resource," while its last two goals are intended to reflect DES's commitment to the development of "solid waste facilities and services . . . that are protective of public health and the environment." (Id. ¶ 18, Ex 1, at 1.)

The 2003 Waste Management Plan tailored its objectives in reliance on the latest data then available. (Id. ¶¶ 19–20.) However, since 2003, DES has failed to publish an updated waste management plan reflective of current conditions and it has fallen short of reaching its stated goals. (Id. ¶¶ 21–22.) In particular, DES allegedly has failed to sufficiently reduce waste, shift in any significant way from solid waste disposal (landfilling and incineration) to source reduction, recycling, reuse, and composting, and has allowed nearly fifty percent of the State's disposal capacity to be saturated with out-of-state waste. (Id. ¶ 22.) Conservation Law alleges the disposal of solid waste in landfills has negatively impacted New Hampshire's environment and public health. (Id. ¶ 23.) These negative impacts have allegedly included: pollution of ground and surface water from landfill leachate, including leachate containing toxic per- and polyfluorinated substances, or "PFAS;" landfill emissions of methane; air pollution from trucks

transporting waste to disposal facilities; the loss of wetlands and other land resources; noise; and odors. (Id.) Despite the lack of an updated solid waste plan, DES has engaged in the review of permit applications for waste disposal facilities, and has granted permits in reliance on the now outdated 2003 Waste Disposal Plan. (Id. ¶ 24.)

For example, in May 2017, WMNH successfully applied to DES for a permit authorizing it to expand the Turnkey Recycling and Environmental Enterprise facility, a solid waste management facility it owns and operates in Rochester. Appeal of Conservation Law Found., No. 2020-00492021, N.H. LEXIS 7, at *2 (Nov. 17, 2020). DES granted the permit in June 2018, and Conservation Law appealed the grant to the State's Waste Management Council (the "Council"). Id. at *3–4; (Conservation Law's Mem. in Supp. Obj. Mots. Dismiss ("CLF Consol. Mem.") at 4.). The Council heard five days of testimony from witnesses called by Conservation Law and WMNH and received hundreds of pages of exhibits from both parties. Appeal of Conservation Law, N.H. LEXIS 7, at *4. As relevant here, Conservation Law brought the appeal before the Council "in part on the grounds that DES had failed to comply with the state waste plan requirement in RSA 149-M:29." (CLF Consol. Mem. at 4–5; CLF Consol. Mem., Ex. 2 ("Council's 2019 Order") at 1, 5–6.) The Council determined as follows:

> . . . [T]he question whether DES has failed to comply with these requirements is not properly brought before the Council in the context of this Appeal. Reply, at p. 8. Council jurisdiction only extends to DES permitting decisions, RSA 21-O:29, and compliance with the plan and report obligations of RSA 149-M:29, while likely intended to benefit the public, is not part of the subject permitting process. Permittee's Motion to Dismiss the argument is granted.

(Council's 2019 Order at 6.)

Following the Council's decision, Conservation Law successfully sought an appeal before the State Supreme Court. See Appeal of Conservation Law, N.H. LEXIS

7, at *4. Conservation Law did not, however, seek appeal on the question of DES's compliance with RSA 149 M-29, I, in part because, in Conservation Law's estimation, the Council was correct in "determin[ing] as a matter of law that . . . DES's compliance with statutory plan requirements [] was not properly before the Council." See id.; (CLF Consol. Mem. at 6.)

One year later, in October 2020, DES granted a permit to North Country Environmental Services ("NCES"), a subsidiary of Casella Waste Systems, Inc. ("Casella"), to expand its landfill in Bethlehem. (Id. ¶ 26.) Conservation Law again pursued an appeal of the permit grant before the Council on November 9, 2020. (Id.) The Council accepted Conservation Law's appeal on January 21, 2021. (CLF Consol. Mem. at 11.) Since the grant of the permit, one of Conservation Law's members, Peter Menard, alleges he has suffered noise impacts, odor impacts, and view impacts from his property in Bethlehem. (Id.)

