STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WASTE MANAGEMENT COUNCIL

Docket No. 20-14 WMC

In re: Conservation Law Foundation, Inc. Appeal

MOTION FOR REHEARING

Pursuant to RSA 541:3 and N.H. Code Admin. R. Env-WMC 205.16(a), North Country Environmental Services, Inc. ("NCES") moves the council for a rehearing of the May 11, 2022, order and its orders of March 17, 2021, and May 11, 2021 denying NCES's motion to dismiss for lack of standing. This motion rests on the following grounds.

I. Introduction

Since 1991 New Hampshire's public benefit statute has been susceptible of being applied to discriminate against disposal of out-of-state waste in the state. Until 2020, NHDES applied the statute in a way that was consistent with its plain language and substantially mitigated its burdens on interstate commerce. In an apparent attempt to ratchet up the statute's discriminatory effect on solid waste imports, in 2020 the department jettisoned nearly thirty years of precedent and determined that RSA 149-M:11 included a "function of time" element. This determination was not only unsupported by the statutory language, it was also inconsistent with the three decades of administrative gloss NHDES had given RSA 149-M:11, III(a).

By order of May 11, 2022, the council, through its hearing officer, abandoned all pretense that 149-M:11 does not facially discriminate against the use of New Hampshire commercial landfills for the disposal of waste originating out of state. Taking NHDES's ill-considered "function of time" analysis to its logical conclusion, the order would limit permitting of commercial landfill capacity to only that which is necessary to accommodate waste generated in

New Hampshire. Through this abrupt departure from NHDES's long-standing application of the statute to mitigate its burden on interstate commerce, the department and the council have laid bare the discriminatory intent and effect of RSA 149-M:11, rendering it invalid as it violates the dormant commerce clause. They have done so, moreover, in the absence of any change in the statutory language or any rulemaking and at the insistence of an environmental activist group that has no standing under the New Hampshire constitution.

This radical departure from thirty years of permitting practice and the resultant invalidity of RSA 149-M:11 has been avoidable at each step along the way, and it remains avoidable. Through rehearing the council can remedy its missteps in the following ways: construe the statute in a manner consistent with the department's administrative gloss and the rules of statutory construction; reconsider the prior hearing officer's orders determining that CLF has standing to bring this appeal; and reconsider the mixed questions of law and fact that were impermissibly resolved solely by the hearing officer.

Leaving in place Section C of the May 11 order not only threatens disruption of NCES's ability to provide disposal services to the residents and businesses of 150 New Hampshire cities and towns, it poses an even more pronounced threat to the validity of the approval NHDES granted to the Mt. Carberry landfill in April of 2022. Because those threats are traceable directly to the department's and the council's effectuation of the facially discriminatory language of RSA 149-M:11, it is inevitable that there will be further litigation challenging the constitutionality of the statute. The net result of the "function of time" analysis and the May 11 order will not be – as NHDES, the council, and CLF seem to hope – the reduction of importation of out-of-state waste. Rather, it will be the invalidation of the public benefit scheme and the loss of the

moderating effect on waste importation that the department's long-standing application of the statute achieved. To avoid these consequences, NCES moves for rehearing.

II. Statement of Facts

The public benefit criteria set forth in the current version of RSA 149-M:11 have been substantively unchanged since 1991. In that year, the general court amended a prior version of RSA ch. 149-M to include the public benefit criteria that are set forth in RSA 149-M:11 today. N.H. Session Laws, 1991, 367:3. Those criteria, together with the inclusion of RSA 149-M:3, XI in the statute, can be read to have the purpose of discriminating against the use of New Hampshire landfill capacity for the disposal of waste originating out of state. The legislature created a joint legislative committee for recodifying the solid waste laws of the state in 1993, charging that committee with repealing laws that are no longer pertinent, correcting inconsistencies in current law, and amending existing law to "further define and clarify the intent of the general court" as to solid waste management and activities. N.H. Session Laws, 1993:133. As a result of the work done by the joint legislative committee, in 1996 the general court repealed RSA ch. 149-M and contemporaneously re-enacted it in its current form. N.H. Session Laws, 1996: 251:2. The 1996 re-enactment included the same public benefit criteria originally adopted in 1991 and presently set forth in RSA 149-M:11, III(a). *Compare id.* with RSA 149-M:11, III(a). There was no substantive change to the requirements of RSA 149-M:11 III(a) and V despite the joint legislative committee's months-long assessment of every section of the statute, and those sections have not been amended or otherwise altered in the three decades that have elapsed since its adoption.

As NCES has maintained from the outset, until 2020 NHDES applied RSA 149-M:11 in a consistent manner. *See* Hearing Ex. Permittee-2. For the reasons discussed *post* at 29-34, the

state lacks authority under the federal interstate commerce clause to enact or apply statutes in a way that would designate or reserve privately owned waste disposal capacity for the disposal of New Hampshire waste. For nearly thirty years NHDES applied the public benefit requirement as a means of determining whether there would be a need for proposed capacity over a twenty-year planning period to accommodate New Hampshire waste, but it did not attempt to give in-state waste priority or limit permitting in a way that would burden interstate commerce by discriminating against waste originating out of state. Put another way, NHDES granted a permit if there was not enough permitted capacity to accommodate projected New Hampshire waste over the twenty-year planning period and the applicant's proposed capacity would be used during that period (referred to in this motion as the "aggregated capacity need method"). NHDES did not make its permitting decisions based on *when* during the twenty-year period there would be a shortfall of disposal capacity for New Hampshire's solid waste needs (what NHDES now calls a "function of time" analysis). A representative survey of the department's prior permitting decisions demonstrates that it consistently applied the aggregated capacity need method before 2020[1]:

- **2003 – Mt. Carberry Expansion (Exhibit A)** – The Mt. Carberry landfill located in Success Township, New Hampshire sought a permit modification authorizing it to increase its waste acceptance rate from 32,500 tons per year to 120,000 tons per year. Ex. A at A-3. The applicant presented information for a planning period from 2003 to 2022, and NHDES

[1] For each exemplar discussed in this motion, NCES has provided an exhibit consisting of a table reconstructing the projected waste generation and available state disposal capacity along with the portions of the applications and the permitting decisions from which the table was derived. It is necessary to reconstruct this information "as a function of time" – as NHDES now calls it – because until 2020 the department did not undertake this analysis, as the question of *when* the shortfall would occur was irrelevant to its permitting decisions. NCES provides Exhibits A-F and H pursuant to Env-WMC 205.16(4) to demonstrate why reconsideration of the order is required.

authorized the increased acceptance rate in a permit dated March 7, 2003, requiring the facility to provide "20 years *or more*" (emphasis supplied) of capacity to New Hampshire waste generators. *Id.* at A-4, A-6, and A-7. Because the permit authorized twenty years of operation, and thus spanned the entire planning period, NHDES required the facility to operate until at least December 31, 2022. *Id.* The applicant provided data quantifying the annual amount of waste to be generated in New Hampshire during the twenty-year planning period and identified the remaining permitted capacity for other landfills and disposal facilities operating in the State. *Id.* at A-6 and A-7. Retrospective analysis of these data demonstrates that a shortfall would not occur until 2011 (*id.* at A-1), yet NHDES authorized Mt. Carberry to commence operations in 2003. *Id.* at A-3. This analysis also establishes that the projected shortfall in 2011 was only 1,075 tons, yet the permit entitled the Mt. Carberry facility to accept 120,000 tons of capacity in 2011. *Id.* at A-1, A-3.

- **2003 – NCES Stage IV (Exhibit B) -** One week after NHDES issued the Mt. Carberry approval, it approved the Stage IV expansion of the NCES landfill for a life expectancy of 10.5 years. Ex. B. at B-4. NCES provided data projecting both the volume of waste requiring disposal for each year of the planning period spanning 2005 to 2025 and the capacity remaining in the state during the same period. *Id.* at B-8 to B-12. Retroactive analysis of the data demonstrates that there was a shortfall in permitted capacity for each year of the proposed ten-year operating period. *Id.* at B-1. However, for the first three years of the facility's life, the amount of the projected shortfall was less than the annual capacity approved by NHDES.[2] *Id.* For example,

[2] NCES's projections did not include the increase in annual capacity approved the previous week for Mt. Carberry. Consequently, at the time NHDES approved the Stage IV permit the shortfall was actually 87,500 tons per year (i.e., the difference between Mt. Carberry's former approved annual capacity of 32,500 tons and its newly approved annual capacity of 120,000 tons) less than the amounts reconstructed in Exhibit B. Given that the public benefit analysis is effective "on the date a determination is made under this section" (RSA 149-M:11, V(c) and (d)), if the *timing* of the shortfall in the twenty-year

NCES's application demonstrates that the shortfall in 2006 would be approximately 113,000 tons, but the permit authorized NCES to fill 140,000 tons per year. *Id.* at B-1 and B-4. It was not until 2008 that the shortfall was projected to be more than 140,000 tons per year. *Id.* at B-1.

- **2014 – NCES Stage V (Exhibit C)** – In 2014, NHDES issued an approval for Stage V of the NCES facility. This approval required NCES to operate Stage V in a manner that provided 5.3 years of disposal capacity. Ex. C at C-2. A reconstruction of the projections of waste generation and permitted disposal capacity for 2014-2034 included with the Stage V application demonstrate that there would be *no* shortfall during the proposed 5.3-year operating period of Stage V. *Id.* at C-1. NCES demonstrated that a shortfall of at least 6.3 million tons would occur during the 20-year planning period using the aggregated capacity need method, but that shortfall would not occur until after Stage V completed operations. *Id.* at C-1 and C-6.

