THE STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

Docket No. 20-14 WMC

Appeal of North Country Environmental Services, Inc.'s Type I-A Permit Modification for Expansion (Permit No. DES-SW-SP-03-02) by Conservation Law Foundation

CONSERVATION LAW FOUNDATION'S MEMORANDUM IN SUPPORT OF OBJECTION TO NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.'S MOTION FOR REHEARING AND IN SUPPORT OF CONSERVATION LAW FOUNDATION'S MOTION TO STRIKE

Conservation Law Foundation ("CLF") hereby objects to North Country Environmental Services' ("NCES") Motion for Rehearing ("NCES Motion") pertaining to the Waste Management Council's Final Order on Appeal dated May 11, 2022 ("Final Order") and requests that the Waste Management Council ("Council") deny such motion. In support of its objection, CLF respectfully states:

INTRODUCTION

The Council, in Section C of its Final Order, correctly interpreted RSA 149-M:11, III(a) and V to require a capacity need for New Hampshire-generated waste for the permitting of landfill facilities and their operations. In doing so, the Council properly rendered a determination – in full conformance with RSA 21-M:3 – regarding the unlawfulness of the Department of Environmental Services' ("DES") permit decision as it relates to criteria (a) of RSA 149-M:11.

NCES moves for rehearing on the Council's decision by rehashing arguments that it has already made (and lost on) with respect to standing and statutory interpretation of RSA 149-M:11; by relying on irrelevant exhibits lacking a proper foundation that are egregiously out-of-time and not in compliance with the Council's rules pertaining to new and additional evidence and which, therefore, should be stricken; and by raising arguments related to administrative gloss

and the dormant commerce clause that NCES deliberately chose not to develop before and during the hearing in this appeal and, therefore, waived.

Even if the Council *could* consider the substantive arguments raised by NCES (which it should not, based on NCES's failure to raise new argument or information on rehearing with respect to standing and statutory interpretation, and based on its waiver of administrative gloss and commerce clause arguments), such arguments are without merit. As more fully set forth *infra*, the Council correctly interpreted the plain meaning of RSA 149-M:11, III(a) and (V) to support its decision; such interpretation in no way violates the dormant commerce clause nor is it precluded in any way by the administrative gloss doctrine asserted by NCES; and CLF – as already determined *twice* by the Council, has standing.

NCES's motion for rehearing is without merit and should be denied.

STATUTORY PROVISIONS

New Hampshire's solid waste management statute's public benefit requirement, RSA 149-M:11, is well established in this matter. To grant a permit for a solid waste facility, NHDES must first determine that the facility will provide "a substantial public benefit." RSA 149-M:11, III. A public benefit is defined as "the protection of the health, economy, and natural environment of the state of New Hampshire consistent with RSA 149-M:11." RSA 149-M:4, XVIII.

To find that a facility will provide a substantial public benefit, DES must make three findings – a capacity need determination, a state hierarchy and goals determination, and a state solid waste plan determination. RSA 149-M:11, III (a), (b), (c), *see also* Final Order at 2-3. The only criteria at issue in the pending motions for reconsideration is the capacity need criteria in RSA 149-M:11, III (a), which states:

III. The department shall determine whether a proposed solid waste facility provides a substantial public benefit based upon the following criteria:

(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.

RSA 149-M:11, III (a).

The formula for determining capacity need in paragraph V states:

V. In order to determine the state's solid waste capacity need, the department shall:

(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.

ARGUMENT

I. The Council Should Deny NCES's Motion Because It Improperly Attempts to Advance Legal Theories NCES Has Waived, Raises Issues That Have Been Fully Litigated, and Attempts to Introduce Exhibits Long After the Record Has Closed.

A motion for reconsideration allows a party to present points of law or fact that the Council has overlooked or misapprehended. *Smith v. Shepard*, 144 N.H. 262, 264 (1999).

NCES's Motion does not. Instead, NCES's Motion (a) attempts to introduce arguments it chose not to pursue over the course of this appeal and thus waived, (b) improperly reiterates old arguments that it has already argued – and lost - before the Council, and (c) seeks to submit additional exhibits long after the record has closed. NCES presents no new argument or basis for reconsideration and has failed to demonstrate good cause for rehearing as required by RSA 541:3. NCES's motion should be denied.

A. NCES failed to develop administrative gloss and the dormant commerce clause and waived those theories.

A motion for reconsideration is not an opportunity for NCES to advance arguments it introduced over the course of this appeal but chose not to develop further, and therefore waived. When a party raises arguments but fails to adequately develop them, those arguments are waived. *Ellis v. Currier*, No. 2014-0752, 2015 WL 11089466, at *1 (N.H. Sept. 28, 2015).

