STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WETLANDS COUNCIL

Docket No. 24-21 WtC

In re: Dalton Conservation Commission Appeal

MOTION TO DISMISS

Granite State Landfill, LLC ("GSL") moves the council, through its hearing officer, to dismiss this appeal because the Dalton Conservation Commission ("DCC") lacks statutory authority to bring this appeal. The DCC lacks standing under RSA 21-O:14, I-a, to appeal the challenged decision of the New Hampshire Department of Environmental Services ("NHDES") to issue the Shoreland Impact Permit 2024-0766 ("Shoreland Permit") to GSL, and the appeal fails to state a claim upon which relief could be granted. This motion rests on the following grounds.

I. Introduction

To have standing to appeal a NHDES decision to the New Hampshire Wetlands Council (the "Council"), a person must be "aggrieved" by that decision. In this context, to be "aggrieved" means that the person can sufficiently allege an injury in fact *caused by* the NHDES decision under appeal. The DCC alleges that it possesses standing to appeal the NHDES decision, based on its alleged entitlement to notice of the shoreland permit application and the alleged failure of NHDES to consider the Shoreland Permit in the aggregate with all other permits required by the landfill project. The DCC's lack of standing deprives the council of jurisdiction, and the appeal must therefore be dismissed in its entirety.

The DCC's substantive arguments also fail. Fundamentally, the DCC mischaracterizes the relevant statutes. The appeal before the Council relates to regulation of shoreland. The DCC,

however, cites to statutes and rules which regulate wetlands in support of its substantive claims. Wetlands and shoreland regulations are fundamentally different; although certain areas of land may be subject to regulation by both the shoreland and wetlands programs, they are separate and distinct permitting regimes with different permitting requirements. As a result, the DCC fails to state a claim upon which relief can be granted because the wetlands statutes and rules do not apply to the work authorized by the Shoreland Permit.

II. Statement of Facts

GSL is seeking to develop a landfill located in Dalton, New Hampshire. To construct that landfill, GSL is required to obtain a permit to construct and operate a landfill under the State of New Hampshire's solid waste statutes and rules. GSL must also obtain other permits including a permit to dredge and fill in wetlands and an alteration of terrain permit. GSL has already received a driveway permit and this Shoreland Permit. All of these permits are administered under different NHDES programs and have different purposes and requirements; one program cannot replace another, nor is there any mechanism to combine the permits into one application.

A portion of the work the GSL needs to complete relates to safety improvements along NH Route 116 in Bethlehem. This work is authorized by the Shoreland Permit which only authorizes work within the protected shoreland; by its terms, it does not allow for any work within wetlands. Indeed, the Shoreland Permit specifically notes that the permit does not authorize any work that would occur within any area regulated under RSA ch. 482-A, *i.e.*, wetlands.

The Shoreland Permit was approved on July 18, 2024 and this appeal followed, initially by way of the DCC filing a preliminary notice of appeal, and then a notice of appeal.

III. Argument

A. *Governing Principles for Standing*

To have standing to appeal a NHDES decision to the council, an appellant must have been a "person aggrieved" by the decision. RSA 21-O:14, I-a ("[a]ny person aggrieved by a department decision may . . . appeal to the council having jurisdiction over the subject matter of appeal."). A "person aggrieved" has been defined in New Hampshire law as a person directly affected by the challenged administrative action, one who has a direct and definite interest in the outcome, not simply all persons in a community who feel they are hurt by the decision. *Weeks Restaurant Corp. v. City of Dover*, 199 N.H. 541, 544-45 (1979). *Weeks* also laid out a non-exhaustive list of factors to weigh for or against a finding of standing. *Id.* This list includes (1) proximity of the plaintiff's property to the site for which approval is sought, (2) the type of change proposed, (3) the immediacy of the injury claimed, and (4) the plaintiff's participation in the administrative hearings. *Id*.

