STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

DOCKET NO. 20-14 WMC

IN RE: CONSERVATION LAW FOUNDATION, INC. APPEAL

ORDER ON NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.'S MOTION FOR RECONSIDERATION

ORDER: MOTION DENIED

BACKGROUND

On October 9, 2020 the New Hampshire Department of Environmental Services ("NHDES") issued a Type 1-A Permit Modification and Waiver for Expansion, Permit No. DES-SW-03-002 (the "Permit") to North Country Environmental Services, Inc. ("NCES") authorizing NCES's Stage VI landfill expansion of its solid waste facility in Bethlehem, NH (the "NCES Facility"). On November 9, 2020, the Conservation Law Foundation ("CLF") filed a Notice of Appeal with the Waste Management Council (the "Council") seeking to have the Permit deemed unlawful and unreasonable. On February 18 and 22, 2022, a quorum of the Council along with a Hearing Officer assembled for a Hearing on this matter. The Council heard testimony and received evidence from the Parties. Deliberations occurred on February 22, 2022.

On May 11, 2022 the Council issued its Final Order on Appeal (the "Final Order"), wherein the Council denied seven out of eight of CLF's appeal claims. The Council remanded a single item to NHDES, with the Council having determined that NHDES acted unlawfully in determining there existed sufficient capacity need under RSA § 149-M:11, III(a) justifying operation of the NCES Facility for its proposed six-year operating period. See Final Order, Discussion Section C, pp. 6-15. On June 10, 2022 NCES filed a Motion for Rehearing regarding the Council's decision to remand. On June 24, 2022 NHDES filed a limited objection to NCES's Motion for Rehearing and CLF filed an objection to NCES's Motion for Rehearing. On July 6, 2022 NCES filed replies to both NHDES's and CLF's objections, and on July 18, 2022 CLF filed a surreply to NCES's reply.

On September 21, 2022 NCES filed a Motion to Stay, wherein NCES revealed that it (as well as Granite State Landfill, LLC) had filed a Petition for Declaratory Judgment with the Merrimack County Superior Court seeking the Court's interpretation regarding RSA § 149-M:11, III.

RELEVANT LAW AND RULES

RSA § 21-O:9, V requires the Council to hear all administrative appeals from NHDES decisions relating to the functions and responsibilities of the division of waste management, in accordance with RSA § 21-O:14. Pursuant to Env-WMC 205.14, the appellant bore the burden of proving, by a preponderance of the evidence, that NHDES's decision to issue the Permit was unlawful or unreasonable. "Unlawful" is defined as "contrary to case law, statute, or rules." Env-WMC 205.14. The Council decides all disputed issues of fact (see RSA § 21-O:9, V), while the Hearing Officer decides upon questions of law (see RSA § 21-M:3, IX(e)).

A motion for reconsideration is permitted under Env-WMC 205.16 and RSA § 541:3.[1] A motion for reconsideration "allows a party to present points of law or fact that the [Council] has overlooked or misapprehended." Smith v. Shepard, 144 N.H. 262, 264 (1999), quoting Barrows v. Boles, 141 N.H. 382, 397 (1996). A party aggrieved by a decision of the Council is allowed to raise arguments relating to "*any* matter determined in the action or proceeding" in a motion for reconsideration, so long as the motion is filed within thirty days of any order or decision made by the Council. RSA § 541:3, emphasis added; see Appeal of N. New England Tel. Operations, LLC, 165 N.H. 267, 271–72 (2013). A motion for reconsideration which merely reiterates arguments previously raised should be denied. See Barrows, 141 N.H. at 397; Appeal of Northridge Env't, LLC, 168 N.H. 657, 665 (2016). The Council may grant a motion for reconsideration if "in its opinion good reason for the rehearing is stated in the motion." RSA § 541:3. The moving party bears the burden of persuasion. See Env-WMC 204.15(d).

Parties are authorized to raise issues for the first time in a motion for reconsideration, so long as the failure to raise the issue earlier did not deprive the Council of a full opportunity to correct its error. See Mortg. Specialists, Inc. v. Davey, 153 N.H. 764, 786 (2006); State v.

[1] For the purposes of this Order, and pursuant to Env-WMC 205.16(a), no distinction is drawn between the terms 'reconsideration' and 'rehearing.'

Hilliard, No. 2020-0063, 2021 WL 5029405, at *3 (N.H. Oct. 29, 2021). It is at the Council's discretion whether to refuse to entertain issues first raised in a motion for reconsideration due to a party's failure to raise said issue at an earlier time. See Smith v. Shepard, 144 N.H. 262, 265 (1999); Mortg. Specialists, Inc., 153 N.H. at 786.