In its Motion NCES argues two legal theories – administrative gloss and the dormant commerce clause –that it failed to develop and litigate over the course of this appeal. Regarding administrative gloss, NCES asserts that DES's capacity analysis for NCES's Stage VI permit is inconsistent with DES's prior capacity determinations. NCES Motion at 3-4, 20-23. This is a theme NCES raised many times over the course of this appeal but chose not to develop fully in motions or at the hearing. *See*, *e.g.*, NCES Motion to Dismiss, June 30, 2021 at n. 6 (alleging that DES changed its capacity analysis when it reviewed NCES's first Stage VI permit application); NCES Prehearing Memorandum at 5-6 (alleging DES changed its "decades-long interpretation of the public benefit statute" with regards to capacity need). A footnote in NCES's Motion to Dismiss demonstrates NCES's *strategic decision* not to pursue the administrative gloss theory at that time:

> Before it decided to deny NCES's original Stage VI application, NHDES had never construed its rules to include a requirement that an applicant show a capacity shortfall during the lifespan of the proposed facility to establish public benefit. Rather, NHDES had applied the statutory language as written: if there was a shortfall in capacity over the twenty-year planning period and the proposed facility would be accepting waste during that period it was deemed to meet the capacity-need element. **While this motion to dismiss does not challenge the lawfulness of this change in the construction of the statute, NCES reserves the right to do so if this motion is not granted.**

NCES Motion to Dismiss, June 30, 2021 at n. 6 (emphasis added). NCES subsequently chose not to develop this challenge further, and in making that choice, waived the administrative gloss argument.

NCES similarly identified its dormant commerce clause theory over the course of this appeal, but chose not to pursue it. In the same Motion to Dismiss NCES made a passing reference to the dormant commerce clause (*id.* at n. 8) and it allotted just a single paragraph in its Prehearing Memorandum to the topic. NCES Prehearing Memorandum at 17. As with administrative gloss, NCES chose not to develop this theory further, and has waived the argument.

NCES had many opportunities to develop these arguments over the course of this appeal and chose not to. NCES had over a year – 15 months – during the extensive prehearing period between CLF's Notice of Appeal in November 2020 and the hearing in February 2022, to develop these arguments, engage in motion practice, and exchange information through discovery. During this time NCES submitted five substantive motions and numerous other filings. Critically, NCES could have developed these arguments, including through evidence and witness testimony during the multi-day hearing held in February 2022, but elected not to. Because NCES made a strategic decision not to develop its theories of administrative gloss and the dormant commerce clause, NCES waived those arguments.

B. NCES raises issues that have been fully litigated.

NCES improperly uses its motion for reconsideration to rehash arguments it has already raised – and lost – several times over the course of this appeal. NCES's arguments regarding statutory interpretation of capacity need and standing have been made to, and rejected by, the Council. *See, e.g.* NCES Motion to Dismiss, June 30, 2021 at 7-10; NCES Prehearing Memorandum at 13-17.

A party cannot use a motion for reconsideration to simply reiterate arguments it has already made. *Barrows v. Boles*, 141 N.H. 382, 397 (1996). NCES had ample opportunity to advance its capacity need analysis and to challenge CLF's standing in this appeal, and those issues have been fully litigated. "A motion for rehearing must do more than merely restate prior arguments and ask for a different outcome." *Freedom Energy Logistics*, N.H. Public Utilities Comm'n, Order No. 25,810, 2015 WL 5309868, at *3 (Sept. 8, 2015) (denying motion for rehearing where motion presented no new information and commission did not overlook or misunderstand issues raised during the proceeding); *Town of Hampton*, N.H. Public Utilities Comm'n, Order No. 26,287, 2019 WL 3890228, at *2 (Aug. 14, 2019) ("A successful Motion for Rehearing does not merely reassert prior arguments and request a different outcome."); *id.* (the "standard for rehearing" is not met when a party "repeat[s] the same arguments it made" in previous filings). Because NCES's motion simply reiterates arguments it has already made regarding capacity need and standing, NCES's motion on these topics should be denied.

C. The Council should strike NCES's proposed exhibits because they are untimely, prejudicial, lack a foundation, and are irrelevant.

i. NCES's proposed exhibits are untimely and would prejudice CLF.

NCES's attempt to introduce new evidence into the record at this very late stage of the proceedings is egregious. NCES had ample opportunity to introduce evidence over the course of

this appeal. NCES's attempt to introduce evidence now, after a Final Order and close of the record, violates several procedural rules and would greatly prejudice CLF.