- **2018 – TLR Turnkey Phases 1-17 (Exhibit D)** – Waste Management of New Hampshire, Inc., obtained a permit for an expansion of 15.9 million cubic yards for its Turnkey landfill in 2018. Ex. D at D-2. Facility operations, pursuant to the permit, were to commence on January 1, 2021, and continue through at least June 30, 2034. *Id.* at D-3 and D-4. A reconstruction of the data provided in the application demonstrates that a shortfall would not occur until 2024, and for the first three years of the new cell's operations there was a surplus of capacity: 753,458 tons per year ("TPY"), 604,226 TPY, and 7,442 TPY, respectively.[3] *Id.* at D-

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planning period were relevant to NHDES's public benefit requirement it would have to have taken the increase in Mt. Carberry's capacity into account. There is nothing in the Stage IV approval that suggests that NHDES considered the new Mt. Carberry capacity in any way as part of the public benefit analysis for Stage IV.

[3] CLF appealed this permitting decision to the council, but it did not challenge the department's determination as to capacity need despite the absence of a shortfall for the first three years of operating life. *See* Docket No. 18-10 WMC, Notice of Appeal.

1. The department approved this permit and authorized 13 years of additional capacity. *Id.* at D-4.

- **2019 – Mt. Carberry Stage 12 (Exhibit E)**– NHDES approved an expansion of the Mt. Carberry facility on February 25, 2019, and required the facility to comply with its public benefit condition on the earlier of its commencement of operations or January 1, 2023. Ex. E at E-2 and E-3. The facility is required to operate for 2.3 years through at least April 29, 2025. *Id.* at E-4. A retrospective analysis of Mt. Carberry's projections of in-state waste generation and permitted disposal capacity for 2017 to 2036 identified a shortfall of 6.1 million tons during the 20-year planning period but with the shortfall occurring in 2024, nearly two years into the projected lifespan of the facility. *Id.* at E-1 and E-6.

The department's 2013 denial of a proposed expansion by Mt. Carberry is not only consistent with the aggregated capacity need method, which it employed in each example discussed above, it also sheds light on how NHDES applied the language "a capacity need for the proposed type of facility shall be deemed to exist to the extent that the proposed facility satisfies that need" as used in RSA 149-M:11, V(d). Mt. Carberry 2013 Permit Materials (Ex. F) at F-2 and F-3. Mt. Carberry's application projected the waste to be generated in the 2009-2029 planning period and the remaining permitted disposal capacity in the state during that same time period. *Id.* at F-3 to F-4. Mt. Carberry proposed a twelve-year operating period commencing in 2020, and its submittal demonstrated that a shortfall in capacity would occur in approximately 2023. *Id.* at F-2 and F-6. In its October 3, 2013 letter, NHDES concluded that, because Mt. Carberry had enough permitted capacity to operate until 2048 (twenty years beyond the planning period contemplated by the application), the applicant "does not address how adding 12 years of additional [sic] capacity to a landfill that already has 37 years of existing capacity could help

satisfy a capacity shortfall in the region during the next 20 years." *Id.* at F-7. In other words, NHDES construed RSA 149-M:11, V, as prohibiting it from approving capacity that will be used beyond the extent of the 20-year planning period even if there is a shortfall within the planning period.

In 2020, with no amendment to the statute, no rulemaking, and no explanation to the public or the regulated community, NHDES unilaterally changed course in how it applies the public benefit statute. For the first time in the nearly thirty-year history of RSA 149-M:11 the department read into it a "function of time" component requiring it to examine *when* in the twenty-year planning period a shortfall in statewide capacity would take place.

NCES applied for an expansion of its landfill into Stage VI on January 14, 2019, and proposed to provide disposal capacity for 2.3 years[4], commencing in 2021, at the same rate as it had been receiving waste in Stage V. Hearing Ex. Appellant-5 at Summary Pages 2 and 32. Just as each commercial landfill had done since the advent of the current public benefit statute in 1991, NCES projected the waste generation and the remaining permitted disposal capacity for the state over a planning period spanning 2020 to 2039. *Id.* at 27. NCES projected that a shortfall of at least 3.8 million tons would occur during that planning period and concluded, based on the statutory language and the manner in which NHDES had applied it on many occasions in the past, that Stage VI would provide a public benefit. NCES's application did not address when in the twenty-year planning period the shortfall would take place, but it was evident from the data in the application that there would not be a shortfall until after the relatively brief projected lifespan of Stage VI had expired. *See id.* at 32.

[4] Pursuant to agreements with the Town of Bethlehem, there are constraints on the area of its land into which it can expand its landfill. Stage VI is the final lateral expansion permissible under these agreements, so NCES did not have the alternative of proposing a larger expansion as a means of lengthening the operating life of Stage VI.

NHDES did not reject the application but found it administratively complete. It requested and received supplemental information from NCES to enable it to conduct its technical review. It held a public hearing on the application and received dozens of written comments from the public on it. *Id.* at 2-4. More than a year after it received the application, and as the statutory deadline for its decision was approaching, RSA 541-A:29, II and RSA 149-M:12, III, NHDES informed NCES that the application would be denied because there would not be a shortfall in capacity until 2025, after Stage VI ceased operations, and thus there was no public benefit for the proposed facility. *See* Hearing Ex. Permittee-2.

Rather than accept a denial on its application, NCES withdrew it in a letter dated February 11, 2020. *Id.* In its withdrawal letter, NCES set forth its multiple objections to the department's insinuation of the "function of time" element into the statutory scheme and pointed out that because it was not based on the statutory language it would be impossible for NCES to know how to satisfy it. *Id.* at 1-3. Based solely on guidance from NHDES, NCES submitted a new application for Stage VI on March 24, 2020. Hearing Ex. Appellant-7 at 1. Because of the areal constraints imposed on the cell by its agreements with the Town of Bethlehem, NCES could not propose a larger cell. Instead, it proposed extending the life of Stage VI. Specifically, the new application contemplated a six-year operating period, with one year of that capacity provided after the department's projected shortfall in 2025.[5] *See* Hearing Ex. Permittee-1 at 20-14 WMC NCES-0010 and Hearing Ex. Appellant-8 at Summary Page 43. NCES's application noted and reserved its objections to NHDES's use of the "function of time" concept in applying public benefit. Hearing Ex. Permittee-1 at 20-14 WMC NCES-0001. The use of that concept has

[5] NCES accepts waste from residents and businesses in approximately 150 New Hampshire municipalities. Hearing Ex. Permittee-1 at 20-14WMC NCES-0011. No commercial landfill facility can interrupt its services to its customers without substantial disruption and expense to those customers.

the effect of giving greater priority to the use of New Hampshire capacity for waste generated in the state, furthering the facially discriminatory purpose of RSA 149-M:11.

NHDES issued a permit to NCES for Stage VI on October 9, 2022, requiring that Stage VI operate until December 31, 2026, to satisfy the "function of time" element of public benefit. *See* Notice of Appeal ("NOA") (11/9/20) at Permit, Page 8. On November 9, 2022, CLF filed a notice of appeal challenging the department's permitting decision, and alleging that CLF had standing because it has members who own property or reside near the NCES landfill and would thus be adversely affected by the noise, odor, and traffic allegedly caused by the expanded landfill operations. NOA at 4. NCES moved to dismiss CLF's appeal for lack of standing on February 8, 2021, arguing that CLF lacked organizational standing since the organization itself had suffered no alleged harm due to the permitting decision, and CLF alleged only a bare fraction of its membership was affected. Mot. to Dismiss (2/8/21) at 7-8. NCES also asserted that those of CLF's members whom it claimed would be affected by the permit were not sufficiently identified, and these members' alleged harm was merely speculation on future negative impacts which is insufficient to confer constitutional standing even on the members themselves. *Id.* at 8-10. Because standing is a mixed question of law and fact, NCES also requested an evidentiary hearing on the CLF's members' claims of harm. Reply to Obj. to Mot. to Dismiss (3/1/21) at 12.

On March 17, 2021, the previous hearing officer, David Conley, Esq., denied the motion to dismiss. Order (3/17/21). He cited the rules of the other environmental councils to justify this decision; while the waste management council's rules do not address organizational standing, other councils' rules purport[6] to grant organizational standing if even one member of the organization is affected by the challenged decision. *Id.* at 2. Appearing to also rely upon federal

[6] As discussed below, standing is a matter of constitutional law and cannot be granted by statute or rule in a manner inconsistent with the state constitution.

case precedent, Mr. Conley determined that CLF possessed organizational standing because it alleged that at least one of its members was adversely affected by the permitting decision. *Id.* at 2. He held that alleged (but unproven) future noise, odor, view, and property value impacts were sufficient to establish standing since it was "reasonably foreseeable" that these impacts would continue if the NCES facility expanded into Stage VI. *Id.* at 3. He also concluded that two CLF members allegedly affected by the permitting decision, who lived about one and two miles from the landfill, were sufficiently proximate to warrant standing since they had a view of the landfill from their residences. *Id.* at 2-3. NCES moved for reconsideration on March 26, 2021, and again requested an evidentiary hearing, but Mr. Conley denied the motion and the request for an evidentiary hearing on May 11, 2021. NCES Mot. for Reconsideration (3/26/21); Order (5/11/21).