The following year, on February 5, 2021, GSL, a private landfill company and another subsidiary of Casella, submitted an application to DES to construct and operate a new landfill in Dalton. (Id. ¶ 25.) That application is currently under review. (See id.) Conservation Law alleges the proposed landfill in Dalton would be 180 acres in size, have a disposal capacity of 23 million cubic yards of waste, operate for approximately 38 years, and require the filling of more than 17 acres of wetlands. (Id.) As applicable to Conservation Law, it maintains the Dalton landfill would directly and adversely affect the property values of three of Conservation Law's members, Laurie Boswell, Robert Grosholz, and Victoria Martin, each of whom owns homes in Whitefield within a mile of the proposed landfill. (CLF Consol. Mem. at 10–11.) They each value their respective

properties for many attributes associated with its setting on Forest Lake, including the pristine nature of the lake itself, the quiet, the views, and the wildlife, all of which Conservation Law claims would be affected by the proposed landfill. (Id. at 10) In addition, Conservation Law alleges the lack of a solid waste plan will affect its members' ability to effectively submit public comments during DES's permit application review. (Id. at 11.)

**Analysis**

A. Injunctive Relief

In its Complaint, Conservation Law seeks an order from this Court enjoining DES (1) from reviewing permit applications and issuing permits for any new or expanded waste disposal facilities; and (2) from reviewing and rendering any further decisions on any waste facility permit remanded to it by the Council until it has achieved compliance with RSA 149-M:11, III, RSA 149-M:12, I(b), and RSA 149-M:29. (Compl. at 13.) In its Expedited Motion for Preliminary Injunctive Relief, Conservation Law seeks an additional injunction preventing DES from engaging in permitting activities related to any new or expanded solid waste facilities, including the proposed facility in Dalton, until DES has complied with its mandatory, non-discretionary duty to have a state solid waste management plan in compliance with RSA 149-M:29 alone. (Expedited Mot. Prelim. Inj. at 5.) The defendants variously reply that Conservation Law has not demonstrated standing, irreparable harm, imminence, an absence of adequate alternative remedies, or that it is likely to succeed on the merits. (See GSL's Post-Hr'g Mem. at 3–23; DES's Obj. Compl. and Mot. Prelim. J. ¶ 1; GSL's Obj. Mot. Prelim. J. ¶ 6; WMNH's Obj. Mot. Prelim. J. at 8, 10–25.) They add that the sought injunctions are

overly broad, would disrupt the status quo, and would not favor the public interest. (Id.) Moreover, they argue this matter is not ripe for review and Conservation Law's failure to appeal the Council's 2019 Order on the basis of DES's noncompliance with RSA 149-M:29, I collaterally estops the Court from addressing the issues raised on the merits. (See, State's Response Pl.'s Reply Obj. ¶¶ 8–9; DES's Post-Hr'g Mem. ¶¶ 8–18; WMNH's Post-Hr'g Brief at 2–9.)

"A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). "The issuance of [an] injunction[], either temporary or permanent, has long been considered an extraordinary remedy." Pike v. Deutsche Bank Nat'l Trust Co., 168 N.H. 40, 45 (2015). Courts will only grant temporary injunctive relief if the petitioner can prove the following five factors: (1) the petitioner faces immediate danger of irreparable harm; (2) the petitioner has no adequate remedy at law; (3) the petitioner faces greater hardship than the respondent; (4) the public interest will not be adversely affected if the injunction is granted; and (5) the petitioner is likely to succeed on the merits. Mottolo, 154 N.H. at 63; UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987); Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982). The Court awards injunctive relief only "upon a consideration of all the circumstances. . . and [pursuant to] established principles of equity." DuPont v. Nashua Police Dep't, 167 N.H. 429, 434 (2015). Ultimately, whether to grant injunctive relief "is a matter within the sound discretion of the Court." Id.

The Court first addresses whether Conservation Law is collaterally estopped from seeking injunctive relief in this forum. The defendants argue Conservation Law

lacks standing to pursue an action for injunctive relief because Conservation Law failed to raise the issue of DES's compliance with RSA 149-M:29, I in its appeal of the Council's 2019 Order. Res judicata or collateral estoppel "precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action." Sleeper v. Hoban Family P'ship, 157 N.H. 530, 533 (2008). For the doctrine to apply, five elements must be met: "(1) the issue subject to estoppel is identical in each action; (2) the first action resolved the issue finally on the merits; (3) the party to be estopped appeared in the first action or was in privity with someone who did; (4) the party to be estopped had a full and fair opportunity to litigate the issue; and (5) the finding at issue was essential to the first judgment." Tyler v. Hannaford Bros., 161 N.H. 242, 246 (2010). "The policy behind collateral estoppel includes considerations of judicial economy and finality in our legal system to avoid repetitive litigation." (Id.)