DISCUSSION

NCES raised four items for reconsideration in its Motion for Rehearing:

ITEM 1: The Council's Interpretation of RSA § 149-M:11, III

As a preliminary matter: NCES's Motion to Stay clarified and informed part of the basis for Item 1 in NCES's Motion for Rehearing, specifically regarding NCES's disagreement with the Hearing Officer's interpretation of RSA § 149-M:11, III regarding capacity need (identified in the Motion to Stay as the 'pure function of time approach'). In its Motion to Stay NCES acknowledged that NHDES did not exercise the 'aggregate capacity need approach' when issuing the Permit. See Motion to Stay, p. 8 ("the aggregate capacity need approach was not at issue because that was not the approach NHDES used in granting the Stage VI permit"); p. 3 ("[NHDES] used [the partial function of time approach] in its consideration of NCES's Stage VI permit applications . . ."). NCES argued that NHDES should have applied the 'aggregate capacity need method' when issuing the Permit. See Motion to Stay, p. 6 ("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"). Accordingly, it appears NCES has concluded that NHDES acted unlawfully regarding the Permit because—per NCES—NHDES was legally obligated to exercise the 'aggregate capacity need method' when issuing the Permit and failed to do so. NCES, CLF, and the Council are therefore in agreement that NHDES acted unlawfully in finding that the NCES Facility provided a substantial public benefit under RSA § 149-M:11, III, which warrants remand of the Permit to the NHDES commissioner pursuant to RSA § 21-O:14, I-a(b).

The issue raised in NCES's Motion for Rehearing regarding Item 1 is, therefore, not whether the Council should remand the Permit to the NHDES commissioner, but rather how did NHDES act unlawfully when issuing the Permit and how should NHDES interpret RSA § 149-

M:11, III when it re-evaluates the Permit pursuant to the Council's remand. Item 1 therefore contained a question of law regarding whether the Council misapprehended RSA § 149-M:11, III in the Final Order

After reviewing NCES's filings and arguments, the Council concludes it did not misapprehended RSA § 149-M:11, III as addressed in the Final Order, Subsection C.

NCES misconstrued the Council's discussion of the language in RSA § 149-M:11, III in the Final Order, Subsection C, as a conclusion that the statute is ambiguous. See NCES's Motion for Rehearing, p. 18 ("the hearing officer apparently found the statute to be ambiguous . . ."); NCES's July 6, 2022 Reply to CLF's Objection, p. 7 ("if the hearing officer is correct and the statute is ambiguous . . . ."). In the Final order, Subsection C, the Council did not find the capacity need language in the statute ambiguous and limited its statutory interpretation to the plain and ordinary meaning of the words used therein. See Final Order, pp. 8-13. NCES has not argued the relevant language in RSA § 149-M:11, III is ambiguous: to the contrary, NCES concluded RSA § 149-M:11, III is unambiguous. See NCES's Motion for Rehearing, p. 20 ("the statute was unambiguous in the first place").[2] Identifying and discussing the plain meaning of language which is in dispute does not indicate ambiguity. The Council determining that NHDES and NCES failed to accurately interpret the plain language of the statute does not indicate ambiguity.

As the statute was not found to be ambiguous or of 'doubtful meaning,' the Council was under no obligation to consider the administrative application of the statute when it interpreted the statute. See Hamby v. Adams, 117 N.H. 606, 609 (1977). "[A] lack of ambiguity in a statute or ordinance precludes application of the administrative gloss doctrine." Anderson v. Motorsports Holdings, LLC, 155 N.H. 491, 502 (2007). Moreover, an agency's interpretation of a statute will not hold precedential effect "if it clearly conflicts with the express statutory language . . . or if it is plainly incorrect." Appeal of Morrissey, 165 N.H. 87, 91 (2013). The

[2] NCES argued RSA § 149-M:11, III is unambiguous as evidenced by NHDES's allegedly consistent application of the statute. See NCES's Motion for Rehearing, p. 20 ("the statute was unambiguous in the first place. This is demonstrated by the decades of consistent application of this statute by NHDES"). Though the reason for why the Council and NCES have determined the statute to be unambiguous are different, NCES's argument in its Motion for Rehearing shows that NCES has not been arguing that the relevant language in RSA § 149-M:11, III is ambiguous.

Council reviewed RSA § 149-M:11, III; received NHDES's claimed interpretation of the statute at the time the Permit was issued; and determined that NHDES's interpretation conflicted with the statutory language and was plainly incorrect. NCES's claims regarding 'administrative gloss' and the Council's alleged-misapprehension of RSA § 149-M:11, III are based on the inaccurate premise that the statute is ambiguous: none of the Parties have argued the relevant language in the statute is ambiguous; the Council never found the statute ambiguous; and it does not find it ambiguous now.[3] As the statute was not deemed ambiguous, its meaning and purpose could be derived from a plain reading of the statutory language, which is exactly what the Council did in interpreting the RSA § 149-M:11, III capacity need language. The resulting evaluation indicated that NHDES's interpretation and application of the statute conflicted with the plain language of the statute, and therefore NHDES acted unlawfully in adhering to this inaccurate interpretation when issuing the Permit. The length of time NHDES may have mis-interpreted RSA § 149-M:11, III is irrelevant to how the statute must be read according to its plain language.