NCES then sought to dismiss CLF's notice of appeal for failure to state a claim. Mot. to Dismiss (6/30/21). CLF's appeal challenged NHDES's determination that NCES had satisfied each element of RSA 149-M:11, III, and NCES argued that CLF's claims were either based on incorrect interpretations of the plain language of the statute, or collaterally estopped because it previously litigated the same issues to finality in its appeal of the 2018 permit issued to the Turnkey facility. *Id.* CLF objected, and on September 3, 2021, Mr. Conley granted NCES's motion with respect to one claim. Order (9/3/21) at 6. He dismissed CLF's claim that it was unlawful or unreasonable for NHDES to determine that NCES satisfied the criteria set forth in RSA 149-M:11, III(a). *Id.* He concluded that substantial public benefit, as a "matter of statutory interpretation," is defined by RSA 149-M:11, V, and while it "is obvious that [Stage VI] has been designed to fill a need only briefly for disposal capacity, the legislative scheme does not currently provide for a further temporal or other inquiry into whether a given proposal is

'substantial' or not." *Id.* He also concluded that New Hampshire law does not "provide a judicial gloss" to the statutory definition. *Id.*

CLF successfully obtained reconsideration of Mr. Conley's order with the successor hearing officer, Zachary Towle, Esq., as to the RSA 149-M:11, III(a) criterion, arguing that the question of whether Stage VI provided a sufficient public benefit was a factual one that should be determined by the council after the hearing, rather than a legal question that could be settled by the hearing officer. Mot. for Reconsideration (9/23/21) at 4-5. Mr. Towle granted CLF's motion, overruling Mr. Conley's decision. Order (11/19/21). Mr. Towle reinstated CLF's claim that the capacity need determination was unlawful and found that Mr. Conley's[7] earlier interpretation of the statute was incorrect, holding instead that the statute limited a finding of capacity need to situations where a proposed facility will "resolve" a waste disposal shortfall. *Id.* at 3-6. He also concluded that the determination of short- and long-term need for the facility was separate from the capacity need measurement and was an instruction to NHDES to determine if the facility was "necessary." *Id.* Each of these determinations was unprecedented.

The council held a two-day hearing on the appeal on February 18 and 22, 2022. It then deliberated and ruled against CLF on each alleged ground in CLF's notice of appeal. The council unanimously approved the following motions (among others):

1. DES measured the short and long-term capacity requirement when issuing the permit.

2. DES acted reasonably in measuring the long-term capacity needs required by statute when issuing the permit.

3. DES was lawful in finding a capacity need for the facility during the lifetime of the permit.

[7] Mr. Conley had presided over council appeals since at least 2012 and thus was thoroughly familiar with RSA ch. 149-M. Indeed, Mr. Conley presided over the 2018 appeal of the Turnkey permit, and while the capacity need criteria was not at issue in that case, it did involve detailed consideration of RSA 149-M:11 in consultation with the council.

4. DES acted reasonably in issuing a permit that addressed capacity needs during the life of the permit.

Exhibit G at ¶¶ 8-11.[8]

On May 11, 2022, the hearing officer issued an order that was faithful to the results of the council's deliberations with one exception. Without meeting and conferring with the council, the hearing officer ruled that NHDES had acted unlawfully in determining that there was a capacity need for Stage VI under RSA 149-M:11. Order (5/11/22) at 6. Under the hearing officer's rationale, NHDES cannot lawfully find a public benefit for new landfill capacity unless *all* of that capacity is provided during a time when there is a shortfall in capacity for waste generated in New Hampshire. *Id.* at 11-12. One result of the hearing officer's order is that NHDES's permitting decisions must be based on the need for capacity to dispose of waste generated in New Hampshire, thereby effectuating the discriminatory intent of RSA 149-M:11. *Id.* at 12. While NHDES's "function of time" analysis burdens interstate commerce by accentuating the constraints on permitting designed to favor in-state waste, the hearing officer's order aggravates this burden substantially. CLF has explicitly recognized this in its press release regarding the hearing officer's order: "This ruling makes clear that the state cannot permit new landfills that aren't needed to satisfy New Hampshire's disposal needs. It's an important decision not only to get the state off its current landfill-expansion treadmill but also to prevent the continued influx of out-of-state waste." CLF Press Release, "CLF Prevails on Critical Issue in Bethlehem Landfill Appeal," May 12, 2022, https://www.clf.org/newsroom/clf-prevails-on-critical-issue-in-appeal-

[8] The hearing in this matter was recorded, and NCES requested a transcript copy of the recording by email to the appeals clerk on June 8, 2022. Although the appeals clerk indicated that he was addressing NCES's request on June 9, 2022, NCES did not receive the requested materials before the deadline for this motion. Accordingly, NCES provides an affidavit from a paralegal assisting on the case who attended the hearing and observed those proceedings. *See* Exhibit G, ¶¶ 1-3.

of-bethlehem-landfill-permit/, last accessed June 8, 2022. The order therefore transforms NHDES's partial abandonment of the aggregated capacity need method – which has protected the state from a commerce clause challenge to RSA 149-M:11 for thirty years – into bald-faced discrimination against waste originating outside of New Hampshire.

On April 22, 2022, the department approved the Phase III-A permit for the Mt. Carberry landfill. Excerpt of NHDES Application Review Summary (4/22/22) (Ex. H) at H-2. That cell will provide 4.9 million cubic yards of capacity and operate from 2025 through 2041. *Id.* at H-2 and H-3. The department's application review summary accompanying the approval, however, employs the "function of time" analysis to determine that there will not be a shortfall in capacity necessary to accommodate in-state waste until 2034. *Id.* at H-3. This means that Phase III-A will be providing capacity for roughly ten years before there is – by NHDES's reckoning – a shortfall in capacity. *See id.* Although CLF submitted comments to NHDES on Mt. Carberry's application arguing that the department could not approve new capacity that would be used before 2034, CLF did not appeal the approval of Phase III-A. This is likely because it views the Mt. Carberry expansion as an effort to "solve the State's problem with out-of-state waste," as CLF concludes that this facility accepts less foreign waste than its competitors. Unless the hearing officer's order is vacated on rehearing or by the supreme court, however, Mt. Carberry's permit will be subject to being vacated as unlawful.

NCES now seeks reconsideration of all rulings of the hearing officers against it.

III. Argument

A party directly affected by a council decision may seek a rehearing within 30 days of the order. RSA 541:3. A motion for rehearing must specify all grounds for rehearing, and such rehearing may be granted if the council determines that good cause exists. *Id.*; *see also* Env-

WMC 205.16(b) (motions for rehearing pursuant to council rules must provide the basis of the party's aggrievement; the findings, conclusions, or conditions to which the movant objects; the basis for the objections; whether the moving party seeks to present new or additional evidence and the nature of such materials; and the nature of the relief requested). A party may not appeal a council decision to the court until it has first sought a rehearing. RSA 541:4. There is no distinction between "rehearing" and "reconsideration." N.H. Code Admin. R. Env-WMC 205.16(a).

NCES seeks reconsideration of four issues:

1. Both the language of the statute and the long-standing construction and application of the statute by NHDES establish that a proposed facility provides a substantial public benefit if it will provide disposal capacity for in-state waste during a twenty-year measuring period in which there is a shortfall of capacity, and the hearing officer erred by concluding that a facility can only satisfy the "capacity need" requirement to the extent the proposed capacity will be provided after a shortfall occurs.

2. The hearing officer erred because his application of RSA 149-M:11 results in invalidity of the statute under the dormant commerce clause.

3. The hearing officer improperly resolved mixed questions of law and fact without consulting with the council as required by statute.

4. The hearing officer erred by not dismissing this case on jurisdictional grounds for lack of standing in its March 17, 2021 and May 11, 2021 orders.

A. Request for Rehearing as to Determinations in May 11, 2022 Order Regarding RSA 149-M:11, III(a)

The criteria for a public benefit determination are well-trod ground in this case. The department must evaluate:

> (a) The short- and long-term need for a solid waste facility of the proposed type, size, and location to provide capacity to accommodate solid waste generated within the borders of New Hampshire, which capacity need shall be identified as provided in paragraph V.
>
> (b) The ability of the proposed facility to assist the state in achieving the implementation of the hierarchy and goals under RSA 149-M:2 and RSA 149-M:3.

> (c) The ability of the proposed facility to assist in achieving the goals of the state solid waste management plan, and one or more solid waste management plans submitted to and approved by the department under RSA 149-M:24 and RSA 149-M:25.

RSA 149-M;11, III(a)-(c). This motion focuses on Section C of the May 11 order and the criterion set forth in RSA 149-M:11, III(a), which requires the department to assess the "short- and long-term need" for the proposed facility. The department must determine whether there is such a need for a facility "to provide capacity to accommodate waste" generated in New Hampshire, and the general court prescribes the formula for projecting the State's capacity need in Paragraph V. RSA 149-M:11, III(a).