The Court concludes Conservation Law's petition for injunctive relief is not collaterally estopped by Conservation Law's failure to raise the RSA 149-M:29, I issue on appeal to the State Supreme Court. Both the party to be estopped—Conservation Law—and the issue subject to estoppel are identical in each action: the action before the Council in 2019 arose from the same "transaction or occurrence" giving rise to the action here, namely, DES's continued permitting activities in violation of its statutory duty under RSA 149-M:29, I to "update the state's solid waste plan" "every six years." Id.; Sleeper, 157 N.H. at 534 (2006); Restatement (Second) Judgments § 24 cmt. b–c (A "transaction . . . connotes a natural grouping or common nucleus of operative facts" and "may be single despite different harms, substantive theories, measures or kinds of

relief.") However, the 2019 action before the Council did not resolve the issue of DES's compliance with RSA 149-M:29, I finally or on the merits, and no findings of the Council with respect to that issue were essential to the Council's judgment. Tyler, 161 N.H. at 246. In fact, the Council never reached whether DES "has failed to comply" with RSA 149-M:29, I because, in its view, it lacked jurisdiction to consider the issue. (Council's 2019 Order at 9.) Accordingly, no findings respecting DES's compliance with the statute could possibly have been "resolved" or "essential" to the Council's judgment. Sleeper, 157 N.H. at 533. No aspect of Conservation Law's claims is collaterally estopped, therefore, for its failure to raise the RSA 149-M:29, I issue in its appeal of the Council's 2019 Order.

The Court now turns to whether Conservation Law's allegations sufficiently support that this action is ripe for judicial review. "The ripeness doctrine prevents courts from entangling themselves in abstract disagreements over administrative policies, and . . . protects agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging party." Appeal of State Emps.' Ass'n, 142 N.H. 874, 878 (1998). Matters before administrative bodies are not ripe for judicial review until "the defined issues in [the] case are based on actual facts . . . and are capable of being adjudicated on an adequately developed record." Id. The Court engages in a two-pronged analysis when reviewing challenges on grounds of ripeness: it evaluates (1) "the fitness of the issue for judicial determination" and (2) "the hardship to the parties if the court declines to consider the issue." Id. Moreover, "[a]dministrative remedies must be exhausted when the question involves the proper exercise of administrative discretion." Konefal v. Hollis/Brookline Coop. Sch. Dist., 143

N.H. 256, 259 (1998) (emphasis added). In the interests of "encouraging the exercise of administrative expertise, preserving agency autonomy and promoting judicial efficiency," an appellant from an administrative decision must ordinarily exhaust all available "administrative remedies . . . prior to appealing to the courts." Id. at 258.

However, the Court recognizes "the exhaustion of administrative remedies doctrine is flexible, and that exhaustion is not required under certain circumstances." Konefal, 143 N.H. at 258. "Exhaustion is not required, for example, when further administrative action would be useless and result in delays that might make the claim moot." Id. at 258–59. Similarly, "a petitioner need not exhaust administrative remedies" to bring a declaratory judgment action or seek an injunction where the questions presented are "peculiarly suited to judicial rather than administrative treatment," "specialized administrative understanding plays little role," and "no other adequate remedy is available." McNamara v. Hersh, 157 N.H. 72, 74 (2008); Frost v. Comm'r, N.H. Banking Dep't, 163 N.H. 365, 373–34 (2012).

The Court concludes the issues raised by Conservation Law's petition for injunctive relief are not ripe for review in this forum. It is the power of the judiciary to "say what the law is," and both the issues and relief invoked by Conservation Law involve pure questions of law "fit for judicial determination:" whether DES has complied with RSA 149-M:11, III, RSA 149-M:12, I(b), and RSA 149-M:29 and whether Conservation Law is entitled to injunctive, declaratory, or mandamus relief. See Claremont Sch. Dist. v. Governor, 143 N.H. 154, 158 (1998); State Emps.' Ass'n, 142 N.H. at 878. The parties do not dispute that the government has not issued an updated solid waste plan since 2003, so no factual or other findings peculiarly suited to

administrative, rather than judicial, treatment are involved. Hersh, 157 N.H. at 74. Moreover, the Council lacks the statutory or equitable authority to issue injunctive, declaratory, or mandamus relief. RSA 21-O:9, V. The Council's jurisdiction is limited to hearing "administrative appeals from [DES] decisions relative to the functions and responsibilities of the division of waste management." Id.