The Waste Management Council's procedural rules provide for limited circumstances where a party may seek to present new evidence in a motion for rehearing. Rule Env-WMC 205:16 states:

> Env-WMC 205.16 Motion for Rehearing.
> . . .
> (c) New or additional evidence shall be permitted when offered to:
> (1) Cure any deficiencies in the original notice of appeal or testimony;
> (2) Correct errors in form in the decision;
> (3) Request reconsideration of the conditions of the approval or of the denial; or
> (4) Challenge any facts of which official notice was taken.

Env-WMC 205:16(c). New evidence may *only* be introduced in these scenarios. *See In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 251 (recognizing "the familiar axiom of statutory construction *expression unius est exclusion alterius*: Normally the expression of one thing in a statute implies the exclusion of another."). In its Motion, NCES seeks to introduce nine new exhibits, but fails to demonstrate why any of the exhibits should be admitted into evidence at this time. NCES does not explain which provisions of Env-WMC 205.16(c) it is offering the exhibits for, or if it is offering all nine exhibits for the same purpose.[1] The proposed exhibits do not fall into any of the permitted categories listed in Env-WMC 205.16(c). As the party offering the exhibits, the burden falls to NCES to demonstrate why the exhibits should be admitted.

[1] NCES makes a general statement in a footnote that it offers NCES Exhibits A-F and H "pursuant to Env-WMC 205.16(4) (*sic*) to demonstrate why reconsideration of the order is required." NCES Motion at n. 1. Assuming NCES intends to offer the exhibits under Env-WMC 105.16(c)(4), this offer is misplaced, as NCES does not identify any facts of which official notice was taken that NCES now challenges. NCES states that it is providing proposed Exhibit G, an affidavit of a paralegal, in the absence of a transcript of the hearing. NCES Motion n. 8. This is not a valid reason under Env-WMC 205.16(c) to offer additional evidence in a motion for rehearing.

NCES's general statement that the exhibits are being offered to support its motion for reconsideration is inadequate and conclusory, and NCES's proffered exhibits should be stricken.

The Council's procedural rules are designed to promote the exchange of information before the hearing. Env-WMC 205.03 (Pre-hearing Exchange of Information). NCES's grossly overdue attempt to introduce evidence egregiously undermines that aim. Incredibly, NCES now attempts to introduce evidence into the record that it refused to produce in response to a CLF discovery request. In discovery CLF sought information related to NCES's Stage V permit public benefit condition, and NCES refused, asserting that NCES's Stage V permit is irrelevant to DES's decision in this appeal.[2] Now, NCES seeks to get that exact permit provision, NCES's Stage V public benefit determination, into the record. NCES proposed Exhibit C-3.

There were numerous opportunities and deadlines for NCES to present its theories and evidence over the course of this appeal. Pursuant to the Pre-Hearing Orders, the parties were required to exchange discovery by September 1, 2021,[3] file pre-hearing memoranda identifying key legal and factual issues by February 8, 2022, and file all exhibits by February 16, 2002. Pre-Hearing Order, Jan. 27, 2022.

Even as the hearing came to an end, NCES passed over opportunities to keep the record open to submit additional evidence. Pursuant to Rule Env-WMC 205.10, prior to the close of the hearing a party may request that the record be left open for a specific period of time in which to file evidence or arguments not available at the hearing. Env-WMC 205.10(b). Under Rule Env-

[2] NCES response to CLF Request for Information 2, attached to this Memorandum as Exhibit CLF 1.
[3] On August 18, 2021 the Hearing Officer granted an Assented-To Motion extending the discovery deadline from August 18, 2021 to September 1, 2021.

WMC 205.11 NCES could have requested that the Council: "reopen the record to consider testimony, evidence, arguments, or exhibits not previously considered." Env-WMC 205.11.

NCES's untimely attempt to introduce evidence – after discovery, the hearing, and several opportunities to keep the record open – greatly prejudices CLF and violates the Council's procedural rules and the purposes of discovery. "The underlying purpose of discovery . . . is to reach the truth and to reach it as early in the process as possible by narrowing the issues pertaining to the controversy between the parties." *Kurowski v. Town of Chester*, 170 N.H. 307, 315 (2017) (quoting *Sawyer v. Boufford*, 113 N.H. 627, 628 (1973)). "The purpose of interrogatories is to narrow the issues of the litigation and prevent unfair surprise by making evidence available in time for both parties to evaluate it and adequately prepare for trial." *Bursey v. Bursey*, 145 N.H. 283, 286 (2000) (quoting *Kearsarge Computer, Inc. v. Acme Staple Co.*, 16 N.H. 705, 707 (1976)). In at least one instance NCES now attempts to introduce evidence into the record that it refused to produce in discovery. *Supra* at 8. To allow NCES to introduce new evidence at this very late stage in the proceedings unfairly prejudices CLF, and the exhibits should be stricken. *See Bursey*, 145 N.H. at 286 ("In order to prevent unfair surprise, a party may be precluded from presenting evidence that he fails to disclose during discovery.").