The May 11 order addressed the "capacity need" component of RSA 149-M;11, III(a) with two separate inquiries: (1) whether the "existence" of RSA 14-M:11, III(a) implied that a capacity need must be found to determine that a facility provides a public benefit and (2) whether NHDES can determine that a proposed facility provides a substantial public benefit if the facility will operate "for periods without a capacity need." Order (5/11/22) at 7 and 13. For the first inquiry, Mr. Towle grappled with NHDES's arguments as to the capacity need requirement and concluded that the department believed that the statutory criterion did not require there to be a capacity need "during the lifetime of a proposed facility" in order to provide a substantial public benefit. *Id.* at 8. By rejecting this argument, he effectively and impermissibly accepted NHDES's unilateral reinterpretation of the statute in the context of the first NCES Stage VI application as binding law and utilized that approach – focusing on when a facility will operate in proximity to the shortfall event – to determine whether a capacity need exists. [9]

[9] As NHDES correctly notes in its motion for rehearing, the department's preliminary conclusions in the application review summary for the withdrawn Stage VI application were not subject to appeal, as this council can only hear appeals as to the department's "final action on an application." RSA 21-O:9, V and RSA 21-O:14, I(a); *see* NHDES Mot. for Rehearing (5/31/22) at 5-6. That application was withdrawn before NHDES reached a final, appealable decision.

Mr. Towle evaluated the statutory language and construed the meaning of the word "satisfies" set forth in RSA 149-M;11, V(d) to mean that "capacity need is limited in scope based on a proposed facility's ability to 'resolve' said capacity need." *Id.* at 9. He also concluded that the legislature's use of the present tense "satisfies" "imposes a present-action relationship between the proposed facility and the proposed facility need," meaning that the facility must have a "present effect" on capacity need and that it must also "satisfy" that need "to some degree." *Id.* at 10.

With this logic, the hearing officer concluded that a facility could not establish a capacity need pursuant to RSA 149-M:11, V if it proposed providing capacity before a shortfall would occur. *Id.* at 11. Mr. Towle determined that RSA 149-M:11 "does require a proposed facility to satisfy a capacity need during the lifespan of the facility, regardless of whatever other effects said facility may have on the future." Order (5/11/22) at 12. Applying that logic to the NCES permit, he then concluded that it was unlawful for NHDES to issue the contested permit because NCES proposed operating for a period of time before the expected shortfall would occur. *Id.* at 14-15. The hearing officer also determined that there is "no evidence that RSA 149-M:11 allows a partial finding of capacity need for a proposed facility" to satisfy the statutory requirement. *Id.* at 14.

The determination in Section C of the order is internally inconsistent with other sections of the order. In its evaluation of the "short- and long-term need" component of RSA 149-M:11, II(a), the hearing officer concluded that NHDES acted reasonably in finding such a need for the NCES facility. *Id.* at 3-6. The order states: "As the law pertaining to this matter is ambiguous in regards to what NHDES must consider when evaluating short-and long-term need, and the Council has determined that NHDES sufficiently determined short-and long term need when

deciding the permit, it cannot be said that NHDES acted unlawfully in its practices" regarding the short- and long-term need determination. *Id.* at 5. Accordingly, it denied CLF's appeal as to that issue. *Id.* at 6.

The same reasons exist on the record and in the order to justify the conclusion that the department also did not act unlawfully in its capacity need analysis. The council previously determined that NHDES acted reasonably in assessing the capacity need of the facility, *id.* at 15-16, and the hearing officer apparently found the statute to be ambiguous because he addressed the potential meanings and construction of "capacity need" in the context of RSA 149-M:11. *Id.* at 8-9. These conclusions should have led to the same result as the hearing officer's conclusion regarding the short- and long-term need for the facility: that it cannot be said that NHDES acted unlawfully in finding a capacity need for the NCES facility when the council determined that the department acted reasonably and the statute is ambiguous.

1. *Both the language of the statute and the long-standing construction and application of the statute by NHDES establish that a proposed facility provides a substantial public benefit if it will provide disposal capacity for in-state waste during a twenty-year measuring period in which there is a shortfall of capacity, and the hearing officer erred by concluding that a facility can only satisfy the "capacity need" requirement to the extent the proposed capacity will be provided after a shortfall occurs.*

The hearing officer determined that a facility can only satisfy the "capacity need" element of RSA 149-M:11, III(a) if it will provide capacity during the entire lifespan of the facility after a shortfall in capacity occurs. This analysis regarding capacity need abandons the aggregated capacity need method entirely to examine when the proposed facility would operate and whether that operating period commences on or after the shortfall event projected by the applicant and the department. *Id.* at 14. Using this approach, the hearing officer concluded that

NHDES acted unlawfully by granting a permit to NCES that would authorize the Stage VI facility to operate for a period *before* the expected shortfall occurs. *Id.* at 14-15.

RSA 149-M:11, III(a) examines the "short- and long-term need for a solid waste facility of the proposed type, size, and location to provide capacity to accommodate solid waste generated within the borders of New Hampshire, which capacity need shall be identified as provided in paragraph V." Paragraph V, then, describes the steps that the department must take to "determine the state's solid waste capacity need:"

> (a) Project, as necessary, the amount of solid waste which will be generated within the borders of New Hampshire for a 20-year planning period. In making these projections the department shall assume that all unlined landfill capacity within the state is no longer available to receive solid waste.
>
> (b) Identify the types of solid waste which can be managed according to each of the methods listed under RSA 149-M:3 and determine which such types will be received by the proposed facility.
>
> (c) Identify, according to type of solid waste received, all permitted facilities operating in the state on the date a determination is made under this section.
>
> (d) Identify any shortfall in the capacity of existing facilities to accommodate the type of solid waste to be received at the proposed facility for 20 years from the date a determination is made under this section. If such a shortfall is identified, a capacity need for the proposed type of facility shall be deemed to exist to the extent that the proposed facility satisfies that need.

RSA 149-M:11, V(a)-(d).

The hearing officer's errors as to this criterion are the product of his statutory interpretation. The legislature's intent is expressed in the words it utilized in the statute when considered as a whole. *State v. Pinault*, 168 NH. 28, 31 (2015). Construing a statute, then, the court will look first to the statute itself and construe the language according to its plain and ordinary meaning. *State v. Telles*, 139 N.H. 344, 346 (1995). The courts will "look elsewhere" for such meaning "only when the plain statutory language permits more than one reasonable

interpretation." *Id.* Statutes must also be construed to avoid an "absurd or unjust result." *Anderson v. Robitaille*, 172 N.H. 20, 23 (2019).

The hearing officer erred by embarking on the detailed statutory analysis set forth in his order, as the statute was unambiguous in the first place. This is demonstrated by the decades of consistent application of this statute by NHDES, *supra* at 4-7. It is further illustrated by Mr. Conley's order on NCES's motion to dismiss, which determined conclusively that the statute – as written – permitted no such analysis as to the temporal effect of a shortfall or when it might occur in relation to the proposed facility's capacity. Order (9/3/21) at 5-6. The council's unanimous reasonableness determination also supports this conclusion. Order (5/11/22) at 15-16.

Rather than adhere to the department's long-standing application of this statute to issue solid waste permits even if a facility would operate before an anticipated shortfall would occur, the hearing officer disturbs NHDES's *de facto* policy, in the absence of any legislative action, in a manner that violates legislative intent and upends the permitting procedures utilized by the department since the public benefit criteria was enacted in 1991. That is an error that warrants reconsideration.

Even assuming *arguendo* that the statute is ambiguous or otherwise subject to a different interpretation than the one applied by NHDES for several decades, the solution is not to chart a new path based on a single hearing officer's interpretation of that statute. Rather, the agency's long-standing application of the statute is entitled to deference. *See Appeal of Morrissey*, 165 N.H. 87, 91 (2013). "[W]here a statute is of doubtful meaning, the longstanding practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the

legislative intent." *Hamby v. Adams*, 117 N.H. 606, 609 (1977). This conclusion is underscored when the legislature amends a statute but does not disturb the section in dispute; in that instance, the legislature's inaction supports the conclusion that the agency's interpretation of the statute should prevail. *Tessier v. Town of Hudson*, 135 N.H. 168, 171 (1991).

In this case, other portions of RSA ch. 149-M have been revised over the years, but the legislature has not amended RSA 149-M:11, III(a) since it was enacted in 1996, and indeed it remains in the same form that it was in when it was originally enacted in 1991, even after a joint legislative committee evaluated whether revisions to the solid waste statute were necessary. *Cf., e.g.*, RSA 149-M:9 (requiring a solid waste permit to construct, operate, or initiate closure of a solid waste facility and defining standards for such applications; amended in 2003, 2007, 2008, 2018, 2019, and 2021). Accordingly, the agency's interpretation of RSA 149-M:11 and utilization of that statute in permitting decisions supports the conclusion that the department's interpretation reflects the legislature's intent. *Petition of the State Employees' Assoc. of N.H.*, 161 N.H. 476, 482 (2011). As demonstrated in this motion, NHDES historically did not examine the "lifespan" of the facility in its analysis of these criteria, and it only recently assessed when the shortfall would occur in 2020 (over NCES's objection). *See* Hearing Ex. Permittee-2.

Courts deviate from an agency's interpretation of a statute when it "clearly conflicts with the express statutory language or if it is plainly incorrect." *Appeal of Morrissey*, 165 N.H. at 92 (quoting *Appeal of Town of Seabrook*, 163 N.H. at 635, 644 (2012)). Neither justification for deviation applies in this case. NHDES's long-standing interpretation of RSA 149-M:11, III(a) does not "clearly" conflict with the express statutory language. Indeed, the hearing officer seems to conclude that there is no "clear" reading of the statutory language when he evaluates definitions for key terms. Order (5/11/22) at 8 (inferring the meaning of "need"), 10 (inferring

the meaning of "to the extent"), 9-11 (inferring the meaning of "satisfies"). Further, it cannot be said that the department's interpretation is "plainly incorrect" when it has formed the bedrock for permitting for more than three decades, resulting in the approval of thousands of tons of capacity, and all without any revision to the statute by the legislature.