In the over forty years since, the supreme court has built upon the *Weeks* standard in a long line of decisions. Standing requires that the appellant show that the decision has caused an "injury in fact" to the appellant, and that the appellant has been "directly affected" by it. *Appeal of Richards*, 134 N.H. 148, 154 (1991); *Golf Course Investors of NH, LLC v. Town of Jaffrey*, 161 N.H. 675, 683-84 (2011) (appellants' speculation that the decision would result in increased traffic and noise did not grant standing since it alleged no direct and definite injury). To have standing, a party must have "suffered a legal injury against which the law was designed to protect." *Roberts v. General Motors Corp.*, 138 N.H. 532, 535 (1994). Having general interest in an issue does not confer standing. *Caspersen v. Town of Lyme*, 139 N.H. 637, 640-41 (1995) (party's "general interest" in effect of zoning amendment on "divers[ity] of community" insufficient to create

standing; ordinance must actually affect party's property); *Goldstein v. Town of Bedford*, 154 N.H. 393, 394 and 396 (2006) (generic interest in seeing the law enforced does not confer standing); *Golf Course Investors of NH, LLC*, 161 N.H. at 684 (same); *Petition of Lath*, 169 N.H. 616, 621 (2017) (same); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (mere interest in a problem, no matter how longstanding the interest or qualified the person, does not confer standing by itself).

A motion to dismiss based on appellant's lack of standing places the burden on the appellant to prove standing. *Ossipee Auto Parts, Inc. v. Ossipee Planning Bd.*, 134 N.H. 401, 403-04 (1991) (plaintiff must demonstrate his right to claim relief when standing challenged by motion); *Joyce v. Town of Weare*, 156 N.H. 526 (2007) (same). The injury in fact cannot be based on a hypothetical set of facts. *Asmussen v. Commissioner, NH Dept. of Safety*, 145 N.H. 578, 587 (2000); *Hannaford Bros. Co. v. Town of Bedford*, 164 N.H. 764 (2013) (finding a claimed injury insufficient to establish standing where it was speculative). There is no standing where it depends on an injury in fact that occurs in the future, based on some later event. *Appeal of Campaign for Ratepayers Rights*, 142 N.H. 629, 632 (1998) (PSNH ratepayers have no standing to challenge public utilities commission decision that would not result in rate increase until later rate-setting proceeding); *In re Stonyfield Farm, Inc.*, 159 N.H. 227, 231-32 (2009) (same).

If the party cannot show that it is a "person aggrieved," he lacks standing, the adjudicative body does not have subject matter jurisdiction, and the case must be dismissed. *Libertarian Party of N.H. v. Secretary of State*, 158 N.H. 194, 195-96 (2008) (standing necessary to invoke constitutional authority of judiciary); *Asmussen*, 145 N.H. at 588 (lack of standing defeats subject matter jurisdiction).

B. *The Dalton Conservation Commission Lacks Standing*

The DCC lacks standing to appeal NHDES's decision to grant the Shoreland Permit because it has not alleged a legally cognizable harm to itself. Nowhere in its notice of appeal does the DCC allege a sufficient interest greater than that of the general public.

The DCC presents two arguments in support of its standing to bring this appeal: (1) it was entitled to notice under the statutes and NHDES rules and therefore has standing by virtue of the notice requirements; and (2) that its statutory function is to protect the environment within the Town of Dalton. *See, generally*, Notice of Appeal. These claims are based on incorrect interpretations of the statute and do not support the DCC's standing to appeal the Shoreland Permit. The DCC has presented no other facts upon which a separate claim for standing could rest; therefore, the DCC's appeal must be dismissed for lack of standing.

i. *The Dalton Conservation Commission Was Not Entitled to Notice*

Certain work GSL plans to conduct is within protected shoreland and regulated by the Shoreland Protection Act, RSA ch. 483-B. Pursuant to RSA 483-B:5-b, IV-a, notice must be given to the "governing body of the municipality or municipalities in which the property is located." In order for notice to be required, then, the project must be located on property within the governing body's geographical jurisdiction. The DCC cannot meet either of these prongs.

The DCC's jurisdiction is limited to the Town of Dalton's geographical limits. *See* RSA §§ 36-A:2 and 36-A:4-a, I(a). All work that will be performed in compliance with and authorized by the Shoreland Permit will occur in Bethlehem, not Dalton.[1] Counter to this fact, the DCC

[1] The DCC counters that it is entitled to notice by virtue of the landfill being within Dalton's borders and relies on RSA ch. 482-A. As discussed in more detail below, RSA ch. 482-A applies to dredge and fill permits, not shoreland permits, and does not require evaluating all the permits that GSL has applied for in the aggregate. There is no requirement in the statutes or rules to allow a conservation commission to interfere with the sovereignty of another municipality.

conflates "project" in RSA 483-B:5-b, IV-a, as including the entirety of landfill development. There is no support for such contention. RSA ch. 483-B is limited in scope to regulating shoreland; it does not regulate landfills, dredge and fill in wetlands, or the alteration of terrain. "Project," as used in RSA 483-B:5-b, IV-a, is limited to projects within protected shoreland. Where no work will occur within Dalton, no notice was required to be given to the DCC. Without any right to notice, the DCC cannot establish an injury-in-fact sufficient to confer standing.