ii. <u>There is no foundation for NCES's proposed exhibits; the Council should strike them.</u>

The Council should strike NCES's proposed exhibits because NCES has failed to lay a proper foundation for the exhibits and the accuracy of the exhibits cannot be determined. For example, proposed NCES Exhibit A-1 is a table apparently created by NCES for their instant motion. The table is rife with problems. It is unclear what the table is intended to demonstrate, but it appears to include data pulled from various other documents and analyzed by NCES. The Notes section references unidentified permits and permit applications which are incorporated

into the table. The table's right columns contain numerous green triangles, which in Excel are used to indicate there is an error in the cell,[4] calling into question the accuracy of the table.[5] The table is followed by apparent excerpts of a DES permit decision for an entirely different landfill (Mt. Carberry) and landfill operator (Androscoggin Valley Regional Refuse Disposal District) than the subject of this appeal, although it is not clear that the subsequent pages are all from the same document.[6] NCES repeats this process of creating a table followed by document excerpts for exhibits B-1, C-1, D-1, E-1, and F-1, with similar problems throughout each proposed exhibit – a hodgepodge of pages apparently culled from different documents and mixed together by NCES. [7] NCES cannot cherry pick certain pages from various unrelated waste permit applications and permitting decisions and merge them together into larger documents along with tables of NCES's own creation and submit them as evidence. NCES's proposed exhibits are undefined, inaccurate, and without foundation and should be struck from the record.

[4] https://support.microsoft.com/en-us/office/what-are-those-buttons-and-triangles-in-my-cells-203e34e6-ba90-4158-ae58-33397dda3ca9#:~:text=red%20(comment).-,Green%20triangle,for%20a%20list%20of%20options ("A green triangle in the upper-left corner of a cell indicates an error in the formula in the cell.")

[5] Green triangles indicating an error are found in NCES proposed exhibit pages A-1, B-1, C-1, D-1, E-1, and F-1.

[6] *See* proposed NCES Exhibit A-3, dated March 7, 2003, and proposed NCES Exhibit A-6, purportedly part of the same permit decision but dated January 9, 2003.

[7] For example, NCES's proposed Exhibit B contains proposed Exhibits B-8 through B-10 that are apparently pages 4 through 6 of an unidentified and undated document. NCES proposed Exhibit F contains highlighting and handwritten notes, with no explanation of who annotated the pages, when, or why. *See* NCES proposed Exhibit F-2 through F-5

iii. NCES's proposed exhibits are irrelevant.

The Council should strike NCES's proposed exhibits because they are irrelevant to this appeal. NCES proposed Exhibits A through F and H appear to be excerpts from solid waste permit applications and permits that are not part of this appeal, and thus irrelevant.[8]

Evidence that is irrelevant, immaterial, or unduly repetitious must be excluded from the hearing. Env-WMC 205.07(b). Under New Hampshire law, evidence is relevant if it tends to make the existence of any fact consequential to the determination of the action more or less probable. *In re Haines*, 148 N.H. 380, 381 (2002). NCES has not demonstrated how these assorted selected pages from other permits are relevant to DES's permit decision-making process in this appeal.

NCES has previously asserted that this type of information – DES permitting outside of this permit – is irrelevant to this matter. During discovery CLF sought documents related to NCES's Stage V public benefit condition, and NCES refused to produce the documents on the grounds of relevancy. CLF Exhibit 1 at 6. ("NCES objects to this request on the grounds that Stage V Permit and NCES's compliance with permit conditions in the stage V Permit is irrelevant to the NHDES decision that is on appeal.") Later, NCES moved to exclude information from other permit processes from hearing. In NCES's Motion in Limine NCES moved to exclude from evidence information regarding the capacity of a previous stage, Stage V, of this landfill and NCES's prior Stage VI permit application. NCES Motion in Limine at 1, 8, 9-10. NCES cannot have it both ways – it cannot claim that DES permitting of other landfills is both relevant and irrelevant to this appeal.

[8] One of the exhibits, proposed Exhibit H, is a permit decision from 2022 and is certainly beyond the scope of DES's 2020 permit decision at issue in this appeal.

II. The Council Correctly Interpreted RSA 149-M:11, III(a) and (V).

A. The Council correctly interpreted RSA 149-M:11, III(a) and V to require a capacity need for New Hampshire-generated waste during the operating life of a proposed facility.

