STATE OF NEW HAMPSHIRE WETLANDS COUNCIL

APPEAL OF DALTON CONSERVATION COMMISSION

Docket No. 24-21 WtC

ORDER ON MOTION TO DISMISS

The Dalton Conservation Commission ("DCC") has appealed the Department of Environmental Services' ("Department") decision to approve a Shoreland Impact Permit submitted by Granite State Landfill ("GSL"). GSL moved to dismiss the appeal on the grounds that DCC has not alleged sufficient facts to demonstrate that it has standing to maintain this appeal, the appeal fails to state a claim upon which relief could be granted, and the dormancy denial of GSL's Solid Waste Permit application does not render this proceeding moot. DCC objects.

I. PROCEDURAL BACKGROUND

On July 18, 2024, the Department approved GSL's application for a permit to impact 24,983 square feet of protected shoreland in order to construct safety improvements entirely within New Hampshire Department of Transportation (NHDOT) right-of-way. *See* DCC's Notice of Appeal ("NOA") at 3-4 (DES's permit approval letter in File Number 2024-00766).[1]

On September 18, 2024, DCC filed a timely notice of appeal. In this notice of appeal, it claims the Department's decision to approve GSL's permit application is unlawful or unreasonable on the following grounds: (1) the Department "failed to provide notice to the Appellant or to the Town of Dalton, New Hampshire, as required by the Shoreland Permit Application and, inter alia, RSA 483-B:5-b, IV-a"; (2) "the Applicant has failed to demonstrate that the least impactful alternative has been selected, and thus failed to meet the Department's avoidance and minimization requirements"; and (3) the Department erroneously allowed "the Applicant to disaggregate, or segregate, one part of a major project affecting multiple communities and watershed areas in contravention of, *inter alia*, RSA 482-A:11, V." *Id.* at 13-14. DCC did not assert any direct standing arguments in the NOA.

[1] DCC's NOA was refiled to cure defects on Jan 2, 2025. Corrected the Service List and added on an abutter list on the last pages of the NOA.

On March 10, 2025, GSL filed a Motion to Dismiss DCC's appeal. GSL maintained that DCC lacks standing and has not stated a claim upon which relief can be granted. In support of its motion, GSL advances these arguments. GSL argues that DCC has identified two primary bases for standing: 1) GSL and the Department did not provide notice to DCC; and 2) the Department failed to aggregate the Shoreland Permit application; if it had DCC should have received notice. Further GSL argues that DCC has failed to state a claim for relief based upon DCC's allegations that the Department failed to: notify DCC of the Shoreland Permit application; consider the Shoreland Permit in aggregation with other permits; and consider the "least impactful alternative" and therefore failed to meet the avoidance and minimization requirements under the law. *See id.* at 10.

On March 18, 2025, the Department filed a Concurrence to GSL's Motion to Dismiss. In this Concurrence, the Department argues that DCC "was not entitled to notice per RSA 483-B:5-b, IV-a." *See* Department's Concurrence at 1. Also, the Department argues that "the impacts of the activities related to the proposed construction or operation of the proposed landfill" do not confer standing because DCC's citations in support of aggregation only apply to the wetlands permitting process. *See* Department's Concurrence at 2. Further, the Department argues that there was no failure to satisfy the avoidance and minimization requirements because those requirements are inapplicable to the Permit at issue here, which was issued under RSA 483-B. The avoidance and minimization requirements relate to permits issued under RSA 482-A. *See* Department's Concurrence at 3.

On March 28, 2025, DCC filed an Objection to GSL's Motion to Dismiss. In its Objection, DCC argues that it has standing under RSA 36-A:2, which gives it the statutory duty to ensure the proper utilization and protection of the natural resources and for the protection of watershed resources for the Town of Dalton. *See* DCC's Objection to Mot. Dismiss at 2. DCC argues that because of this duty it must have notice of all permits that relate to the proposed landfill. DCC argues that all the various permits should have been considered one unified project, in which case the notice provisions under RSA 482-A:8, instead of those under RSA 483-B were applicable to the Shoreland Permit. *See id.* Based upon this same rationale, DCC also argues that the project was required to meet the minimization and avoidance requirements under RSA 482-A:11.