Regardless of the geographical location project, the DCC is not the governing body of Dalton, and was not entitled to notice. The statute only requires notice to the "governing body." Although "governing body" is not defined in RSA ch. 483-B, or elsewhere in Env-Wq 1400, et seq., it is defined in RSA 21:48 as "shall mean the board of selectmen in a town, the board of aldermen or council in a city or town with a town council, the school board in a school district or the village district commissioners in a village district, or when used to refer to unincorporated towns or unorganized places, or both, the county commissioners." RSA § 21:48. No reference is made to conservation commissions. Under the plain language of the statute, there is no requirement to send any notice to the DCC. The DCC therefore lacks standing to maintain this appeal as it cannot show it was injured by the lack of notice.

ii. *The Dalton Conservation Commission Cannot Show a Sufficient Interest Based on its Claim that the Shoreland Permit Should Have Been Assessed in the "Aggregate."*

The DCC also appears to claim that it has standing based on the enabling statute for conservation commissions and the overall impact the development of the landfill will have on Dalton. The overall impact of the development, however, is irrelevant. The only issue before the Council is the lawfulness of NHDES's decision to grant GSL the Shoreland Permit.

The DCC's powers are limited to that which is authorized by statute. The enabling statute, RSA ch. 36-A, imbues conservation commissions with limited powers for the purpose of "the proper utilization and protection of the natural resources and for the protection of watershed resources of [the] city or town." RSA § 36:1. A conservation commission's powers to expend funds are severely limited by statute. For example, it cannot expend funds for the purchase of land without the authorization of the local governing body. There is nothing that authorizes a conservation commission to initiate lawsuits or appeal decisions of NHDES; by all indications, the DCC must be authorized to pursue an appeal by the Dalton selectboard. The DCC has not alleged that it is authorized to pursue this appeal on behalf of Dalton, and it cannot as the selectboard has expressly revoked any authority the DCC might have had to maintain this appeal. *See* Letter attached hereto as Exhibit A. Where the DCC lacks authority to prosecute this appeal, the appeal must be dismissed.

Regardless of the DCC's authority, the Shoreland Permit does not authorize any work to occur within Dalton. To counter this fact, the DCC attempts to link, through RSA ch. 482-A, the work authorized by the Shoreland Permit with the landfill project in general, *i.e.*, the permitting for the landfill project must be considered in the aggregate. This argument exhibits a fundamental misunderstanding of the permitting landscape and the statutes and rules.

The DCC asserts that GSL's shoreland permit application must be assessed in conjunction with every other permit GSL has applied for. There is no basis for this assertion. Indeed, there is no requirement for NHDES to assess a project that requires permits from several different programs in an aggregated process. Nor is there any mechanism to do so. The DCC relies on RSA 482-A:11, V, which provides:

> Notwithstanding any rules adopted by the commissioner defining minor projects, a series of minor projects undertaken by a single developer or several developers over a period of 5 years or less may, when considered in the aggregate, amount to a major project in the opinion of the department; all such related projects shall be subject to a public hearing as provided in RSA 482-A:8. A series of minor projects shall be considered in the aggregate if they abut or if they are a part of an overall scheme of development or are otherwise consistent parts of an eventual whole.

RSA § 482-A:11, V.

Under this section, it is true that several *minor projects* to be completed within five years of each other must be considered together, in the aggregate, if they would amount to a *major project*. What the DCC failed to note in its appeal, however, is that RSA ch. 482-A *only* governs wetlands. A *minor project* is one which has a minimal amount of work completed within wetlands and does not require the same regulatory process as a *major project* which involves more extensive work within the wetlands. There is no basis to conclude that *minor project* and *major project* refer to anything other than projects within wetlands.