In short, the hearing officer's conclusion in this matter is contradictory to the prior practices of: the department; its professional staff of engineers and employees with solid waste expertise; the regulated community and their consulting attorneys and engineers who assist in preparing public benefit statements; the previous hearing officer who presided over nearly a decade of council proceedings;, and the waste management council itself, which found the department's determination as to capacity need in this matter to be both lawful and reasonable.

Even if the statute could be considered ambiguous, NHDES's long-standing interpretation and application of the statute has created an administrative gloss from which neither NHDES nor the council can deviate without legislative authorization. Administrative gloss is a rule of statutory construction that pertains to ambiguous statutory language. *Anderson v. Motorsports Holdings, LLC*, 155 N.H. 491, 502 (2007). Agencies are prohibited from deviating from the administrative gloss applied to the statutes that they enforce without legislative action. A "statute is ambiguous [when] there is more than one reasonable interpretation of its language." *Bovaird v. N.H. Dep't of Admin. Servs.*, 166 N.H. 755, 761 (2014). When language is ambiguous, the courts "examine the statute's overall objective and presume that the legislature would not pass an act that would lead to an absurd or illogical result." *Estate of Gordon-Couture v. Brown*, 152 N.H. 265, 266 (2005).

Administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated

applicants over a period of years without legislative interference. *Anderson*, 155 N.H. at 501-02. "If an 'administrative gloss' is found to have been placed upon a clause, the agency may not change its *de facto* policy, in the absence of legislative action, because to do so would, presumably, violate legislative intent." *Petition of the State Employees' Assoc. of N.H.*, 161 N.H. at 482 (brackets and quotation omitted). NHDES impermissibly changed its *de facto* policy in 2020 when it suddenly abandoned the aggregated capacity need method and required NCES to demonstrate that it would provide capacity during a period of shortfall – something it had never required or otherwise incorporated into the public benefit determination in prior evaluations of RSA 149-M:11, III(a). The hearing officer takes that departure from the *de facto* policy even further by requiring *all* capacity to be provided during a period of capacity shortfall.

By requiring the department to determine the moment in time when a shortfall will happen and deny a permit if *any* portion of the capacity would be provided before that time, the hearing officer "writes into" the statute words and consequences not employed by the legislature, which is presumed to be intentional about the words it utilizes in legislation. *See In re J.P.*, 173 N.H. 453, 463 (2020) (legislature presumed not to enact superfluous or redundant words); *Monahan-Fortin Properties, LLC v. Town of Hudson*, 148 N.H. 769, 771 (2002) (courts will neither consider "what the legislature might have said nor add words that it did not see fit to include"). Specifically, he interprets the word "satisfies" to require temporal proximity between the lifespan of the facility and the expected shortfall to conclude that it is unlawful for NHDES to issue a permit if the permittee would provide capacity before the shortfall occurs. Order (5/11/22) at 14-15. The statute, however, makes no reference to the lifespan of a facility or its proposed operating period, nor does it direct NHDES or the applicant to pinpoint the moment in time when a shortfall is expected to occur. *See* RSA 149-M:11, III(a) and V; Order (5/11/22) at 9

and 11. This focus on the verb tense and "present-action" relationship between the facility and capacity need is untethered to the statute and contradicts the administrative gloss as to terms which the council concedes are undefined. *Id.* at 9-10. The hearing officer's analysis also ignores the function and effect of the word "which" in RSA 149-M:11, III(a), which specifically defines how capacity need is to be measured. Again, that section of the statute makes no reference to the lifespan of a facility or the projected date of a shortfall. The hearing officer's decision not only overruled the will of the legislature, then, but also disregarded the well-established canons governing statutory construction.

The hearing officer's emphasis on the temporal aspect of the shortfall misses the forest for the trees. The statute's requirement that capacity need exists "to the extent" it satisfies a shortfall is best explained by the 20-year planning period contemplated by the statute. RSA 149-M:11, V(d). If the department determines that there is a shortfall of 1 million tons during the 20-year planning period, and an applicant proposes providing 2 million tons of capacity, then there would be no public benefit for a facility of that size, as there is no benefit provided by that surplus of 1 million tons. This is exactly what justified NHDES's denial of Mt. Carberry's application in 2013. *See* Ex. F. There is a public benefit for that project only for 1 million tons, as that is the amount of capacity that will satisfy the projected 1 million ton shortfall. *When* that capacity would be provided has until recently been irrelevant to the department's analysis.

Prohibiting the issuance of a permit simply because some or all of the capacity would be consumed before the shortfall occurs would have the absurd and unworkable result of "threading the needle" to permit and construct a facility just in time for a capacity shortfall that may not actually occur when projected, or to require a permittee to stand by idly, waiting to bring a facility "online" for new capacity until such an event occurs. Few businesses can or would

submit to such a process, particularly where permitting and constructing a facility can be a years-long, multi-million-dollar endeavor. This construction of RSA 149-M:11, III(a) also unreasonably requires a pinpointed date and time on which the shortfall would occur – something that is all but impossible to generate. *See State v. Williams*, 143 N.H. 559, 562 (1999) (legislature not assumed to enact statutory language that would lead to an absurd result).

It is important to observe the effect of this order on customers, including New Hampshire residents, municipalities, and businesses that rely on solid waste capacity for budgetary and planning purposes. An effect of this order is that some New Hampshire municipalities may suddenly be without a destination for their solid waste for a period of years. For example, if NCES is projected to exhaust its capacity in 2027, but a shortfall is not projected to occur until 2034, then NCES will be unable to obtain additional capacity until 2034. In that seven-year interim, its customers – which include 150 towns and cities in this state – will have to search for another destination for their waste, and in the case of towns in the North Country, that will likely lead to increased transportation and disposal charges. *See* Hearing Ex. Permittee-1 at 20-14WMC NCES-0011 (describing NCES customers). Eliminating competitors from the marketplace in this manner also gives the facilities with remaining capacity after others close an economic edge, permitting them to charge whatever they see fit for waste acceptance since those towns and customers will have nowhere else to go with their waste. This cannot be what the legislature intended when enacting RSA 149-M:11, III(a), but it is a possible impact of the hearing officer's construction of the statute.

The council inquired about how a shortfall can be identified during deliberations on February 18, 2022, and witnesses from the department explained that there are "different ways" to calculate capacity need and anticipate when the shortfall will occur. The witness noted that it

is "extremely difficult" to know how waste is generated, particularly where some waste does not enter the waste management system. Exhibit G at ¶¶ 5-6. The hearing officer's order incentivizes applicants to get creative with how they explain and determine when a shortfall will occur if a facility can only be permitted during a period of shortfall, but it also underscores that this is ultimately an exercise based on educated assumptions, rather than a specific science. A shortfall might occur in 2025, as the department projected in the October 2020 application review summary for the NCES Stage VI application, but it might not. A weather event or special circumstance could result in a sudden surge of waste that requires disposal, consuming existing capacity at a faster rate than expected and moving that shortfall date into the nearer future. The population may not grow as anticipated, or an unforeseeable event – like the sequestration of all New Hampshire residents in their homes during the early days of the COVID-19 pandemic – could change the manner and rate at which waste is generated. In short, the capacity need analysis set forth in RSA 149-M:11, V is a *projection*, not a certainty, yet the hearing officer's order assumes that a shortfall will occur exactly when projected and pins the entire permitting process to that assumption. This creates fault lines in the state's permitting process, as it is not difficult to envision scenarios where capacity is needed but not available because a permittee could not obtain a permit based on a projected shortfall date.

To this end, shortfall has historically been demonstrated under the aggregated capacity need method as a volume of waste, not a moment in time. Presenting the capacity need analysis in this manner avoids many of the issues that arise from the hearing officer's interpretation of the statute, such as limiting a permit to the date on which a shortfall might occur or prohibiting a project simply because it proposes providing some if its capacity before that date. If the state identifies a volume of waste for which there is no projected disposal capacity during the planning

period, a new facility would satisfy that shortfall if it will provide capacity to reduce the total volume of the shortfall, regardless of when that shortfall may occur. That is reflected in the past permitting decisions described herein. *Supra* at 4-7.

Even assuming, *arguendo*, that there is some requirement in the statute for a facility to operate after a shortfall occurs, the hearing officer does not explain why that same facility cannot also operate for a period before the shortfall occurs. The order dismisses this argument by concluding that "[t]here is no evidence that RSA 149-M:11 allows a partial finding of capacity need for a proposed facility" to satisfy the public benefit criteria. Order (5/11/22) at 14. However, there is no indication that the statute makes any distinction as to when the shortfall would occur, so the notion of a "partial finding of capacity" is the product of the hearing officer's analysis, not the intent of the legislature. There is no evidence that the statute compels the department to reject an application merely because an applicant would provide some capacity before a shortfall occurs. Even adopting the hearing officer's conclusion that RSA 149-M:11, V "explicitly limits a finding of capacity need to only instances where a proposed facility will satisfy a shortfall," a facility proposing to offer capacity on both sides of the shortfall event meets the objective described by the order, as capacity would be provided after the shortfall occurs and thus satisfy a need as described in the manner conceived by the order. Order (5/11/22) at 8.

