

STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

DOCKET NO. 20-14 WMC

IN RE: CONSERVATION LAW FOUNDATION, INC. APPEAL

ORDER ON PERMITTEE'S MOTION TO STAY

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 and a Final Order was issued May 11, 2022. The Council remanded a single matter to the commissioner of NHDES pursuant to RSA § 21-O:14, I-a(b), with the Council ruling that NHDES acted unlawfully in finding that the NCES Facility provided a substantial public benefit under RSA § 149-M:11, III when the NCES Facility was projected to operate during periods without capacity need/shortfall. See Final Order, Discussion Section C, pp. 6-15.

Both NHDES and NCES filed motions to reconsider the Final Order, which were followed by a series of objections, replies, requests to file surreplies, surreplies, a motion to supplement, a motion to strike, and a motion for an evidentiary hearing. 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:

- A. “[A]n order declaring that the aggregate capacity need method¹ is explicitly required for assessing capacity need pursuant to RSA 149-M:11, V”;
- B. “[A]n order declaring that, if RSA 149-M:11, V is ambiguous, [NHDES’s] long-standing application and interpretation of the statute utilizing the aggregate capacity need approach constitutes an administrative gloss that cannot be set aside without an amendment of the statute by the legislature”; and
- C. “[A]n order declaring that the strict function of time approach, the partial function of time approach, and the discretionary approach for determining capacity need pursuant to RSA 149-M:11, V, violates [sic] the dormant commerce clause of the United States Constitution”

DISCUSSION

NCES’s Motion to Stay focused solely on the Council’s legal interpretation of RSA § 149-M:11 as justification for staying the Council’s actions, but the Council’s interpretation of RSA § 149-M:11 was only one of the several items which was pending review by the Council. In addition to claims regarding the interpretation of RSA § 149-M:11, NCES raised both a claim that the Hearing Officer improperly resolved mixed questions of law and fact and that the Hearing Officer erred in not dismissing the appeal for lack of standing in its June 10, 2022 Motion for Rehearing. See NCES’s Motion for Rehearing, p. 15. These claims for reconsideration/rehearing are not dependent on an interpretation of RSA § 149-M:11, and no argument has been presented to warrant a stay of the Council’s action on these items.

Regarding the interpretation of RSA § 149-M:11: the Council is empowered to determine whether NHDES acted unlawfully or unreasonable (see RSA § 21-O:14, I-a), which implies the Council can determine the meaning and application of the law (otherwise the Council would be unable to determine whether an action is in fact unlawful). RSA § 21-M:3, IX, (e) affirms this power and invests the hearing officer with the power to “[d]ecide all questions of law presented during the pendency of the appeal” Upon a determination that NHDES acted unlawfully, the Council is required to specify the “factual and legal basis for its determination” when remanding the unlawful NHDES decision to the Commissioner, which further supports the Council’s power

¹ NCES defines the ‘aggregate capacity need approach,’ as well as the ‘partial function of time,’ ‘pure function of time,’ and ‘discretionary’ approaches in its Motion to Stay, pp. 3-4.

to determine the meaning and application of the law (otherwise the Council would be unable to specify the legal basis for its determination). NCES's conclusion that the Council's determination of law is somehow precluded by the ability of the courts to address the same legal question is wrong. The flaw in NCES's conclusion is further highlighted by the fact that any legal determination made by the Council is subject to the review of the New Hampshire Supreme Court.

Moreover, NCES's claim that it was somehow prejudiced by the Council's appeal process due to its status as the permittee (see NCES's Motion to Stay, p. 6) was unconvincing. NCES participated fully in the appeal process and elected to argue that NHDES acted lawfully in its issuance of the Permit. The Council's power is limited to determining whether NHDES acted lawfully and reasonably: CLF argued NHDES acted unlawfully while NHDES argued it acted lawfully. While it is apparent that NCES would have benefited from a finding that NHDES acted lawfully, NCES admitted that it believes NHDES acted unlawfully in issuing the Permit. See NCES's Motion to Stay, p. 3-4 (NCES arguing NHDES applied an incorrect interpretation of RSA § 149-M:11, III when issuing the Permit). In its Motion for Rehearing NCES further asserted that RSA § 149-M:11 is facially discriminatory against out-of-state waste importers and, though NHDES allegedly did not enforce most of the discriminatory provisions, its actions were still injurious to waste-importers in some capacity. See NCES's Motion for Rehearing, p. 31 (“[RSA § 149-M:11] never imposes enough harm on importers of out-of-state waste to justify challenging it”). It is readily apparent NCES could have raised the arguments regarding the interpretation of RSA § 149-M:11, III articulated in its Motion for Rehearing earlier in the appeal process but chose not to. NCES elected to pursue what it considered a beneficial outcome instead of seeking to address allegedly unlawful activity conducted by NHDES. The Council found NHDES acted unlawfully and NCES filed a motion for rehearing claiming the Council's interpretation of RSA § 149-M:11, III was inaccurate. NCES had a full opportunity to participate in the appeal process and did so: any perceived prejudice NCES suffered was merely the result of NCES's decision to argue NHDES acted lawfully.

CONCLUSION

Ultimately NCES offered no good basis to stay the Council's actions on the pending motions. Several items to be acted upon by the Council are not dependent on any interpretation of RSA § 149-M:11, and those items which are dependent on an interpretation of RSA § 149-M:11 can be acted upon by the Council based on the arguments and record provided by the Parties. As detailed above, NCES's Motion to Stay 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.