The Council in the Final Order correctly determined that New Hampshire's solid waste management statute requires that a proposed solid waste facility must satisfy a capacity need during the operating life of the facility. Final Order at 12. This determination is based on the plain and unambiguous wording on the statute. Interpreting the statute, the Council determined that RSA 149-M:11, III(a) "does require a proposed facility to satisfy a capacity need during the lifespand of the facility . . . If there is no capacity need during the lifespan of a proposed facility, then NHDES cannot lawfully determine said facility provides a substantial public benefit pursuant to the (a) criteria." Final Order at 12.

The Council's determination comes directly from the words of the statute. RSA 149-M:11, III (a) (the "a criteria") plainly requires DES to determine if there is a short- and long-term capacity need for the facility, and requires that capacity need to be identified according to RSA 149-M:11, V. RSA 149-M:11, III (a), Final Order at 8 ("A plain reading of the (a) criteria clearly demonstrates there must be a 'capacity need' to exist for NHDES to justify a finding of substantial public benefit.").

Section V, for its part, lays out the formula for calculating capacity need and determining if the proposed facility satisfies that need. RSA 149-M:11, V, Final Order at 9. After projecting the amount of solid waste to be generated within New Hampshire over a twenty-year planning period, DES is instructed to identify the types of waste that will be received by the proposed facility and to identify, by type of solid waste received, all permitted facilities operating in New Hampshire. RSA 149-M:11, V (a), (b), (c). In the final provision, RSA 149-M:11, V(d), DES

must make two determinations: first, whether there will be any shortfall in capacity for the type of waste for the proposed facility over the twenty-year planning period, and second, if there is such a shortfall, the extent to which the proposed facility satisfies that need. RSA 149-M:11, V(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.")

The Council's determination that a facility must satisfy a capacity need during the lifespan of the facility is based on the final provision of Section V(d), which states that if there is a shortfall, "a capacity need for the proposed type of facility shall be deemed to exist *to the extent the proposed facility satisfies that need*." RSA 149-M:11, V(d) (emphasis added); *see* Final Order at 9-12. The Council correctly reached this conclusion by a plain reading of the statute. Using what the Council describes as a "plain reading of the word 'satisfies'" it determined that: "the language 'to the extent that the proposed facility satisfies that [capacity] need' ties a finding of capacity need to a finding of shortfall, subject to the degree a proposed facility resolves said capacity need. . . . it is readily apparent that a finding of capacity need is limited in scope based on a proposed facility's ability to 'resolve' said capacity need." Final Order at 9.

NCES concedes that under the statute, a capacity need only exists to the extent that need satisfies a shortfall, but NCES argues that the shortfall can occur at any time over the twenty-year planning period. *See* NCES Motion at 24 (The statute's requirement that capacity need exists 'to the extent' it satisfies a shortfall is best explained by the 20-year planning period . . ."). This position ignores plain statutory language. The statute does not simply say "to the extent" as

quoted by NCES, but rather "to the extent that *the proposed facility satisfies* that need." RSA 149-M:11, V(d) (emphasis added). Under New Hampshire law every statutory word must be given its full effect. *See Town of Amherst v. Gilroy*, 157 N.H. 275, 279 (2008) ("The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect."); *see also Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009) (quoting *Amherst* and adding that courts "also presume that the legislature does not enact unnecessary and duplicative provisions.") (internal citations omitted). NCES's position that if a shortfall occurs at any time during the twenty-year planning period, there is a capacity need, would only makes sense if the statute did not include the words "to the extent that the proposed facility satisfies that need." Critically, the statute *does* include those words. The legislature qualified the capacity need, providing that a capacity need only exists "to the extent the proposed facility satisfies that need." RSA 149-M:11, V(d). The words "to the extent the proposed facility satisfies that need" must be given their full meaning and cannot be ignored. *See Town of Amherst*, 157 N.H. at 279.

The Council correctly determined that, because the statute requires that the proposed facility "satisfies" the capacity need, a present-action relationship must exist between the capacity need and the proposed facility. Final Order at 10. Stated another way, the facility operations and the capacity need must be contemporaneous.[9] *See id.* The Council reached this determination based on a plain reading of the statute. Final Order at 10-11 ("a plain reading of paragraph V(d) imposes a requirement that a proposed facility must presently satisfy capacity need . . .").

[9] This does not mean that the capacity need and facility operations cannot occur in the future, as suggested by DES. *See* DES Motion at 3-4. The capacity need and facility operations may occur in the future, as long as they occur at the same time.