Neither NHDES nor the hearing officer should have taken the step to unilaterally reconstrue RSA 149-M:11, III(a). That authority resides only with the legislature, which has made no revision to this statute despite having many opportunities to do so, or the administrative rulemaking process, which is uniquely suited to address, absorb, and incorporate industry-specific feedback about proposed policy changes to the agency's rules. The department's rules

are adopted pursuant to RSA 541-A, which requires the agency to "hold[] a public hearing and receiv[e] comments under RSA 541-A:11." RSA 21-O:3, IV; RSA 541-A:3, IV. This hearing and comment period provides "all interested persons reasonable opportunity to testify and to submit data, views, or arguments in writing . . ." for consideration. RSA 541-A:11, I(a). The focus on "interested persons" is an important one, as it provides an opportunity for those who would actually be affected by a proposed rule or interpretation to participate in the rulemaking process, voice concerns about the application of such a rule, or propose alternatives for the department's consideration. Utilizing this procedure before adopting the interpretation of RSA 149-M:11 set forth in this order, then, would have given NCES, other members of the regulated community, and impacted consumers an opportunity to express their concerns about the practical effects of this new application.

In short, the statute was interpreted and applied by NHDES for several decades to require an applicant to establish that a shortfall would occur during the 20-year planning period, and that shortfall was represented as a volume of capacity, rather than a moment in time. The department only recently altered its *de facto* policy to require some period of operation after the shortfall occurs, and while NCES objected to this interpretation as an unlawful rulemaking in the absence of a change in the statute, it complied with that interpretation of the criteria, as well, when it submitted its second application for the Stage VI development. The hearing officer now narrows the period in which a proposed facility could operate even further, limiting capacity need to the time period after the projected shortfall would occur. This is inconsistent with the statute, upends the application of that statute after years of contrary practice, and injects reasoning and prohibitions into the statute that the legislature did not see fit to include. For those reasons, the

hearing officer erred in his determination as to Section C of the order, and reconsideration is required.

2. *The hearing officer erred because his application of RSA 149-M:11 results in invalidity of the statute under the dormant commerce clause.*

RSA ch. 149-M:11 is facially unconstitutional because it explicitly conditions permitting on the source of waste being disposed of in a proposed facility. The commerce clause of the federal constitution states that Congress has the power to "regulate commerce . . . among the several States." U.S. Const. art. I, §8, cl. 3. The Supreme Court of the United States has further developed this authority through case law, determining that there is a "negative aspect embedded in this language – an aspect that prevents state and local governments from impeding the free flow of goods from one state to another." *Houlton Citizens Coalition v. Town of Houlton*, 175 F.3d 178, 184 (1999). This "dormant" commerce clause "prohibits protectionist state regulation designed to benefit in-state economic interests by burdening out-of-state competitors." *Grant's Dairy-Maine, LLC v. Comm'r of Me. Dep't of Agric., Food and Rural Res.*, 232 F.3d 8, 18 (1st. Cir. 2000); *see also Smith v. N.H. Dep't of Revenue Admin.*, 141 N.H. 681, 691 (1997) (the dormant commerce clause "denies the state the power unjustifiably to discriminate against or burden the interstate flow of commerce . . ."). The hearing officer's new application of RSA 149-M:11 reveals that it is such a protectionist law.

As drafted, RSA ch. 149-M discriminates against out-of-state waste both overtly and implicitly. In listing NHDES's responsibilities and powers under the statute, one section instructs the agency to "assess a surcharge on the disposal of out-of-state waste" which would then be used to "reduce and offset general fund expenditures for solid waste management." RSA 149-M:6, XI. Similarly, the penalties provision of the statute authorizes the state to seize "[a]ny property . . . used or intended for use in violation of this chapter, and any property constituting

the proceeds of a violation of this chapter . . ." RSA 149-M:14. This seizure provision magnifies the discriminatory impact of the surcharge and the public benefit statute. State laws imposing such penalties on out-of-state waste are facially unconstitutional and invalid. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Oregon*, 511 U.S. 93, 99 (1994). The surcharge provision of RSA ch. 149-M has never been enforced – likely because to enforce the penalty would be unconstitutional. Previously, the state has conceded that when it makes the decision to treat in-state commerce and out-of-state commerce differently, it has violated the dormant commerce clause. *Smith*, 141 N.H. at 684-85.

Beyond this demonstration of penalizing out-of-state waste, however, the premise upon which the statute is based is discriminatory, as it restricts NHDES to only granting permits based on New Hampshire's own need for waste disposal capacity. The statute prohibits any construction or operation of a disposal facility without a permit from NHDES. RSA 149-M:9, I. It then provides that permits will only be granted if NHDES determines that the proposed facility will provide a "substantial public benefit." RSA 149-M:11, III; RSA 149-M:12, I. The statute provides three factors for the agency to consider in arriving at its determination on public benefit, and each tethers the criteria to the interests of New Hampshire: (a) the short- and long-term state need for the facility "to provide capacity to accommodate solid waste *generated within the borders of New Hampshire* . . .", (b) if the facility will help the *state achieve its waste management goals under the statute*, and (c) if the facility will help either the *state or municipalities achieve the goals of their waste management plans*. RSA 149-M:11, III(a)-(c) (emphasis supplied). Notably lacking from this mandatory determination is any consideration of out-of-state waste. The statute is therefore discriminatory to foreign waste because on its face it prohibits any consideration of such waste in determining whether to permit a new facility.

While facially discriminatory, the department's prior application of RSA ch. 149-M before 2020 did not overtly discriminate against out-of-state waste. NHDES, in administering and enforcing the statute, seems to have followed the well-established canon of statutory interpretation that courts, or in this case, the agency, must construe statutes in a manner that avoids constitutional violations. *See Miller v. French*, 530 U.S. 327, 336 (2000) ("[W]e agree that constitutionally doubtful constructions should be avoided where fairly possible[,] [b]ut where [the legislature] has made its intent clear, we must give effect to that intent."). NHDES thus conducted its capacity need analysis to permit only those facilities that provided a substantial public benefit as required by the statute, but facilities were not strictly prohibited from developing additional disposal capacity to accommodate out-of-state waste, and NHDES never enforced the statute's instruction to impose a surcharge on out-of-state waste or interpreted the statute so as to impose penalties for the acceptance of out-of-state waste. Deprived of much, though not all, of its discriminatory effect, the statute never imposed enough harm on importers of out-of-state waste to justify challenging it. By NHDES altering its application of the statute and pursuant to the May 11 order, the state and the council have reverted to the nakedly discriminatory language of the statute in a manner that would render it unconstitutional.

To determine whether state laws violate the dormant commerce clause, the Supreme Court has established a two-step analysis. *Oregon Waste Sys., Inc.*, 511 U.S. at 99. First, the court must determine whether the law discriminates against out of state commerce; such discrimination in this context is defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.*; *Deere & Company v. State*, 168 N.H. 460, 485 (2015) (discrimination under the dormant commerce clause occurs when "the effect of a state regulation is to cause local goods to constitute a larger share, and

goods with an out-of-state source to constitute a smaller share, of the total sales in the market.") (*quoting Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126, n.16 (1978)). A facially discriminatory law is *per se* invalid unless the state "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate public interest."[10] *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392 (1994); *Houlton*, 175 F.3d at 185 ("In the jurisprudence of the dormant commerce clause, a finding of facial discrimination is almost always fatal."); *Deere*, 168 N.H. at 483 (same) (quoting *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 35 (1st Cir. 2005)). Second, if the law is not facially discriminatory, it is presumptively "valid unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits." *Oregon Waste Sys.*, 511 U.S. at 93, *citing Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1993) (finding a state surcharge on out-of-state waste violated the dormant commerce clause).

The hearing officer's application of RSA 149-M:11 is facially discriminatory because it gives different treatment to in-state versus out-of-state waste, explicitly favoring and accommodating the former while disfavoring and excluding the latter. A facility may only be permitted if it will entirely operate during a period when the state experiences a shortfall in disposal capacity for in-state waste; accordingly, no other disposal capacity may be permitted under this construction. The hearing officer observed that "[a]dding additional capacity via the proposed facility [operating before the shortfall] would . . . allow [other] facilities to take in more non-New Hampshire waste to meet their maximum-allowed fill rates instead of actually accommodating New Hampshire Waste as expected by RSA § 149-M:11." Order (5/11/22) at 12.

[10] The Maine legislature elected to make the financial commitment to open and operate a state-run landfill so the state can exercise control over imported waste. *See, generally*, Me. Rev. Stat. Ann. Tit. 38, § 2156-A, 4. Plainly, then, there is a viable alternative to restricting private companies. The New Hampshire legislature has not taken such a step.

Here, the hearing officer specifically states that the expectation of the statute is that disposal space will only be provided for in-state waste, thus discriminating against the acceptance of waste from other states and interfering with interstate commerce.