The DCC, however, persists in its interpretation, claiming that the shoreland permit application impacts should have been considered in the aggregate with the impacts of the landfill overall. *See* Notice of Appeal, ¶16.[2] This is not how the permitting scheme under NHDES rules work, nor would it make any sense to evaluate development in the way the DCC proposes. NHDES operates several different regulatory programs which have different purposes and are oftentimes duplicative. *See, generally*, RSA chs. 149-M, 482-A, 483-B. For example, if an applicant wished to develop shoreland in a marsh abutting a river or lake, it would be required to obtain both a shoreland permit and a wetlands dredge and fill permit. Each of these programs is designed to

[2] The DCC cites to a letter dated August 26, 2021, claiming that NHDES already determined that the application must be considered in the aggregate. This is disingenuous. The August 26, 2021 letter relates to a prior wetlands dredge and fill application which proposed significantly different impacts, over three phases, than the current dredge and fill application. Moreover, that letter requested the applicant to submit an application for proposed impacts relating only to the first phase of development. Notably, the letter did not address or discuss any shoreland permits or construction within protected shoreland.

protect different characteristics of the environment, such as erosion of shoreland or elimination of wetlands. Each program operates independently of the other programs and applications are analyzed subject to the specific requirements of each program. In effect, a development is considered in the "aggregate" by requiring permits from multiple programs.

This is exactly the case here. GSL has submitted multiple applications for several different permits. These permits are analyzed according the rules promulgated by NHDES and the New Hampshire Department of Transportation for a driveway permit. Each program has limited jurisdiction based on the type of program it is. For instance, the wetlands program could not claim any authority over a project which does not include any impacts to wetlands. Yet this is exactly what the DCC would have this council believe. Each program has limited jurisdiction. GSL and NHDES are complying with the requirements of each program.

Where each program is limited in its jurisdiction and NHDES can only assess a permit based on the work that is proposed within its jurisdiction, the DCC cannot show that it has standing to pursue this appeal on the basis that it was injured by NHDES not assessing the application in the aggregate with every other permit the landfill requires.

C. *The Dalton Conservation Commission's Appeal Fails to State a Claim*

The DCC also fails to state a claim upon which relief can be granted. Assuming, as is required, that the facts the DCC alleges are true, there is no legal basis to award the DCC the relief it claims it is entitled to.

When reviewing a motion to dismiss for failure to state a claim, a court, or in this case, the hearing officer, will assume for purposes of the motion that the allegations in the complaint are true and draw all inferences from these allegations in favor of the appellant, although it does not assume the truth of statements that are "merely conclusions of law." *Ojo v. Lorenzo*, 164 N.H. 717,

721 (2013). The hearing officer may also consider documents attached to the appellant's pleadings, documents sufficiently referred to in the complaint, and documents the authenticity of which are not disputed. *Barufaldi v. City of Dover*, 175 N.H. 424, 427 (2022). The hearing officer then "test[s] the facts alleged in the pleadings against the applicable law." *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010). "Dismissal is appropriate if the facts pled do not constitute a basis for legal relief." *Id*. (internal quotation marks omitted).

The DCC claims that it is entitled to relief based on the alleged failure to notify the DCC of GSL's shoreland permit application, NHDES's alleged failure to assess the shoreland permit application "in the aggregate," and the alleged failure that the "least impactful alternative" was not selected which therefore failed to meet "avoidance" and "minimization" requirements.

As discussed above, these legal theories are inherently flawed and have no basis in any reasonable interpretation of the applicable statutes and rules. The DCC was not entitled to notice because the work under the Shoreland Permit will only take place within Bethlehem. Moreover, if any entity in Dalton was entitled to notice, it was the selectboard which has expressly rejected the initiation of this appeal. Similarly, requiring NHDES to evaluate the shoreland permit application in the aggregate with the landfill development is not authorized by statute or rule. Each NHDES program evaluates a permit based on the limits of its jurisdiction; a wetlands application cannot be reviewed based on the requirements of a shoreland application, and vice versa.