To the degree NCES further argued the Council's interpretation of the RSA § 149-M:11, III language is inaccurate (see NCES's Motion for Rehearing, pp. 23-24), NCES raised no new arguments as to how the language of the statute should be interpreted differently. See also Order on NHDES's Motion for Reconsideration, pp. 6-11 (detailing interpretation of RSA § 149-M:11, III language based on its plain meaning and the requisite inferences which must be drawn therefrom). Likewise, NCES's 'practicality' arguments are both uncompelling and irrelevant to the inquiry of whether the Council misapprehended RSA § 149-M:11, III in the Final Order. See NCES's Motion for Rehearing, pp. 24-25. NCES predicted a series of dire consequences from the Council's interpretation of RSA § 149-M:11, III, but prophesized repercussions do not change the language of the statute. See Id., at 24-27.

[3] While NCES argued in its Motion for Rehearing that administrative gloss should apply to any interpretation of RSA § 149-M:11, NCES did not argue that RSA § 149-M:11 is ambiguous. NCES asserted that *if* RSA § 149-M:11 is ambiguous, then administrative gloss must apply, but this statement is not an argument that the statute is ambiguous. As no Party has argued the relevant statutory language is ambiguous in the course of this Appeal and NCES did not argue as such in its Motion for Rehearing, it cannot be concluded the issue of whether RSA § 149-M:11 is ambiguous has been raised for the Council's determination. The Council impliedly determined the statutory language is unambiguous by evaluating the statutory language's plain meaning, but the issue of ambiguity has not been raised—whether for the first time or otherwise—in NCES's Motion for Rehearing.

NCES further raised the prospect that RSA § 149-M:11, III may allow a proposed facility to operate during both a period of capacity need/shortfall and a period without capacity need/shortfall, with NCES offering a hypothetical of "a facility proposing to offer capacity on both sides of [a] shortfall event . . . ." See Id., at 27. NCES proposed that such an arrangement would still meet the objectives of RSA § 149-M:11, III, even though the facility would be operating during periods without capacity need/shortfall. Id. This argument is uncompelling, and indicates NCES does not fully appreciate the interpretation of RSA § 149-M:11, III provided in the Final Order. It is the Council's opinion that a proposed facility must be projected to operate during a period of capacity need/shortfall for NHDES to approve said facility in compliance with the statute: the 'extent' language in RSA § 149-M:11, V requires as much. See Final Order, pp. 9-13. As RSA § 149-M:11, III and V require the existence of a capacity need/shortfall, it may be inferred that the lack of such capacity need/shortfall (even if proximate to a capacity need/shortfall) bars NHDES from approving a facility during said lack of capacity need/shortfall time period.

For the above identified reasons, NCES failed to establish that the Council misapprehended RSA § 149-M:11, III in its Motion for Rehearing. NCES's argument for reconsideration regarding Item 1 is **DENIED**.

ITEM 2: The Dormant Commerce Clause

Item 2 raised issues regarding a) whether NCES can now raise its dormant commerce clause arguments; and b) NCES's position in both its Motion for Rehearing and in the Appeal as a whole. NCES raised the dormant commerce question twice in its filings (see NCES's Motion to Dismiss, June 30, 2021, p. 10, n. 8; NCES's Prehearing Memorandum, p. 17). Both instances were passing mentions and emphasized that NHDES cannot prohibit the acceptance of waste from other states: in its Prehearing Memorandum, NCES raised the dormant commerce clause to counter an alleged argument made by CLF that the Permit should have been denied by NHDES because the NCES Facility would accept out-of-state waste. See NCES's Prehearing Memorandum, p. 17. NCES did not develop an argument regarding the dormant commerce clause at the Appeal Hearing.

In its Motion for Rehearing NCES argued that RSA § 149-M:11 is facially unconstitutional because of the dormant commerce clause (see NCES's Motion for Rehearing, p. 29) and the Hearing Officer's interpretation of RSA § 149-M:11, III in the Final Order, Subsection C, resulted in the statute still being unconstitutional. See Id., at 32. NCES further argued that NHDES has not been enforcing relevant portions of RSA § 149-M:11, which resulted in the impact of the statute being nominal enough that no party affected by the 'facially unconstitutional' provisions have challenged it. See Id., at 31. A plain reading of NCES's argument indicates NCES believes RSA § 149-M:11 is unconstitutional regardless of which interpretation of the statute is applied, but NCES would prefer one interpretation over the others because the impact is less severe on importers of out-of-state waste. See Id.

The Council is faced with an odd challenge: NCES, the intervenor-permittee which has been arguing that NHDES acted lawfully in issuing the Permit, is now arguing that the relevant statute through which NHDES issued the Permit is unconstitutional. Though NCES raised the dormant commerce clause in previous filings, such arguments were to counter CLF arguments, not to raise a claim that RSA § 149-M:11, III is facially unconstitutional. Though not articulated by the Parties, it appears that if NHDES acted in accordance with an unconstitutional statute, then the argument could be made that NHDES acted unlawfully; alternatively, if as proposed by NCES, NHDES was purposefully disregarding language in a statute, then NHDES may have also acted unlawfully.