However, Conservation Law has failed to allege sufficient hardship would result were the Court to decline to consider the issues before it. State Emps.' Ass'n, 142 N.H. at 878. Any concrete harm alleged resulting from the permitting of new or modified waste disposal facilities, including the facilities in Dalton and Bethlehem, may be appealed before the Council and, ultimately, the State Supreme Court, following an "administrative decision" whose "effects [have been] felt in a concrete way." Id. Conservation Law's current challenges before DES and the Council may be successful, rendering much of the alleged harm speculative at this stage. Moreover, the alleged hardship currently suffered by Conservation Law, including the impact to the property values of at least one of its members, would be cured in the event of a successful appeal, has either not resulted or would not result from the permitting of new or expanding facilities, or is merely procedural in nature.

Because the harm is speculative and the administrative appeals process constitutes an adequate alternative remedy, an injunction may not issue as a matter of law. Mottolo, 155 N.H. 57, 63 ("An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law.") It is not enough to confer standing for Conservation Law to allege DES failed to comply with statutorily prescribed procedural requirements:

> In limiting the judicial power to "Cases" and "Controversies," Article III of the [Federal] Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action . . . This limitation "is founded in concern about the proper--and properly limited--role of the courts in a democratic society . . . [A] deprivation of a procedural right without some concrete interest that is affected by the deprivation--a procedural right in vacuo--is insufficient to create Article III standing.

Summers v. Earth Island Inst., 555 U.S. 488, 494–96 (2009) (emphasis added). While the New Hampshire Supreme Court has not had the opportunity to explicitly address the issue as a matter of New Hampshire law, the Court is persuaded that "a procedural right," without more, is insufficient to confer standing for purposes of injunctive relief. See id. Conservation Law's requests for injunctive relief must, therefore, be dismissed.

B. Declaratory Judgment

The Court next turns to the defendants' motion to dismiss Conservation Law's petition for declaratory judgment. To prevail on a motion for declaratory judgment, a petitioner is not required to show "proof of a wrong committed by one party against the other." Avery v. N.H. Dep't of Educ., 162 N.H. 604, 607 (2011). Rather, the "distinguishing characteristic" of declaratory judgment is that it "can be brought before an actual invasion of rights has occurred." Carlson, Tr. v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons, 170 N.H. 299, 303 (2017) (citing Portsmouth Hosp. v. Indemnity Ins. Co., 109 N.H. 53, 55 (1968)) (emphasis added); cf. 26 C.S.J. § 30 (declaratory judgment may be sought as "a prophylactic measure before a breach [of duty] occurs.") The Court will not, however, award declaratory judgment where a petitioner has a "purely subjective or speculative fear of future harm." Carlson, 170 N.H. at 304 (citing Prasco, LLC v. Medicis Pharmaceutical Corp., 537 F.3d 1329, 1339–42

(Fed. Cir. 2008)). A petitioner must assert a right "inherently adverse" to the respondent's and show that the respondent is "likely to overburden or otherwise interfere with [the petitioner]'s right." Id. at 303 (emphasis added). Ultimately, "standing requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." Censabella v. Hillsborough County Atty., 171 N.H. 424, 427 (2018).

The defendants contend that Conservation Law has not alleged sufficient harm, lacks organizational standing, and has failed to identify any authority that even contemplates the relief sought. (GSL's Mot. Dismiss Counts 1 and 3 ¶¶ 12–23; WMNH's Joinder GSL's Mot. Dismiss Counts 1 and 3 ¶¶ 1–7.) They stress that declaratory judgment is only proper to resolve controversies, to address claims based on definite and concrete interests, and not to provide advice as to future or hypothetical cases. (DES's Post-Hr'g Mem. ¶¶ 17–18.) Finally, they contend that, as with its claim for injunctive relief, Conservation Law's claim for declaratory judgment is not ripe for judicial review until it exhausts all available administrative remedies. (See State's Mot. Dismiss ¶¶ 40–42.)