B. The Final Order is consistent with DES's own interpretation of the statute.

As recognized in the Final Order, requiring facility operations and capacity need to occur contemporaneously is the exact position DES took when it denied NCES's first Stage VI permit application. Final Order at 11. DES now reverses course and suggests that a facility could satisfy a capacity need by addressing a future capacity shortfall. DES Motion at 3. As explained in the Final Order:

> This argument contradicts NHDES's findings in its February 2020 Permit Application Review Summary which contains NHDES's review of NCES's initial application for its Stage VI expansion. *See* Appellant Exhibit 5, p. 191. After reviewing NCES's initial application – in which NCES's proposed facility would operate during a period without any shortfall in New Hampshire's waste capacity need – NHDES concluded: '[t]he proposed facility cannot satisfy a need for disposal capacity when that need does not exist during the time the proposed facility would be accepting solid waste for landfilling.' *Id.*

Final Order at 7.

NCES makes much of its assertion that DES or the Council has somehow engaged in a radical new practice of examining capacity need as a function of time. This argument is baseless because the plain language of the statute *requires* DES to examine capacity need as a function of time *See* RSA 149-M:11, V(a) (requiring DES to "[p]roject, as necessary, the amount of solid waste which will be generated within the borders of New Hampshire for a 20-year planning period."), RSA 149-M:11, V(d) (required DES to "[i]dentify any shortfall in the capacity of existing facilities … for 20 years . . ." and determine "the extent that the proposed facility satisfies that need.").

C. The doctrine of administrative gloss does not apply.

As discussed above (*see supra* at 4-5), NCES has waived its administrative gloss argument. However even if, assuming *arguendo*, NCES could assert this argument, it fails as a matter of law.

The doctrine of administrative gloss is a rule of statutory construction employed when a statutory clause is ambiguous. *Anderson v. Motorsports Holdings, LLC*, 155 N.H. 491, 501-02 (2007). Where there is no ambiguity, the doctrine does not apply. *DHB, Inc. v. Town of Pembroke*, 152 N.H. 314, 321 (2005) ("Since there is no ambiguity in the statute . . . the doctrine of 'administrative gloss' does not apply.").

Here, as NCES itself concedes, the statute at issue is unambiguous. The Final Order correctly and repeatedly states that the capacity need analysis is based on a "plain reading" of the statute. *See, e.g.*, Final Order at 8 (plain reading of the (a) criteria); *id.* at 9 (plain reading of the word satisfies), *id.* at 10 (plain reading of paragraph V(d) requires a facility to presently satisfy a capacity need). Importantly, NCES concedes that the statute is unambiguous, asserting that a detailed statutory analysis is unnecessary because "the statute was unambiguous in the first place." NCES Motion at 20.

Acknowledging that the statute is unambiguous, NCES raises administrative gloss as an alternative argument. NCES Motion at 22 ("Even if the statute could be considered ambiguous, NHDES's long-standing interpretation and application of the statute has created an administrative gloss . . ."). Because the statute is unambiguous and the administrative gloss doctrine is inapplicable, the Council should disregard NCES's assertion of administrative gloss. *See Anderson*, 155 N.H. at 503 (rejecting an argument to apply the administrative gloss doctrine where the party has failed to show that the statute is ambiguous.).

Even if, however, the Council were to apply the doctrine of administrative gloss (which it should not), DES has historically conducted its capacity analysis as a function of capacity over time, as plainly required by the statute. *See supra* at 15.

Moreover, and of critical importance, the administrative gloss doctrine does not preclude an agency from adapting its practices over time. In *Appeal of Public Service Co. of New Hampshire*, 141 N.H. 13 (1996,) the New Hampshire Supreme Court held that the administrative gloss doctrine did not bind the New Hampshire Public Utilities Commission ("PUC") to its longstanding practice of granting exclusive service territories to electric utilities. *Id.* The court held that the PUC:

> has broad discretionary authority to determine the public good under [the statute.] That the commission may have historically interpreted the public good [in one fashion] does not preclude it from adopting a new paradigm based on changing concepts of what the public good requires. "An administrative agency is not disqualified from changing its mind".

Id. at 22 (*quoting Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993)).

For the foregoing reasons – because NCES has waived its administrative gloss argument, because the statute at issue is unambiguous, and because DES is not precluded from evolving its interpretation of the statute over time as it relates to substantial public good – NCES's administrative gloss argument should be rejected.

III. The Council Should Deny NCES's Request for Rehearing as to the Dormant Commerce Clause.

As discussed above, *supra* at 4-5, NCES has waived its dormant commerce clause argument. NCES chose not to develop the theory fully over the course of this appeal and cannot now pursue it further.[10] *See Ellis*, 2015 WL 11089466, at *1. Even if the Council were to consider NCES's dormant commerce clause argument, however, the argument fails for the following reasons.