On April 4, 2025 DCC filed a Second Supplement to its Objection to GSL's Motion to Dismiss. In this Motion, DCC informed the Council that the Department has denied GSL's

application for a Solid Wast Permit on the basis of dormancy because GSL failed to provide the information requested by NHDES more than a year after it had been requested. DCC argued that the denial of the Solid Waste permit rendered the action in Shoreland Permit moot. In the alternative DCC requested a stay of the appeal.

On April 11, 2025, GSL filed a Reply to DCC's Objection to GSL's Motion to Dismiss. In addition to arguments previously made, GSL argues that the dormancy denial given by the Department to GSL for a Solid Waste Permit application does not render this proceeding moot. *See id.* at 3. Finally, GSL argues that DCC is not authorized to maintain this appeal. *See id.* at 3-4. On April 18, 2025, DCC submitted a notice to the Council that GSL's Shoreland Permit had expired because construction had not begun within one year of the date of that permit.

Having reviewed the pleadings, objections, and replies, I conclude that there are no material facts in dispute and there is adequate information before me to base a ruling as a matter of law, and that ruling on GSL's motion is therefore proper pursuant to EC-WET 203.09(f)(1).

II. STANDARD OF REVIEW

A. Standing

When a motion to dismiss challenges a party's standing, the burden falls on the party asserting jurisdiction to prove its standing. *Joyce v Town of Weare*, 156 N.H. 526 (2007). The claimed injury in fact must be based on a "direct, definite interest in the outcome of the proceeding." *Appeal of Department of Environmental Services*, 176 N.H. 379, 386 (2023). There is no standing when a claimed injury depends on something that may or may not happen in the future. *Appeal of Campaign for Ratepayers' Rights*, 142 N.H. 629, 632 (1998). If a party cannot show that it is a "person aggrieved" by the decision, then it lacks standing. *Libertarian Party of N.H. v. Secretary of State*, 158 N.H. 194, 195-96 (2008). When an appellant's standing to maintain an appeal is challenged in a motion to dismiss, the Wetlands Council may "look beyond the [appellant's] unsubstantiated allegations and determine, based upon the facts, whether the [appellant] has sufficiently demonstrated [its] right to claim relief." *Avery v. Comm'r, N.H. Dep't of Corr.*, 173 N.H. 726, 736-37 (2020).

Fundamental to the determination of whether a party has standing is whether the party alleges that they have or will suffer a direct, definite injury by the Department decision. *Department of Environmental Services* at 386-87. It is insufficient for a party to allege they have a general interest in a matter. *Caspersen v. Town of Lyme*, 139 N.H. 637, 640-41 (1995). As the US

Supreme Court has stated: "mere interest in a problem, no matter how longstanding the interest or qualified the person, does not confer standing by itself." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

B. Failure to State a Claim

When reviewing a motion to dismiss for failure to state a claim, the hearing officer will assume for purposes of the motion that the allegations in the pleadings 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.*

III. RELEVANT LAW AND RULES

A. Standing

For an appellant to have standing to appeal, they must have been a "person aggrieved" by the decision.

RSA 21-O:14, I-a(a) provides that

> "Any person aggrieved by a department decision may, in addition to any other remedy provided by law, appeal such decision by submitting a notice of 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."

RSA 21-O:14, I-a(a)

IV. DISCUSSION

1. <u>Mootness Based Upon Denial and Expiration of Permits</u>

As noted above, while GSL's Motion to Dismiss was pending, DCC notified the Council that the Department issued a denial of GSL's Application for a Solid Waste Permit based upon dormancy in a collateral permit case before the Waste Management Council. Further, DCC notified the Council that the Shoreland Permit, which is the subject of this appeal, has expired. Therefore, consideration must be given as to whether the issues under consideration in this matter are moot.