As a preliminary matter, Conservation Law is not barred from seeking declaratory relief on the ground that it lacks organizational standing. "Whether a[n organization]'s interest in [a] challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis." Golf Course Inv'rs of NH v. Town of Jaffrey, 161 N.H. 675, 680 (2011). "[T]he New Hampshire Supreme Court has, on occasion, been willing to entertain cases brought by organizations that represent individuals in order to expedite litigation," see State Emp. Ass'n v. State, 161 N.H. 730

(2011), "but the Court requires the plaintiffs to address "how many or to what extent the members of [the organization] are affected by the challenged" action. AFT-NH v. State, No. 2009-EQ-00290, 2013 N.H. Super. LEXIS 29, at *6 (Jul. 10, 2013) (McNamara, J.) (rev'd on other grounds). As a general matter, "[o]rganizational plaintiffs may demonstrate standing by: (1) "showing associational standing, i.e., that the member of the organization would have standing to sue as an individual and the interests the organization seeks to protect are germane to its purposes;" or (2) organizational standing, i.e., "that the organizational plaintiffs have standing to sue on their own." See Equal Means Equal v. Ferriero, 478 F. Supp. 3d 105, 120 (D. Mass. 2020). "Associational standing . . . requires that the organization at the very least identify a member who has suffered the requisite harm." Id. (emphasis added) (alterations and citations omitted).

Here, Conservation Law has sufficiently alleged associational standing to sustain its request for declaratory relief. Conservation Law has alleged at least four of its members—Mr. Menard, Ms. Boswell, Mr. Grosholz, and Ms. Martin—face almost certain procedural harm in the event Conservation Law is successful in arguing that the Department may not lawfully issue permits without an updated solid waste plan. Moreover, Conservation Law has alleged that, partly as a result of DES's procedurally insufficient review of permitting appeals, Mr. Menard has suffered harm from a decrease in the value of his residential property near the facility in Bethlehem. While Conservation Law has not alleged organizational standing in its own right, the Court concludes Conservation Law has sufficiently identified how many and to what extent its members are affected by the Department's alleged interference with their procedural

rights and, therefore, has the requisite associational standing to pursue declaratory judgment on its members' behalf. AFT-NH v. State, 2013 N.H. Super. LEXIS 29, at *6.

In addition, Conservation Law's claim for declaratory judgment is not subject to dismissal on the grounds that the harm alleged was not sufficiently concrete. Pursuant to RSA 149-M:29, I, DES "shall update the state's solid waste plan" every six years. (emphasis added). Conservation Law has invoked a procedural right to administrative review by an agency compliant with all statutory obligations expressly imposed by the State Legislature, including the obligations imposed by RSA 149-M:29. DES has conceded it has failed to issue a solid waste plan since 2003 and expressed it intends to continue to review Conservation Law's challenges to the permitting of solid waste facilities in Dalton and Bethlehem in the absence of a statutorily-compliant plan. In addition, Conservation Law's interest in a procedurally compliant assessment of its permitting objections is "inherently adverse" to the Department's right—and duty—to continue its permitting activities in an effort to assure disposal capacity in a manner protective of the public health and the environment. Finally, the declaratory relief sought involves pure questions of law, "capable of judicial redress," Censabella, 171 N.H. at 427, as Conservation Law seeks an order clarifying whether DES may lawfully issue permits in the absence of an updated solid waste plan. Accordingly, the procedural harm invoked is not "purely subjective or speculative;" it pertains to an actual, judicially justiciable controversy. Censabella, 171 N.H. at 427.

Nevertheless, Conservation Law's request for declaratory judgment is not ripe for judicial review. "[I]t is proper to permit the use of the declaratory judgment procedure to challenge the validity of" agency action "where . . . the question is one peculiarly suited

to judicial rather than administrative treatment and no other adequate remedy is available to [the] plaintiff." Prop. Portfolio Group, LLC v. Town of Derry, 154 N.H. 610, 616–17 (2006) (emphasis added). Here, however, Conservation Law has an alternative, adequate remedy in the administrative appeals process available to persons "aggrieved by a . . . decision" of DES. See RSA 21-O:14. It is to pursue an appeal before the Council and, ultimately, the State Supreme Court. Id. Although the issues raised by Conservation Law's petition for declaratory relief are "fit[] . . . for judicial determination," the Court concludes "the hardship to the parties if the [C]ourt declines to consider the issue[s]" is insufficient in view of the administrative remedies available. State Emps.' Ass'n, 142 N.H. at 878. The Court declines to entangle itself in this matter until the issues raised by Conservation Law are ripe for judicial review. Delude v. Town of Amherst, 137 N.H. 361, 363 (1993) ("Whether to issue a declaratory judgment is a discretionary matter for the [C]ourt."). Conservation Law's petition for declaratory judgment is, consequently, dismissed.