CLF, the appellant, did not raise any arguments regarding the dormant commerce clause in its Notice of Appeal or any subsequent filings in this Appeal (except in response to NCES's arguments). If the roles were reversed in this matter and CLF filed a motion for reconsideration of the Final Order because the dormant commerce clause allegedly makes RSA § 149-M:11 unconstitutional, it is readily apparent that such an argument would be precluded. CLF would have been required to raise such an argument early in the appeal process and would have been expected to make such an argument well before the entry of the Final Order. Moreover, to the degree NCES's dormant commerce clause argument is an appeal claim (i.e. NHDES acted unlawfully by adhering to an unconstitutional statute when issuing the Permit), the time for NCES to have raised such an appeal claim is well past.

NCES all but confirmed that its goal in this appeal was to have NHDES's issuance of the Permit affirmed by the Council. See NCES's July 6, 2022 Reply to CLF's Objection, p. 5. Raising arguments that RSA § 149-M:11 is facially unconstitutional likely would not have supported a finding that NHDES acted lawfully and reasonably in issuing the Permit, hence it is understandable for such arguments to not be raised by NHDES and NCES during the appeal process. That being said: NCES had an opportunity to raise such arguments during the appeal and elected not to. NCES further had an opportunity to appeal the Permit itself if it felt that NHDES acted unlawfully when issuing it and elected not to. Moreover, NCES could have filed suit against NHDES independent of the present appeal to address the alleged unconstitutionality of RSA § 149-M:11 which, NCES argued, was injuring out-of-state waste importers to some degree. Instead, NCES elected to participate in this Appeal as an intervenor-permittee, arguing that NHDES acted lawfully and reasonably in issuing the Permit. NCES cannot now shift to be an appellant-permittee because NCES dislikes the Council's decision. NCES elected to pursue what it considered a beneficial outcome instead of seeking to address allegedly unlawful activity conducted by NHDES. For these reasons, the Council elects to not entertain NCES's dormant commerce clause argument.[4] NCES's argument for reconsideration regarding Item 2 is **DENIED**.

ITEM 3: The Hearing Officer Improperly Resolved Mixed Questions of Law and Fact

NCES argued the Hearing Officer improperly resolved the following issues:

a. *The Hearing Officer concluded that the question of whether NHDES acted unlawfully in determining there was sufficient capacity need was "purely a question of law." NCES's Motion for Rehearing, pp. 36-37.*

NCES argued the Hearing Officer, while empowered to determine the meaning and requirements of RSA § 149-M:11, III, exceeded his power by interpreting the statute and then in turn ruling that NHDES violated said statute. NCES contended the Council was empowered to deliberate with the Hearing Officer whether "NHDES's decision to grant the [Permit]

[4] Even if, *arguendo*, the Council were to consider NCES's dormant commerce clause argument, the results of the Final Order would remain unchanged. NCES's dormant commerce clause argument would have failed for the reasons identified in NHDES's June 24, 2022 Limited Objection to [NCES's] Motion for Rehearing, pp. 7-12.

comport[ed] with the legal requirements defined by the hearing officer" pursuant to RSA § 21-M:3, IX(d). Id.

NCES is mistaken in concluding that the question raised at this point in the Appeal was a mixed question of law and fact. The relevant appeal question was whether NHDES acted unlawfully by authorizing the NCES Facility to operate during periods without capacity need/shortfall. A mixed question of law and fact "concern[s] the application of a rule of law to the facts and the consequent determination whether the rule is satisfied." Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 282 (1992). The Council did not, however, need to decide any factual questions regarding what actions NHDES had taken regarding the Permit because NHDES's actions regarding the Permit were undisputed.[5] See RSA § 21-O:9, V (the Council "shall decide all disputed issues of fact . . ."). Neither CLF, NCES, or NHDES argued that NHDES did not act as the record reflected when it issued the Permit: the record showed that NHDES issued the Permit for a five-year period where there was no present capacity need/shortfall followed by a one-year period where there was capacity need/shortfall. See Appellant Exhibit 8, p. 274.