Akin to the argument that the landfill project must be assessed in the "aggregate" is the DCC's perplexing claim that work authorized by a shoreland permit must meet avoidance and minimization requirements only applicable to work within wetlands. In support of its claim, the DCC cites to Env-Wt 311.06[3], Env-Wt 313.03, and Env-Wt 524.02. Both the Env-Wt 300 and 500

[3] The DCC cites to Env-Wt 311.06, but that is presumably a typo as Env-Wt 311.07 references avoidance and minimization requirements.

sections solely apply to "any dredge, fill, or construction activities, or any combination thereof, in a jurisdictional area." Env-Wt 305.02(a); *see also* Env-Wt 509.02. "Jurisdictional area" is further defined as "an area that is subject to regulation under RSA 482-A, including but not limited to surface waters, streams, lakes, rivers, ponds, wetlands, banks, flats, shores, sand dunes, upland tidal buffer zones, and duly-established 100-foot buffers." Env-Wt 103.27. Any work completed within a jurisdictional area, then, is potentially subject to the requirements of Env-Wt 311.07, 313.03, and 524.02. There is no indication in any of the rules, however, that the avoidance and minimization requirements of the aforementioned rules apply to the shoreland program or any work authorized thereunder.

To the contrary, avoidance is defined as "not impacting jurisdictional areas if there is a practicable alternative to the proposed project that would have less impact on the aquatic ecosystem or jurisdictional areas, so long as the alternative does not have other significant adverse environmental consequences." Env-Wt 102.12. Similarly, minimization "means the reduction of adverse impacts using minimization measures that remain after all practicable measures have been taken to avoid adverse impacts to jurisdictional areas." Env-Wt 103.40. Definitionally, avoidance and minimization apply only to work conducted in jurisdictional areas; these requirements cannot be crafted on to a shoreland permit to "avoid" impacts within the protected shoreland.

Despite the fact that these rules only apply to wetlands, and not the shoreland program, the DCC insists that GSL must meet the requirements of these facially inapplicable rules. Assuming, for the sake of discussion, that the DCC is correct and the Env-Wt 300s and 500s could apply to the work authorized by the Shoreland Permit, the DCC's claim still fails. The shoreland permit does not authorize any work within a jurisdictional area, *i.e.*, wetlands. Avoidance and

minimization requirements, then, have been met to the fullest extent possible because *none of the work* authorized by the Shoreland Permit occurs within a jurisdictional area.

This exemplifies the fundamental issue with the DCC's appeal: it claims that rules from separate and distinct permit programs must be applied to each other. However, the DCC has not provided any support for such a claim, instead making arguments facially unsupported by the statutes and rules. In essence, the DCC's appeal must be dismissed for failing to state a claim. It cannot stretch the requirements of one environmental program to apply to the requirements of another environmental program.

IV. Conclusion

In accordance with the foregoing, GSL respectfully requests that the council dismiss the DCC's appeal.

Respectfully submitted,

GRANITE STATE LANDFILL, LLC,
By Its Attorneys,
CLEVELAND, WATERS and BASS, P.A.,

Dated: 3/10/2025

/s/ Jacob M. Rhodes

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CERTIFICATION

I, Jacob M. Rhodes, hereby certify that on March 10, 2025, I filed the foregoing document with the Council by way of electronic mail and regular mail, with copies served upon all persons listed on the service contact list through electronic mail.

/s/ Jacob M. Rhodes

4911-0106-7031, v. 2

EXHIBIT A

Town of Dalton, NH
Board of Selectmen
756 Dalton Road
Dalton, NH 03598
Selectmen@townofdaltonnh.gov

February 10, 2025

Mr. Phil Trowbridge, LRM Manager
NH Department of Environmental Services
29 Hazen Drive
Concord, NH 03302-0095
Philip.r.trowbridge@des.nh.gov
(sent via email)

Re: Wetlands Permit Application (RSA 482-A) NHDES File Number: 2023-03259
Subject Property: Douglas Drive, Dalton, Tax Map #406/1, Lot #406/2 ("Application")

Dear Mr. Trowbridge:

Please accept this letter to ensure notice that the Dalton Select Board has not authorized any actions taken by the Dalton Conservation Commission, Mr. Swan or his legal counsel to appeal the Wetlands Shoreland Impact Permit Application for the Granite State Landfill on behalf of the town of Dalton, NH.

This letter should also serve to notify Mr. Swan and the Dalton Conservation Commission not to pursue any further appeals without first getting approval from the Dalton Select Board.

Sincerely,

The Dalton Select Board

Eric Moore, Chairman

Tom Dubreuil

JoBeth Dudley

Cc: Dalton Conservation Commission