C. Mandamus

Finally, the Court turns to Conservation Law's petition for mandamus. With the exception of DES, the defendants did not initially seek dismissal of Conservation Law's mandamus petition and moved to dismiss only after Conservation Law allegedly communicated to GSL that it does not view the mandamus claim as decoupled from the request for injunctive relief. (DES's Obj. Compl. and Expedited Mot. Prelim. Inj. Relief ¶¶ 37–38; GSL's Mot. Partial Dismissal at 2.) Fearing Conservation Law's petition for mandamus may result in relief "precluding DES from issuing permits to waste management facilities," the remaining defendants now move to dismiss, arguing along

with DES that (1) DES's duty to update the state solid waste plan is not ministerial in nature, (2) DES's actions are not arbitrary or the result of bad faith, (3) Conservation Law failed to exhaust its administrative remedies before seeking mandamus relief, (4) Conservation Law has failed to demonstrate that it has a right to this requested relief, and (5) a writ of mandamus may not serve as a means of enjoining the execution of a state agency's core statutory duties. (Id. at 3–4; WMNH Mot. Dismiss Count 2; DES's Resp. Pl.'s Reply and Obj. ¶¶ 19–20.)

Mandamus is an "extraordinary writ[]." In re CIGNA Healthcare, Inc., 146 N.H. 683, 687 (2001). "A writ of mandamus is used to compel a public official to perform a ministerial act that the official has refused to perform, or to vacate the result of a public official's act that was performed arbitrarily or in bad faith." Id. The Court "will, in its discretion, issue a writ of mandamus only where the petitioner has an apparent right to the requested relief and no other remedy will fully and adequately afford relief." Id. A "ministerial act" is one "performed without the exercise of discretion or judgment," or one "the law prescribes and defines . . . with such precision as to leave nothing to the exercise of discretion . . ." Black's Law Dictionary 30 (10th ed. 2014); See Soares v. Brockton Credit Union, 107 F.3d 969 (1st Cir. 1997) (quoting Neal v. Regan, 587 F. Supp. 1558, 1562 (N.D. Ind. 1984)). Consequently, "[w]hen an official is given discretion to decide how to resolve an issue before him [or her], a mandamus order may require [the official] to address the issue, but it cannot require a particular result." Appeal of Morrissey, 165 N.H. 87, 94 (2013). "When the official has addressed the issue, mandamus will lie only to vacate the result of [an] action taken arbitrarily or in bad faith." Guy v. Comm'r, N.H. Dep't of Educ., 131 N.H. 742, 747 (1989).

Here, Conservation Law has not pled facts sufficient to support entitlement to mandamus relief. As a preliminary matter, Conservation Law's petition in no way purports to "serve as a means of enjoining the execution of [DES]'s core statutory duties." (GSL's Mot. Partial Dismissal at 4.) Rather, the only relief Conservation seeks in its petition for mandamus is for the Court to order DES to "comply with the state solid waste plan requirement set forth in RSA 149-M:29, I." (Compl. at 13.) Moreover, although conducting studies and analyzing data relevant to the development of an updated solid waste plan is not a task that is ministerial in nature, merely deciding whether to engage or not engage in updating the 2003 Solid Waste Plan at this time is a ministerial decision. See Morrissey, 165 N.H. at 94. That is, although the Court may not require an updated plan to reach "a particular result," the Court may nevertheless issue "a mandamus order" that DES at least "address the issue[s]" expressly identified by the Legislature when directing DES to update the plan every six years. RSA 149-M:29, I. However, the Court is not satisfied from Conservation Law's allegations that "no other remedy will fully and adequately afford relief." CIGNA, 146 N.H. at 687. The appropriate avenue for Conservation Law to pursue its procedural challenge is the agency appeals process, not an appeal to this Court's equitable powers. As with its requests for injunctive and declaratory relief, Conservation Law does not allege sufficient "hardship" would result "if the [C]ourt declines to consider the issue" of DES's compliance with RSA 149-M:29, I. State Emps.' Ass'n, 142 N.H. at 878. A lack of hardship is especially evident from DES's concession that it is statutorily required to update the plan, as well as its representations that it is in the process of doing so. Conservation Law lacks an "apparent right" to secure an order from this Court

mandating compliance with a statutory provision the parties currently interpret in the same fashion and with which DES has already committed to comply. CIGNA, 146 N.H. at 687.

## III. Conclusion

For the foregoing reasons, the defendants' motions to dismiss Conservation Law's Complaint and Expedited Motion for Preliminary Injunction are GRANTED.

**SO ORDERED.**

5/14/21
**Date**

**John C. Kissinger, Jr.**
**Presiding Justice**

Clerk's Notice of Decision
Document Sent to Parties
on 05/14/2021