[5] NCES claimed the Council unanimously affirmed a motion "that DES was lawful in finding a capacity need during the life of the permit" (Audio Recording of February 22, 2022 Deliberations at Time Stamp 1:56:04), and NCES concluded a) the Council's approval of this motion affirmed that NHDES properly interpreted RSA § 149-M:11, III and applied this interpretation when issuing the Permit, and b) the Hearing Officer improperly set aside this determination in the Final Order. See NCES's Motion for Rehearing, p. 37; NCES's July 6, 2022 Reply to CLF's Objection, p. 14. NCES correctly quoted the audio record of the Council's deliberations, but clearly neglected to listen to the preceding eight minutes. After informing the Council there was a question of law for the Hearing Officer to decide, the Hearing Officer told the Council: "what matters for the Council is the question of fact of did DES in fact *determine that there is a capacity need* during the life of the Permit." Audio Recording of February 22, 2022 Deliberations at Time Stamp 1:48:49, emphasis added. The Council undertook a discussion of this topic, specifically addressing the question of whether NHDES determined there was a capacity need during the life of the Permit issuing the Permit. At the end of the discussion, the Chairperson posed the motion presented by NCES. The Hearing Officer failed to correct the language used by the Chairperson and interpreted the motion as the Council affirming its conclusion that NHDES had determined there was capacity need during the life of the Permit when issuing the Permit. Such a conclusion would have been necessary for the Hearing Officer and Council to find NHDES acted lawfully if the Hearing Officer found the interpretation of RSA § 149-M:11, III proposed by NHDES compelling. A review of the record makes it immediately apparent the Council was not addressing the topic proposed by NCES, and NCES's claims regarding the Council's conclusion and the Hearing Officer's treatment of said conclusion are unfounded. The inaccuracy of NCES's interpretation of the record is further reinforced by the fact that the Council reviewed and approved the Final Order pursuant to RSA § 21-M:3, IX(f)) and found no issue with the Hearing Officer's treatment of the issues in the Final Order, Subsection C.

A mixed question of law and fact becomes a question of law when the facts have been agreed upon by the parties or are undisputed. See Tuttle v. Dodge, 80 N.H. 304 (1922), quoting Harrison v. Cent. Const. Corp., 135 Md. 170 (1919) ("[w]hen the facts have been ascertained and agreed upon by the parties, or are undisputed, and there is no dispute as to the inferences to be drawn from the facts, the question becomes one of law"); see also Cahoon v. Coe, 57 N.H. 556, 600 (1876) ("whether or not a certain place is a public place is a mixed question of law and fact, which ought to go to the jury. But when the facts are admitted, the question is one of law").

NHDES and NCES did not address CLF's appeal claim by arguing factual issues, but instead by challenging CLF's proposed interpretation of RSA § 149-M:11, III. As the Parties all agreed that NHDES issued the Permit for periods without capacity need/shortfall, the potential mixed question of law and fact became solely a question of law regarding the interpretation of RSA § 149-M:11, III. The Parties argued numerous interpretations of the statute, and the Hearing Officer interpreted the statute pursuant to RSA § 21-M:3, IX(e). At that point there were no questions of fact or questions of law to deliberate with the Council: interpreting the statute inherently determined whether NHDES acted lawfully.

To the degree the Hearing Officer was required to pose the question provided by NCES to the Council, the decision recorded in the Final Order would remain unchanged. No Party disputed the fact that NHDES authorized the NCES Facility to operate during periods without capacity need/shortfall, and no evidence was entered into the record to contradict this fact. Therefore there could be no evidentiary support for the Council to find that NHDES comported with the Hearing Officer's interpretation of RSA § 149-M:11, III, and therefore the Council would have been required to find that NHDES acted unlawfully.[6] This inevitable outcome is readily apparent because the Hearing Officer's interpretation of RSA § 149-M:11, III required a proposed facility to operate during periods of capacity need/shortfall and the record shows the NCES Facility was authorized to operating during periods without capacity need/shortfall.

[6] If the Council had tried to find that NHDES had complied with the Hearing Officer's interpretation of RSA § 149-M:11, III (i.e. NHDES had authorized the NCES Facility to operate only during periods of capacity need/shortfall), such a finding would have been rejected by the Hearing Officer pursuant to RSA § 21-M:3, IX(c) because there was no evidence in support of such a conclusion by virtue of the fact the Parties were not disputing whether the NCES Facility was set to operate during periods without capacity need/shortfall.

b. *The Hearing Officer identified and distilled the Parties' arguments on the merits of the appeal in the Final Order. See NCES's Motion for Rehearing, p. 37.*

NCES argued the Hearing Officer "improperly engaged in fact-finding to identify and apply the department's alleged arguments" (NCES's Motion for Rehearing, p. 37) by noting the Hearing Officer recorded Parties' arguments in the Final Order, such as: "NHDES, at the time of the issuance of the Permit, ascribed to the argument that the existence of any shortfall during the proposed lifespan of a facility authorized a finding of capacity need for the entire lifespan of said facility." Id.; see also Final Order, p. 6. NCES's argument is uncompelling because the Hearing Officer was required to prepare and submit a proposed written decision on the merits of the Appeal to the Council (see RSA § 21-M:3, IX(f)) for the Council's review. The Council attended the Appeal Hearing; had access to all filings made in the Appeal; was fully aware of the Parties' arguments and evidence; and engaged in deliberations regarding the Parties' arguments and evidence. The Hearing Officer, after attending the Appeal Hearing, deliberations, and reviewing the Parties' filings, was obligated to prepare a written decision regarding the merits of the Appeal, including the Council's decisions on questions of fact and the Hearing Officer's decisions on questions of law. The Hearing Officer's re-recording of the Parties' arguments—coupled with citations to the written sources for said arguments—in the Final Order was not a matter of fact-finding, but a matter of ensuring the Parties' positions were accurately presented and preserved in the Final Order. The Council reviewed the Final Order prior to its publication and was satisfied with the Hearing Officer's recording of the Parties' arguments.