When reviewing a motion to dismiss for mootness, the question is one of convenience and discretion and is not subject to rigid rules. *In re Thayer*, 145 N.H. 177, 182 (2000). The hearing officer "will refuse to review a question that no longer presents a justiciable controversy because the issues involved have become academic or dead, but may review a question that has become moot if it involves a significant constitutional question or an issue of significant public concern." *Id.*; *Exeter Hosp. Med. Staff v. Bd. of Trs. Of Exeter Health Res.*, 148 N.H. 492, 498 (2002). A decision upon the merits may also be justified where future litigation may be avoided. *Sullivan v. Town of Hampton Bd. of Selectmen*, 153 N.H. 690, 692 (2006).

As noted above, DCC has argued that the denial of GSL's Solid Waste Permit means that this Shoreland Permit is moot at this moment in time. As DCC points out in the Second Supplement to its Objection to GSL's Motion to Dismiss, the Solid Waste Permit was denied on the basis of dormancy. DCC argues that because the Solid Waste Permit has been denied, that means the landfill cannot move forward and the Shoreland Permit should be moot. In the alternative, DCC requests that this matter be stayed pending resolution of the proceedings related to the Solid Waste Permit. DCC then filed a Notice of Expiration of Permit By its Plain Terms informing the Council that the Shoreland Permit expired because construction of the facility did not occur within one year of the issuance of the permit, and further that GSL has not sought to extend or renew the permit. However, DCC has not withdrawn its appeal of the Shoreland Permit.

GSL argues that it has an appeal of the denial of the Solid Waste Permit based on dormancy which is pending on the (Wetland's) Council docket, so the issue is not moot. GSL also argues that denial of the Solid Waste Permit does not preclude GSL from refiling another application for a Solid Waste Permit. Presumably, the same is true of the Shoreland Permit. Whether such action is within the realm of possibility is worth considering because if GSL were to prevail in its appeal or refile the application for the Shoreland Permit, then deciding this appeal might help to avoid

future litigation over the permit at issue, which militates against dismissing the appeal as moot. *LeBaron v. Wright*, 156 N.H. 583, 585 (2007).

One of the main issues under consideration in this Order is whether DCC has standing to bring this appeal. If GSL prevails in its appeal of the denial of the Solid Waste Permit or refiles applications of the Solid Waste Permit and the Shoreland Permit, this issue is likely to arise in the future. Therefore, an exception to the mootness doctrine is justified. *Batchelder v. Town of Plymouth Zoning Bd of Adjustment*, 160 N.H. 253, 256 (2010).

2. GSL's Motion to Dismiss

GSL argues RSA 483-B:5-b, IV-a requires that notice of a Shoreland Permit application be given to the governing body of the municipality or municipalities in which the property is located. GSL contends that DCC is not a "governing body" as defined in RSA 21:48. GSL also argues that DCC's powers are limited to the Town of Dalton's geographic limits, and all the work that is to be performed under the Shoreland Permit will be conducted in the Town of Bethlehem. GSL contends that because there was no requirement to send notice to DCC, DCC cannot rely upon its failure to receive notice under RSA 483-B:5-b, IV-a to confer standing.

Regarding DCC's claim that its standing is based upon its duty to assess the overall impact the landfill will have on Dalton, GSL contends that the Shoreland Permit does not authorize any work in the Town of Dalton. Further, GSL contends that DCC's attempt to link RSA 482-A to the work authorized under the Shoreland Permit is misplaced because RSA 482-A relates to dredge and fill projects in wetlands jurisdictions. Further, DCC's contention that RSA 482-A:11 is applicable to the Shoreland Permit under the theory that the Shoreland Permit was required to be assessed in conjunction with every other permit, demonstrates a fundamental misunderstanding of the permitting process, statutes and rules. GSL argues that there is no requirement or mechanism for the Department to assess a project that needs permits from multiple different programs in an aggregated manner. On the contrary, GSL contends that it submitted multiple applications for several different permits and the permits are analyzed according to the Department's statutes and rules as well as those for the Department of Transportation (for a driveway permit.) GSL notes that each program has limited jurisdiction, and that DCC has submitted insufficient authority for cross application of the wetlands' statutes and rules to Shoreland Permits issued under RSA 483-B. As noted above, the Department concurred in GSL's Motion to Dismiss.