[10] The proper approach for NCES to challenge the constitutionality of the solid waste management statute is to bring the claim in Superior Court, not in a post-hearing motion for reconsideration before the Council.

A. NCES failed to establish that RSA 149-M:11 discriminates under the dormant commerce clause.

NCES, as the party asserting a dormant commerce clause challenge, bears the burden of proof to show that the statute discriminates against interstate commerce. *See Smith*, 141 N.H. at 693. The New Hampshire Supreme Court has described this as a fact intensive analysis, stating: "In order to determine the extent of discrimination in this case, the trial court must make a factual determination . . . ." *Smith*, 141 N.H. at 696. That court further explained that to successfully press a dormant commerce clause claim, "[t]he petitioners must offer evidence to support 'a precise determination of the extent of the discrimination.'" *Id.* (quoting *Maryland v. Louisiana*, 451 U.S. 725 at 759-60 (1981)).

NCES has failed to present sufficient evidence to support its claim. NCES's entire dormant commerce clause arguments rests on unsupported conclusory assertions of discrimination. Without relying on any evidence to support its claims, NCES baldly asserts:

- "The use of [NHDES's function of time] concept has 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." NCES Motion at 9-10. NCES does not cite to anything to support this assertion. *See id.*

- "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." NCES Motion at 13. To support this assertion, NCES cites only to a CLF press statement issued after the Final Order. *Id.*

- "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 a bald-faced discrimination against waste originating outside of New Hampshire." NCES Motion at 14. NCES does not cite to anything to support this assertion. *See id.*

These assertions are conclusory, self-serving, and devoid of evidentiary support. NCES goes so far as to allege – *with no support* – that the statute now *prohibits* facilities from receiving out-of-

state waste. NCES Motion at 34 ("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.") (emphasis added). NCES has failed to present any evidence to support its dormant commerce clause argument; accordingly, the Council should reject it. *See E. Kentucky Res. v. Fiscal Ct. of Magoffin Cnty.*, 127 F.3d 532, 543 - 44 (6th Cir. 1997) (party cannot maintain dormant commerce clause claim where it fails to present evidence to show the discriminatory nature of the challenged statute.).

B. RSA 149-M:11 does not violate the dormant commerce clause.

As discussed above, NCES has waived its dormant commerce clause argument and failed to support it with sufficient evidence. Even if, however, the Council were to consider the argument (which it should not), RSA 149-M:11 does *not* violate the dormant commerce clause for the following reasons.

i. Managing solid waste for the benefit of the state is a traditional function of the state and is not in itself discriminatory.

As a preliminary matter, New Hampshire can enact a solid waste statute to address the needs of New Hampshire, and this is not discriminatory. NCES concedes this in its Motion: "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, 1(a)-(c)." NCES Motion at 33 (emphasis added). Managing solid waste is a traditional function of the state. *United Haulers Ass'n, Inc. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (detailing benefits of waste ordinances and describing them as "exercises of the police power . . . a typical and traditional concern of local government.); *see also id.* at 334 ("Disposing of trash has been a traditional activity for years, and laws that favor the government in such areas – but treat every private

business, whether in-state or out-of-state, exactly the same – do not discriminate against interstate commerce for purposes of the Commerce Clause.").

ii. Limitations on landfills do not facially discriminate against out-of-state waste.

The first step in analyzing a dormant commerce clause is to determine if it facially discriminates against interstate commerce. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994). In this context the Supreme Court instructs that: "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* Under this formulation the Supreme Court has held that statutes that discriminate against interstate commerce, such as a ban on out-of-state waste or a surcharge on the disposal of out-of-state waste are invalid. *See id.*

Landfill siting restrictions that limit or prevent construction of a landfill do not discriminate against interstate commerce because they limit *all waste* from disposal and do not distinguish between in-state and out-of-state waste. As explained in *Clarkco Landfill Co. v. Clark County Solid Waste Management Dist.*, 110 F.Supp.2d 627 (S.D. Ohio 1999): "Indeed, by preventing the Plaintiff from constructing the proposed landfill, the Clark County Defendants will be preventing the disposal of solid waste in Clark County, regardless of whether it was generated within the state of Ohio, or elsewhere." *Clarkco Landfill Co.*, 110 F.Supp.2d at 640 (dismissing dormant commerce clause claim). The Supreme Court recognized this in an early dormant commerce cause case addressing landfill restrictions. In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Supreme Court held that a New Jersey statute prohibiting the importation of all out-of-state waste violated the dormant commerce clause. Explaining that New Jersey cannot ban out-of-state waste to meet an ultimate goal of reducing waste disposal costs or protecting the environment, the Supreme Court noted that New Jersey *could* address those goals

by slowing down *all waste* into the State's landfills, even if that resulted in some incidental effect on interstate commerce: "And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." *City of Philadelphia*, 437 U.S. at 626 (emphasis in original). Similarly, because they treat in-state and out-of-state waste alike, statutes that include provisions to ensure adequate capacity to address waste generated within a state are not facially discriminatory. *E. Kentucky Res.*, 127 F.3d at 541.