c. *The Hearing Officer determined that "capacity need" requires a present-tense relationship between capacity and a proposed facility. See NCES's Motion for Rehearing, p. 37-38.*

RSA § 21-M:3, IX(e) empowers the Hearing Officer to decide all questions of law presented during an appeal. Statutory interpretation of the language used in RSA § 149-M:11, III and V was at the heart of this Appeal. Evaluating the plain meaning of language used in a statute is quintessential statutory interpretation.

d. *The Hearing Officer concluded there was "no evidence" on the record regarding alleged repercussions from a specific interpretation of RSA § 149-M:11 nor regarding an argument that RSA § 149-M:11 may allow a partial finding of capacity need. See NCES's Motion for Rehearing, p. 38.*

RSA § 21-M:3, IX(e) empowers the Hearing Officer to decide all questions of law presented during an appeal. Statutory interpretation of the language used in RSA § 149-M:11, III was at the heart of this Appeal. In both instances identified by NCES in its Motion for Rehearing, the Hearing Officer was conducting statutory interpretation and concluded that claims asserted by the Parties regarding the interpretation of RSA § 149-M:11 were unsupported by evidence. As the Hearing Officer is empowered to decide questions of law in the Appeal, the Hearing Officer is required to review and judge evidence provided by the Parties regarding questions of statutory interpretation. Acknowledging a lack of evidence regarding a statutory interpretation question is merely an acknowledgment that the Parties did not provide further support for their position and therefore the Hearing Officer had to make his decision on the available information.

Regarding the 'inevitable repercussion' item (see Final Order, p. 12; NCES's Motion for Rehearing, p. 38), the Hearing Officer was clearly addressing the interpretation of the word 'satisfies' as used in RSA § 149-M:11, V and NCES's/NHDES's arguments regarding an alternative interpretation of the word and statute. A proposed counter-interpretation of the relevant statute was raised and, by addressing such interpretation, the Hearing Officer further affirmed the accuracy of his interpretation. Acknowledging that no evidence or argument was forthcoming to support NCES's/NHDES's interpretation was not a finding of fact, but an affirmation the Parties did not present any further evidence or argument in support of their positions.

Regarding the 'partial finding of capacity need' item (see Final Order, p. 14; NCES's Motion for Rehearing, p. 38), the Hearing Officer merely acknowledged there was no evidence that the relevant statute allows for a finding of partial capacity need. Such a determination is part of statutory interpretation, with the Hearing Officer acknowledging his inability to find support for a claim that RSA § 149-M:11 allows for a finding of partial capacity need.

The Hearing Officer did not misapprehend his powers nor inappropriately apply them in the Final Order. For the above identified reasons, NCES's arguments for reconsideration regarding Item 3 are **DENIED**.

ITEM 4: CLF Lacks Standing

Issues of subject matter jurisdiction, including standing, may be raised at any time in a proceeding. See Gordon v. Town of Rye, 162 N.H. 144, 149-150 (2011); Libertarian Party of New Hampshire v. Sec'y of State, 158 N.H. 194, 195 (2008). NCES was empowered to raise arguments related to "any matter determined in the action or proceeding" in its motion for rehearing, so long as the motion was filed within thirty days after any order or decision made by the Council. RSA § 541:3; see Appeal of N. New England Tel. Operations, LLC, 165 N.H. at 271–72. NCES's present Motion for Rehearing was filed within thirty-days of the Council's Final Order, and, while the Final Order did not address CLF's standing, NCES was entitled to raise the standing issue in its Motion for Rehearing because said issue was previously raised and decided upon by the Council. See March 17, 2021 Decision and Order on Permittee's Motion to Dismiss; May 11, 2021 Decision and Order on Permittee's Motion for Reconsideration.

In its Motion for Rehearing, NCES raised two primary items which it contends the Council overlooked or misapprehended in determining that CLF has standing to bring this Appeal: a) two members of a group are insufficient for said group to qualify for organizational standing (see NCES's Motion for Rehearing, pp. 39-42), and b) the CLF members relied upon by CLF for organizational standing are unable to sufficiently allege injuries-in-fact qualifying for individual standing, thereby undermining CLF's alleged organizational standing. Id., at 42-44.

NCES acknowledged that an organization can have organizational standing in New Hampshire. See Id., p. 39, citing New Hampshire Bankers Ass'n v. Nelson, 113 N.H. 127, 127-129 (1973); Appeal of Richards, 134 N.H. 148, 156 (1991);and In re Londonderry Neighborhood Coal., 145 N.H. 201, 203 (2000). NCES's sole contention was that two members is an insufficient number of members to grant organizational standing. NCES argued the New Hampshire Supreme Court has never found organizational standing to apply when only a 'token' number of members are injured. See NCES Motion for Rehearing, p. 40. NCES contended the

Court has only ever found organizational standing when "the majority of [] members were actually harmed." Id. This conclusion by NCES was, however, entirely unsupported in the motion, and review of the matters cited by NCES do not indicate that the number of injured members was ever considered by the Court when determining organizational standing.