3. DCC's Objection to GSL's Motion to Dismiss

As noted above, DCC argues that it has standing because it was required to but did not receive notice of the Shoreland Permit. DCC argues that pursuant RSA 483-B:3, when the standards and practices established in RSA 483-B conflict with other local or state laws and rules, the more stringent standard shall control. Further, because RSA 482-A:8 provides notice to municipal conservation commissions, it is a stricter notice standard and therefore, should control.

DCC also argues that GSL's attempt to disaggregate the project in an "uncoordinated, unplanned and piecemeal" way is far from the objective of the legislature in "enacting Shoreland Permit and consistency requirements of RSA 483-B." *See* DCC Objection at 6. DCC contends that all the impacts of the activities related to the proposed landfill should be considered in the aggregate. DCC also argues that to the extent that it is a party to the proceedings concerning one of the other permits, then it has a cognizable interest sufficient to confer standing to challenge the Shoreland Permit. DCC contends that RSA 483-B:5-b and the shoreland protections rules do not require permits for projects that are also subject to permitting under RSA 482-A, which includes avoidance and minimization requirements. Therefore, the Shoreland Permit in the instant case could have and should have been part of a universal permit. *See* DCC Objection at 8.

4. Analysis

DCC maintains that it was required to receive notice of the Shoreland Permit application, and the failure to provide that notice is actionable harm conferring standing to maintain this appeal. Notice of a shoreland permit application under RSA 483-B:5-b is required to be given to the "governing body of the municipality or municipalities in which the property is located" which means the property must be within the governing body's geographical jurisdiction. RSA 483-B:5-b, IV-a. As stated in DCC's NOA, the site-access location would only be in Bethlehem, not Dalton. No work under the Shoreland Permit is authorized to take place in Dalton. Therefore, there was no requirement for DCC to be given notice of this permit.

Moreover, even if the work under the permit was to be conducted in the Town of Dalton, RSA 483-B:5-b, IV-a requires notice to be given to the "governing body" of the municipality. DCC has not asserted that it is the governing body for the municipality of the Town of Dalton. Further, based upon the record, it does not appear that the governing body for the Town of Dalton, that being the Selectboard, has authorized DCC to maintain this appeal in its name. *See* Exhibit A to

GSL's Motion to Dismiss. Accordingly, DCC has failed to demonstrate that it was entitled to notice under RSA 483-B:5-b, IV-a. Because there was no requirement to send notice to DCC under RSA 483-B, there can be no injury therefrom.

DCC's argument that it was entitled to notice under RSA 482-A:8 is similarly flawed. DCC posits that if the Shoreland Permit were assessed in the aggregate, then notice that it received a dredge and fill permit under RSA 482-A:8 would operate to require notice of the Shoreland Permit under RSA 483-B. In support of its argument that the Department was required to assess all the permits under this project in the aggregate, DCC relies on RSA 482-A:11, V. Under RSA 482-A:11,V, in order to prevent developers from breaking a "major" impact wetlands project into a series of "minor" projects and thereby avoiding the public hearing requirement, RSA 482-A:11,V requires that "a series of minor projects undertaken by a single developer or several developers over a period of 5 years or less… [if] when considered in the aggregate, amount to a major project in the opinion of the department" may also "be subject to a public hearing as provided in RSA 482-A:8." DCC's reliance upon RSA 482-A:11, V is misplaced because the statute clearly refers to wetlands permitting projects. In contrast, permits issues under RSA 483-B, Shoreland and Water Quality Protection have no such requirement.