Since the hearing officer's application of RSA 149-M:11 is facially discriminatory, the next question is whether the state can demonstrate "under rigorous scrutiny" that there is no other way it can promote a particular "legitimate public interest." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. at 392; *Deere*, 168 N.H. at 483 ("A state statute that has no direct extraterritorial reach but that discriminates against interstate commerce of its face, in purpose, or in effect receives a form of strict scrutiny so rigorous it is usually fatal.") (*quoting Gwadosky*, 430 F.3d at 35). The original, non-discriminatory goals of the statute were to ensure that adequate waste disposal capacity exists within New Hampshire for the needs of the state while protecting public health and the environment. RSA 149-M:11, I (a)-(c) (setting forth the goals of the public benefit requirement for solid waste facility permits). To the extent the council believes the new, discriminatory application of the statute advances these legitimate public interests, it cannot justify it because these same public interests were promoted under NHDES's long-standing, less discriminatory application of the aggregate capacity need method and thus could be achieved in a non-discriminatory manner. *Oregon Waste Sys.*, 511 U.S. at 93 (rejecting state's argument that statutory discrimination against out-of-state waste was justified because it was a compensatory tax or constituted resource protectionism). Since the intent of the original statute is to achieve goals which are either constitutionally invalid – such as reducing the amount of out-of-state waste deposited in New Hampshire – or can be accomplished without virtually prohibiting out-of-state waste – such as ensuring that waste disposal is accomplished with sufficient protections for the state's public and environmental health – RSA ch. 149-M is facially

unconstitutional and provides no sufficient justification for its unconstitutional restrictions on interstate commerce.

The hearing officer's application of the statute not only gives preferential treatment to in-state waste through the public benefit requirements, but it also returns to the discriminatory meaning of the statute by declaring that it is unlawful for NHDES to grant any permit which proposes to develop any further capacity than is specifically needed for the disposal of in-state waste. This reduction of the status of out-of-state waste from disfavored to prohibited operates as an unconstitutional state restriction on inter-state commerce and is *per se* invalid. *See Carbone*, 511 U.S. at 386 (finding a solid waste regulation invalid because it impeded out-of-state access to the local market in violation of the dormant commerce clause); *Oregon Waste Sys.*, 511 U.S. at 93 (same). Since the hearing officer's application of RSA ch. 149-M facially discriminates against out-of-state waste by excluding it from the state market, and no sufficient state justification exists for this discrimination, this application of the statute would render it unconstitutional.

3. *The hearing officer improperly resolved mixed questions of law and fact without consulting with the council as required by statute.*

Legislation and the council's procedural rules delineate the roles and responsibilities of the council and its hearing officer. The waste management council is established to hear administrative appeals from department decisions relative to the functions and responsibilities of the waste management department of NHDES. RSA 21-O:9, V. The council is comprised of individuals appointed by the governor and council who represent a variety of fields and areas of expertise, such as local conservation commissions, municipalities, and the waste management industry. RSA 21-O:9, I.

Hearings may be conducted by a hearing officer assigned by the department of justice. RSA 21-O:14, II. A hearing officer appointed by the attorney general must – among other things – regulate procedural aspects of the proceeding, adopt the council's findings of fact "except to the extent any such finding is without evidentiary support in the record," and decide all questions of law. RSA 21-M:3, IX(a)-(f). The determination of mixed questions of law and fact, however, requires the hearing officer and council to work together. RSA 21-M:3, IX(d). 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., Inc. v. City of Claremont*, 135 N.H. 270, 282 (1992), *citing Crocker Nat'l Bank v. City and County of San Francisco*, 782 P.2d 278, 281 (Ca. 1989); *see also In re B.C.*, 167 N.H. 338, 342 (2015) (application of a legal standard to historical facts is a mixed question of law and fact). The hearing officer must deliberate with the council to resolve such questions involving the application of legal principles, like statutory construction, to the facts. RSA 21-M:3, IX(d). The final determination is thus not made by the hearing officer acting alone, but rather by the council in consultation with the hearing officer as to the legal implications of the matter.

Reconsideration of Section C of the May 11 order is warranted because it appears that the hearing officer resolved mixed questions of law and fact without the necessary consultation with the council. The hearing officer improperly resolved the following issues, which require application of his legal determinations to the facts and evidence in this matter:

1. "Whether NHDES acted lawfully in determining there existed sufficient capacity need during the lifespan of the NCES Facility justifying a finding of substantial public benefit." Order (5/11/22) at 6.

2. Identification and distillation of the parties' arguments on the merits of the appeal. *Id.*

3. Whether NCES's Stage VI expansion provides a "capacity need" by applying the hearing officer's legal construction of that term to the facts. *Id.* at 11-12.

4. Concluding that there is "no evidence" that RSA 149-M:11 permits a "partial finding" of capacity need. *Id.* at 14.

As to the first issue, the hearing officer improperly concluded that the question of whether NHDES acted lawfully in determining there was a sufficient capacity need is purely a question of law. *Id.* at 6. The issue, as presented in the order, is not a pure question of law, as a determination examining NHDES's decisions and whether there was a "justified" finding of public benefit are factual determinations that are within the council's jurisdiction. *Id.* It is appropriate for the hearing officer to advise on legal matters, such as the meaning or intent of a statute, but *applying* that legal analysis to the facts to reach a determination that addresses the law and the facts is beyond the hearing officer's authority. RSA 21-M:3, IX(d). Once the hearing officer determined what the law requires, a question of fact still lingered to be resolved by the council: did NHDES's decision to grant the permit comport with the legal requirements defined by the hearing officer? There is no indication in the record or the order that this consultation between the council and the hearing officer occurred. Instead, the hearing officer resolved the legal question of what must be shown to demonstrate a "capacity need" pursuant to RSA 149-M:11 and then proceeded to apply that determination to the facts to conclude that it was unlawful to grant a permit where this particular facility would operate before a shortfall occurred. Order (5/11/22) at 13-15.[11] NHDES advances a similar argument in its motion for rehearing, arguing

[11] This erroneous characterization of the capacity need element as a question of law predates the May 11 order. In its motion for reconsideration of NCES's motion to dismiss, CLF argued that its capacity need arguments presented a mixed question of law and fact. CLF Mot. for Reconsideration (9/23/21) at 4-5. CLF asserted that two questions of fact were involved: first, whether a facility that operated for just one year out of its six years of planned operation during a disposal capacity shortfall justified the required finding of substantial public benefit, and second, whether NHDES's conclusion that it did justify the permit was unreasonable. *Id.* In an order reversing Mr. Conley's determination, Mr. Towle disagreed and concluded that "statutory interpretation is a question of law" that the hearing officer may undertake. Order

that "whether a facility providing capacity at a certain point can 'resolve' a capacity shortfall that occurs sometimes after this capacity comes on-line . . . is a question of fact not law." NHDES Mot. for Rehearing (5/31/22) at 4.

Importantly, the council already addressed the issue of whether NHDES acted lawfully in reaching its capacity need conclusion during deliberations on February 22, 2022, and it did so in the presence of the hearing officer. To the extent the hearing officer seeks to overrule or set aside that determination with this order, then, his conclusions must be set aside, as the council already resolved this mixed question of law and fact in his presence during deliberations, as required by RSA 21-M:3, IX(d). *See* Exhibit G at ¶10.

The hearing officer next erred by reaching factual determinations about the parties' arguments in this matter. What the parties argued and what the evidence shows is a question of fact. *See Crocker Nat'l Bank*, 782 P.2d at 281 ("Questions of fact concern the establishment of historical and physical facts . . . ."). Mr. Towle observes, for example, that "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." Order (5/11/22) at 6. In this regard, the hearing officer improperly engaged in fact-finding to identify and apply the department's alleged arguments. While the council might need his advice in understanding technical legal arguments, deciding what argument has been made based on the record is a factual decision the council must make.

The hearing officer also made a factual determination when he concluded that "capacity need" requires a present-tense relationship between the capacity and the facility. *Id.* at 11-12. The order grapples with NHDES's arguments concerning whether capacity can be provided

(11/19/21) at 4. Thus, even before the hearing on the merits, the hearing officer improperly reduced this mixed question of law and fact to a purely legal determination.

before a shortfall occurs and thus increase the capacity of other facilities in the future to delay the occurrence of such a shortfall. *Id.* at 12. The hearing officer opined that this would permit facilities to accept additional non-New Hampshire waste and concluded that "[n]o evidence or argument has been forthcoming that such a result would not be the inevitable repercussion" of NHDES's argument regarding when capacity may be provided. *Id.* To the extent the hearing officer evaluated the evidence and drew a conclusion about NHDES's arguments, then, he improperly resolved a mixed question of law and fact requiring the application of the evidence to his legal determinations.

Similarly, Mr. Towle concluded that there can be no capacity need before a shortfall occurs, and he went a step further to conclude, "There is no evidence that RSA 149-M:11 allows a partial finding of capacity need for the proposed facility to satisfy the requirement of the (a) criteria." *Id.* at 14. Evaluating evidence on the record, judging the repercussions of a decision, and deciding if current industry practices align with the statutory requirements are all factual decisions that must be made by the council in consultation with the hearing officer. RSA 21-M:3, IX(d).

None of these issues were taken up by the council during deliberations on February 22, 2022, and there is no record of a meeting between the council and hearing officer to resolve mixed questions of law and fact. Thus, it appears that the hearing officer unilaterally resolved those issues in contravention of RSA 21-M:3, IX(d).[12] If the hearing officer did indeed improperly decide mixed issues of law and fact without the required deliberation with the

[12] Undersigned counsel inquired with the appeals clerk for the council on May 24, 2022, regarding whether such a meeting had been held, and learned that it had not. Email from J. Martinez to B. Gould (Exhibit I). The clerk reported that the council determined no meeting was necessary, but even then, a decision representing the quorum of the council should have been made following a public meeting properly noticed to the public. *Id.;* RSA 91-A:2, I and II; Env-WMC 203.01(a)-(b).

council, those determinations were made *ultra vires* and are therefore invalid. These errors warrant reconsideration as to the council's conclusions in Section C of the May 11 order.