The language of the Court's decisions may support the conclusion that multiple members must be impacted for an organization to have standing, but no majority requirements are imposed by the Court. See e.g. In re Londonderry Neighborhood Coal., 145 N.H. at 203 ("[b]ecause EFSEC could have found that LNC's members have suffered or will suffer a direct economic injury as a result of the decision approving AES's application, LNC has standing to pursue this appeal"); Appeal of Richards, 134 N.H. at 156 ("[the CRR] does . . . have standing to represent its members if they have been injured"). In Appeal of Richards, the Court cites to Sierra Club v. Morton wherein the U.S. Supreme Court affirmed that organizations may represent injured members. See Appeal of Richard, 134 N.H. at 156, citing Sierra Club v. Morton, 405 U.S. 727, 739 (1972). The U.S. Supreme Court has also confirmed that an organization may have standing pursuant to injury suffered by "its members, or any one of them . . . ." Warth v. Seldin, 422 U.S. 490, 511 (1975).

NCES's contention that CLF cannot have organizational standing because it relies on injuries suffered by a 'token' number of members is unconvincing. NCES, as in its February 8, 2021 Motion to Dismiss, once again failed to show that such 'token' membership-based organizational standing is prohibited in New Hampshire. NCES provided no compelling argument that an organization cannot qualify for organizational standing so long as it is representing an injured member who would qualify for standing him/herself. The Hearing Officer, in his March 17, 2021 Decision and Order on Permittee's Motion to Dismiss, addressed the question of law regarding whether organizational standing can extend to an organization when only one or two members have standing by determining that at least one of CLF's members had standing (see March 17, 2021 Decision and Order on Permittee's Motion to Dismiss, p. 3) and said member's standing was sufficient for CLF to have organizational standing. The Hearing Officer denied NCES's motion to dismiss, and the Council now re-affirms that decision: the Council did not overlook or misapprehend any points of law or fact in its earlier decision.

NCES further argued that CLF lacks organizational standing because the members it represents lack standing. This contention is broken into two parts by NCES: first, evidence of Peter Menard ("Mr. Menard") suffering injury should not have been accepted and considered by the Council when determining whether CLF's members had standing because Mr. Menard's alleged injuries were not identified in the Notice of Appeal, and second, Andrea Bryant ("Ms. Bryant") lacked sufficient injuries-in-fact to qualify for standing.

Regarding standing, appellants are only required to submit a "clear and concise statement as to why the appellant has standing to bring an appeal, for example, why the appellant will suffer a direct and adverse affect as a result of the decision being appealed in a way that is more than any impact of the decision of the general public . . ." in their notice of appeal. Env-WMC 204.02(b)(5). The notice of appeal is reviewed for compliance with Env-WMC 204.01 and Env-WMC 204.02(b) and is then accepted by the Council if compliance is determined. See Env-WMC 204.03. As acknowledged by NCES, a claim for lack of standing is an affirmative defense which shifts the burden to the appellant if standing is challenged. See NCES's Reply to CLF's Objection to NCES's February 8, 2021 Motion to Dismiss, p. 3.

NCES's argument regarding the inadmissibility of Mr. Menard's affidavit is unconvincing. CLF's Notice of Appeal was determined to meet the standards of Env-WMC 204.02(b)(5) when it was filed, which was an acknowledgment that CLF provided a clear and concise statement regarding its standing. There was no requirement that CLF fully detail and evidence every basis for standing that it possessed.[7][8] CLF stated in its Notice of Appeal that its members—plural—were directly and adversely affected by the NCES Facility's operations, and that such members would continue to be impacted by NHDES granting the Permit. See Notice of Appeal, p. 4. In its February 8, 2021 Motion to Dismiss, NCES raised the issue of standing

[7] NCES's passing argument that the language in RSA § 21-O:14, I-a(a) ("[o]nly those grounds set forth in the notice of appeal shall be considered by the council") required CLF to specifically identify Mr. Menard and his injuries for the Council to receive and consider Mr. Menard's affidavit is uncompelling. See NCES's Motion for Rehearing, p. 42. The 'grounds' addressed in RSA § 21-O:14, I-a(a) unequivocally relate to the basis for an appellant's claim i.e. why the appellant claims NHDES acted unlawfully or unreasonably. An appellant's standing, and the sufficiency of presenting said standing in a notice of appeal, is not considered or addressed in RSA § 21-O:14.