The premise that is common to DCC's arguments is that if RSA 482-A and RSA 483-B, are applied interchangeably, it would have standing. However, apart from its broad policy arguments, it has failed to submit sufficient authority to wit: statutes or regulations that would enable or require the Department program to evaluate its permits beyond the jurisdictional limits of that program. As noted by the New Hampshire Supreme Court, the scope of chapter 482-A limits the Department's assessment to the assessment of construction activities in wetlands when it issues dredge and fill permits. *Greenland Conservation Commission v. N.H. Wetlands Council*, 154 N.H. 529, 535 (2006). DCC has otherwise not submitted sufficient authority to support its argument that the statutes and regulations established under RSA 482-A can be used to assess permits that are not in jurisdictional wetlands. *Id*. Regarding DCC's policy argument that an aggregated approach to the various permits is required for the project, the proper place for making that argument is before the legislature. *Id*.

Accordingly, viewing the notice of appeal in the light most favorable to DCC, it has failed to meet its burden that it has standing to bring this appeal.

A. Failure to State a Claim

GSL argues that DCC has failed to state a claim also based on the contention that the Department and GSL failed to notify DCC of the Shoreland Permit; that the Department failed to consider the project in the aggregate; and that the GSL failed to use the least impactful alternative which, in turn failed to meet the avoidance and minimization requirements under RSA 482-A. It is not entirely clear the DCC is raising the issue of notice and the failure to assess this project as one unified project in aggregation, as claims that the Department's decision was unlawful or unreasonable. To the extent that these are separate claims, as noted above, there is no discernable difference between DCC's arguments in support of standing, from the argument it makes in support of its claims that the Department's actions were unlawful or unreasonable. In both cases, DCC arguments are based upon the same premise that landfill projects should be considered as one unified project and the statutes, rules and regulations applicable to permits issued under RSA 482-A should be applied to permits issued under RSA 483-B. As noted above, apart from making a policy argument, DCC has not submitted sufficient legal authority to support this contention.

Regarding DCC's avoidance and minimization claim, DCC advances that this criterion in RSA 482-A should have been applied to the Shoreland Permit. In support of its contention, DCC argues that under RSA 483-B:5-b, IV, "[i]mpacts in the protected shoreland that receive a permit in accordance with RSA 482-A and commercial or industrial redevelopment in accordance with RSA 485-A:17 shall not require a permit under this section." Therefore, DCC argues that the Shoreland Permit could have and should have been part of a universal application under RSA 482-A. *See* DCC Objection at 8.

At the outset, the avoidance and minimization criteria under RSA 482-A exist within the wetland's permitting process. DCC has not alleged, and the record permit itself indicates that none of the work authorized by the Shoreland Permit will occur in wetlands jurisdictional areas and the permit requires approvals for work that have any wetlands impact. *See* NOA, Permit Attachment. A logical reading of RSA 483-B:5-b, IV, dictates that in order for the Department to issue a permit under RSA 482-A, there would necessarily have to be wetlands within the protected shoreland. *See* RSA 482-A:3, I (a). As previously noted, the Shoreland Permit does not authorize any work in wetlands, and no wetlands are being affected under the Shoreland Permit. As such, DCC's reliance on RSA 483-B:5-b, IV to support its claim that GSL failed to use the least impactful

alternative and failed to meet the avoidance and minimization requirements under RSA 482-A, is misplaced.

V. CONCLUSION

In conclusion, for the foregoing reasons, GSL's motion to dismiss the appeal is **GRANTED**.

So ordered,

Dated: May 1, 2026

/s/ Mary E. Maloney

Mary E. Maloney, Esq., NH Bar 1603
Hearing Officer, Wetlands Council

In accordance with Ec-Wet 203.17(b)(4), the Council hereby notifies the parties that any party whose rights are directly and adversely affected by this decision may move for reconsideration pursuant to RSA 541:3 and Ec-Wet 203.18.