B. Request for Rehearing as to Standing

1. The hearing officer erred by not dismissing this case on jurisdictional grounds for lack of standing in its March 17, 2021 and May 11, 2021 orders.

The council erred in declining to dismiss CLF's appeal because it lacks standing, and the individual named members it claims are adversely affected by the Stage VI permit base their alleged harms on mere speculation. Order (3/17/21); Order (5/11/21). Only a "person aggrieved by a department decision may" appeal it. RSA 21-O:14, I-a. Standing to appeal an executive agency's decision is based on the New Hampshire Constitution. CLF claims that it has "organizational standing," meaning it can advocate on behalf of its constituent members, even if only some portion of them are allegedly affected by the contested decision. Obj. to Mot. to Dismiss (2/19/21) at ¶¶ 5, 8, 9. NCES has disputed CLF's standing from the outset of this appeal. Mot. to Dismiss (2/8/21).

In New Hampshire, organizational standing exists when some or all of an organization's members are affected by the challenged conduct. *See New Hampshire Bankers Ass'n. v. Nelson*, 113 N.H. 127, 127-29 (2011) (finding a banker's organization had standing when the decision appealed allowed savings banks to compete with commercial banks, thus affecting all of its members); *Appeal of Richards,* 134 N.H. 148, 156 (1991) (finding organizational standing for a ratepayer's organization where the challenged decision affected its ratepayer members); *Appeal of Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000) (homeowner's organization formed by homeowners specifically opposed to an agency's decision which affected their properties found to have standing to oppose that decision). In each instance in which the

Supreme Court of New Hampshire has found an organization has standing to bring legal action on behalf of its affected members, the majority of those members were actually harmed. The court has never recognized standing based on the token member standard in which only a small number of an organization's members are impacted by the contested action. CLF's argument that it has standing to pursue this appeal because two members are allegedly impacted thus has no purchase in New Hampshire precedent.

Mr. Conley denied NCES's motion, relying in part on the administrative rules adopted by councils other than the waste management council. Order (3/17/21) at 2. The wetlands, water, and air resources councils, for example, apparently permit organizational standing, but there is no corollary provision in N.H. Code Admin. R. Env-WMC 200, *et seq*. *See id.* Mr. Conley concluded that there was no reason the waste management council's rules should be different than those of its sister environmental councils, but this interpretation placed words in the rules that the council did not see fit to include, violating the well-established maxim of statutory construction forbidding just such methods of interpretation. *See id.; Green v. School Admin. Unit #55*, 168 N.H. 796, 798 (2016). Mr. Conley's assumption that the council would adopt the standing rules of its sister councils also abrogates the council's ability to determine what rules to promulgate to effectuate its statutory grant of authority, and thus the hearing officer essentially engaged in rulemaking on behalf of the council when it never adopted such a regulation. The hearing officer is not empowered to take such an action on behalf of the council. *See* RSA 541-A:3-:16 (establishing provisions for the adoption of administrative rules). If anything can indeed be inferred from the fact that the council has not adopted the token member standard of organizational standing, it is that the council does not recognize or allow the token member standard in proceedings before it, and especially in light of the fact that the burden is on CLF to

demonstrate it possesses standing, it is this inference which should have been adopted. *Appeal of Concord Nat. Gas Corp.*, 121 N.H. 685, 691 (1981) (when a law omits a provision, the presumption is that the omission was intentional).

Standing is a question of subject matter jurisdiction, so the councils cannot themselves decide to extend standing further than the state constitution allows. *Duncan v. State*, 166 N.H. 630, 640 (2014). It is also a question that can be raised at any time in the proceeding. *Gordon v. Town of Rye*, 162 N.H. 144, 149-150 (2011). The New Hampshire Supreme Court has not adopted the token member standard for organizational standing, and while some councils have adopted the rule, it has not been endorsed by the supreme court. Since New Hampshire's law of standing springs from its constitution, as interpreted by the New Hampshire Supreme Court, it is to those authorities that the council must turn to determine if CLF has met its burden to demonstrate standing in this appeal, which cannot be overcome by the procedural rules of other environmental councils.

Nor does Mr. Conley's apparent reliance on federal environmental cases provide justification for his refusal to dismiss CLF's appeal for lack of standing.[13] Mr. Conley failed to take into account that the cases CLF cited in support for the proposition that token member standing applied to appeals before the council were entirely based on federal law, not state law, and thus inapposite to demonstrate that CLF possesses standing in this appeal. CLF Surreply (3/5/21) at n.2. Critically, each of the cases CLF cites is one which involves a federal environmental statute which specifically allows individual citizens and organizations to bring

[13] Mr. Conley asserted that his decision to deny the motion to dismiss was not based on federal law, despite specifically citing to the federal cases which CLF argued supported its theory. Order (3/17/21) at 2, *citing* CLF Surreply (3/5/21). While NCES is thus unable to determine which of the reasons discussed in Mr. Conley's order formed the basis for his decision, it addresses each of these reasons so as not to omit any potentially necessary argument.

suit to enforce the statute. *Id.* But there is no similar "citizen's suit" provision in either RSA ch. 149-M, under which CLF alleges violations, or RSA ch. 21-O, upon which it relied to bring this appeal.

This token member standard, if adopted, would allow organizations pushing specific policy agendas to selectively sue to advance those goals based on one or two recruited members who claim to have experienced some ill effect from the decision, allowing well-heeled special interest groups to drive public policy through litigation, rather than pursuing change through the legislature. This token member standard contradicts the basic principles of standing established in the state constitution and maintained by the state supreme court, and serves only to attenuate the vital role of standing in restricting litigation to those parties who have truly sustained an injury that requires judicial redress.

Even assuming *arguendo* that CLF could possess organizational standing to bring an appeal on behalf of one or two of its many members, those members do not themselves sufficiently allege an injury-in-fact attributable to the contested permitting decision and thus lack individual standing, which in turn deprives CLF of standing. CLF supplied affidavits from two members, Peter Menard and Andrea Bryant, to establish the organization's standing in this matter. *See* CLF Obj. to Mot. to Dismiss (2/19/21) at Exhibits 1 and 2. As a threshold matter, the testimony of Mr. Menard should not have been considered by Mr. Conley in his standing determination because the affiant's complaints and alleged harms were not included in CLF's notice of appeal. *See id.* at Exhibit 2. The statute establishing the administrative appeal process states, "Only those grounds set forth in the notice of appeal [as the basis of the appeal] shall be considered by the council." RSA 21-O:14, I-1(a). CLF's NOA included a short paragraph on standing that contained no reference to Mr. Menard or the specific complaints he later alleges in

his affidavit to establish standing. NOA at 4. While CLF alleges it has "members" near the landfill who will supposedly be affected by the expanded landfill, the only specific injuries the notice sets forth are those later elaborated on in Ms. Bryant's affidavit. *Id.*, Obj. to Mot. to Dismiss (2/19/21) at Exhibit 1. Thus, the council erred in considering an affidavit that the law specifically barred, and Mr. Menard's affidavit must be excluded from any further consideration of CLF's standing. It also erred in denying NCES its repeated request to hold an evidentiary hearing to address the mixed question of law and fact regarding standing and to probe the sufficiency of the affiant's allegations.

Neither Ms. Bryant nor Mr. Menard sufficiently alleges any injury-in-fact which meets the standard for an individual to be "aggrieved" by an agency decision. *Weeks Restaurant Corp. v. City of Dover*, 199 N.H. 541, 544-45 (1979). *Weeks* established that a "person aggrieved" is one who has been directly affected by the challenged action; the case outlined a non-exhaustive list of factors to weigh for or against a finding of standing. *Id.* Here, Ms. Bryant and Mr. Menard complain of negative *past* impacts they claim to have suffered from the landfill, but these alleged harms were in no way caused by NHDES's decision to grant a permit for a future facility. CLF Obj. to Mot. to Dismiss (2/19/21) at Exhibits 1 and 2. Ms. Bryant and Mr. Menard also speculate on potential impacts from the expansion, such as odor, noise from the landfill, traffic, the view of the landfill, and property value impacts. *Id.* These assertions fail to rise to the requisite standard – speculation about future harms cannot form the basis of the immediate, concrete harm needed to establish standing. *Duncan v. State*, 166 N.H. 630, 646 (2014) (harm must be "definite and concrete" to establish standing); *Appeal of N.H. Right to Life*, 166 N.H. 308, 314 (2014) (speculative harm cannot confer standing). CLF has never met its burden to

demonstrate standing, and thus the council must reconsider its decision and dismiss the appeal in its entirety on jurisdictional grounds.

IV. Conclusion

In accordance with the foregoing, NCES respectfully requests that the council:

A. Reconsider the council's decision as to Section C of its May 11 order and its prior determinations that CLF has standing; and

B. Grant such further relief as it deems appropriate.

Respectfully submitted,

NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.,
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Date: 6/10/22

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CERTIFICATE OF SERVICE

I hereby certify that the within document was this day forwarded via U.S. Mail, postage prepaid, to:

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