[8] Under organizational standing, CLF may only need to present a single member's standing for CLF to have qualified for standing. Therefore, presenting the details for a single member would meet the requirements of Env-WMC 204.02(b)(5), even though other member's standing may also have contributed to CLF's organizational standing.

thereby compelling CLF to prove its standing, which it did so by filing two affidavit's detailing injuries claimed by its members. The Council accepted Mr. Menard's affidavit and concluded it, along with Ms. Bryant's affidavit, sufficiently established the affiant's standing and, in turn, CLF's standing. NCES's argument for the barring of Mr. Menard's affidavit is based on the premise that Mr. Menard's injuries were not sufficiently raised in the Notice of Appeal.[9] See NCES's Motion for Rehearing, p. 42. The Hearing Officer disagreed, and accepted Mr. Menard's affidavit, concluding that Mr. Menard sufficiently articulated injury-in-fact from the NCES Facility. See Decision and Order on Permittee's Motion to Dismiss, p. 3. It is readily apparent that the injuries attested to by Mr. Menard are described in the Notice of Appeal, which supported the Hearing Officer's decision to allow Mr. Menard's affidavit. The Council now re-affirms this decision: the Council did not overlook or misapprehend any points of law or fact in its earlier decision to accept Mr. Menard's affidavit.

NCES was empowered to argue that Mr. Menard and Ms. Bryant lacked sufficient injuries-in-fact to qualify for standing. It does not appear, however, that NCES in its Motion for Rehearing was denying the validity of the injury claims made in the CLF affidavits. See NCES's Motion for Rehearing, p. 43. Instead, NCES argued that CLF's affidavits and filings failed to articulate a basis for standing which satisfied CLF's burden. See Id. at 43-44 (NCES contends that CLF "never met its burden to demonstrate standing, and thus the council must reconsider its decision and dismiss the appeal . . ."). As NCES is not disputing the contents of the affidavits, the question of whether CLF met its burden to demonstrate standing is a question of law.

Whether a party has standing is typically a factual determination. See Weeks Rest. Corp. v. City of Dover, 119 N.H. 541, 545 (1979); see also Appeal of New Hampshire Right to Life, 166 N.H. 308, 311 (2014) (if material facts are not in dispute, the issue of standing is a question of law). The Weeks decision identifies a non-exhaustive list of factors which can be considered when determining whether a party has standing: 1) proximity of a party's property to the site at

[9] Though NCES contends Mr. Menard's affidavit should have been disallowed because Mr. Menard's injuries are not explicitly identified in the Notice of Appeal, no members names were identified in the Notice of Appeal. NCES *inferred* that Ms. Bryant is the member described in the Notice of Appeal, (see NCES's March 1, 2021 Reply to CLF's Objection, p. 4), but this inference was based on the unsupported premise that Ms. Bryant was the only female member of CLF who owned and resided at property close to the NCES Facility who experienced noise and odor from the facility and who had raised unaddressed concerns with NCES.

issue; 2) the types of changes proposed at a site; 3) the immediacy of the injury claimed; and 4) the party's participation in administrative hearings. Id. Whether a party has a direct, definite interest in the outcome of a matter is a further basis for standing. See Id.; see also Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 770 (2013).

Both Mr. Menard's and Ms. Bryant's affidavits indicated they own and reside at properties proximate (one mile and two miles, respectively) to the NCES Facility. Both individuals asserted they have experienced foul odors and disturbing sounds from the NCES Facility on their properties and in their homes. Both affiants asserted their quiet enjoyment of their properties, as well as the surrounding woodlands, was negatively impacted by the NCES Facility's operations. NCES argued that Mr. Menard's and Ms. Bryant's alleged injuries are merely speculative because it is unknown whether they will continue to suffer injuries due to NHDES granting the Permit, and therefore Mr. Menard and Ms. Bryant failed to sufficiently articulate an injury-in-fact caused by the Permit. See NCES's Motion for Rehearing, p. 43.

To establish standing, an appellant must show it is "likely, as opposed to merely speculative, that [his] injury will be redressed by a favorable decision." Teeboom v. City of Nashua, 172 N.H. 301, 309 (2019), quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992). The affidavits indicated the affiants own property close to the NCES Facility. By granting the Permit for the NCES Facility, NHDES authorized NCES to continue its operations and to continue accepting waste. The injuries claimed to be suffered by the affiants are the result of NCES's operations and continued acceptance of additional waste. The Permit authorized NCES to expand its facilities via the implementation of Stage VI, which implies NCES has previously implemented earlier stages which did not resolve the odor and noise harms alleged by the affiants. The record supports the conclusion that there was sufficient information provided by the affiants for the Council to conclude the affiant's predicted injuries were not merely speculative, but likely, based on the affiant's past experiences with the NCES Facility and the nature of the Permit. NCES's claim that CLF never met its burden to demonstrate its members have standing to raise the appeal is therefore uncompelling. The Council did not overlook or misapprehend any points of law or fact in finding CLF provided sufficient information to establish its members had standing.

For the above identified reasons, NCES's argument for reconsideration regarding Item 4 is **DENIED**.

CONCLUSION

For the above detailed reasons, NCES's Motion for Rehearing is **DENIED**.

For the Council, and by Order of the Hearing Officer,

/*s/ Zachary Towle* Date: 11/3/2022
Zachary N. Towle, Esq., NH Bar 270211
Hearing Officer, Waste Management Council

Pursuant to RSA § 541, any party whose rights are directly and adversely affected by this decision may file a motion for reconsideration with the Council within 30 days of the date of the decision.