Despite several assertions by NCES to the contrary, *supra* at 18-19, RSA 149-M:11 is not facially discriminatory. It does not ban on out-of-state waste, as in *City of Philadelphia*, *supra*, nor does it facially discriminate in other ways, such as imposing a surcharge on out-of-state waste.[11] *See Oregon Waste Sys.*, 511 U.S. at 99 (finding it "obvious" that Oregon's out-of-state surcharge fee, almost three times greater than the in-state fee, was discriminatory.). Instead, RSA 149-M:11's capacity need requirement limits *all* waste going into New Hampshire landfills, limiting in-state and out-of-state alike, and does not discriminate against out-of-state waste. *See E. Kentucky Res.*, 127 F.3d at 541; *Clarkco Landfill Co.*, 110 F.Supp.2d at 640.

iii. New Hampshire's solid waste statute does not discriminate against interstate commerce under the *Pike* balancing test.

When a statute is found to be nondiscriminatory on its face, the second step in analyzing a statute under the interstate commerce clause is to apply a balancing test laid out by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *Oregon Waste Sys.*, 511 U.S. at 99 (citing *Pike*, 397 U.S. at 142). Under the *Pike* analysis "nondiscriminatory regulations that

[11] NCES claims that the statute overtly discriminates against out-of-state waste by assessing a surcharge for the disposal of that waste (NCES Motion at 29), but this provision is not part of this appeal and NCES does not claim to be subject to that surcharge.

have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id.* (quoting *Pike*, 397 U.S. at 142.)

There is substantial public benefit in the proper management of waste within a state. Applying the *Pike* balancing test, the Supreme Court has held that the benefits of waste management outweigh abstract assertions of harm to interstate commerce. *United Haulers Ass'n*, 550 U.S. at 346; *see also VIZIO, Inc. v. Klee*, 886 F.3d 249 (2nd Cir. 2018) (upholding Connecticut's e-waste law under the *Pike* balancing test, nothing that "[t]he benefits provided by [the law] are legion."); *E. Kentucky Res.*, 127 F.3d at 545 (listing the benefits of state's waste disposal program). Beneficial waste statutes that treat in-state and out-of-state waste the same, including RSA 149-M:11, do not violate the dormant commerce clause, even if they result in incidental effects on interstate commerce. *See VIZIO*, 886 F.3d at 260 (public benefit outweighs effects on interstate commerce where waste companies are treated the same, no matter which state they come from) (internal citations omitted).

New Hampshire's solid waste statute does not discriminate against interstate commerce, either facially or applying the *Pike* balancing test. The Council should deny NCES's motion to reconsider the Final Order regarding the dormant commerce clause.

IV. The Council Should Deny NCES's Request for Rehearing as to Standing

A. The matter of standing has been fully litigated; NCES's request for rehearing presents no new argument or basis for reconsideration and therefore must be denied.

On February 8, 2021, NCES filed a motion to dismiss CLF's appeal for lack of standing. Motion to Dismiss for Lack of Standing (Feb. 8, 2021). CLF objected to that motion, presenting sworn statements of members who are and will continue to be directly affected by the operation

of NCES's landfill in Bethlehem. *See* Objection to Motion to Dismiss (Feb. 19, 2021). NCES filed a reply to CLF's objection, and CLF filed a surreply. Reply to CLF's Objection to NCES's Motion to Dismiss for Lack of Standing (March 1, 2021); Surreply to Intervener NCES's Reply to Appellant's Objection to Motion to Dismiss (March 5, 2021).

On March 17, 2021, following the above-referenced extensive briefing, the Council issued an order rejecting NCES's many arguments challenging CLF's standing. *See* Decision & Order on Permittee's Motion to Dismiss (March 17, 2021). The Council denied NCES's motion to dismiss, ruling that CLF had sufficiently demonstrated standing and that NCES's arguments to the contrary were without merit. *Id.*

On March 25, 2021, NCES filed a motion for reconsideration, rehashing the same arguments it had previously made to challenge CLF's standing. *See* Motion of NCES for Reconsideration (March 25, 2021). CLF filed an objection, to which NCES filed a reply. Objection to Motion for Reconsideration (March 25, 2021); Permittee's Reply to Appellant's Objection to Motion for Reconsideration (April 5, 2021). On May 11, 2021, the Council issued an order denying NCES's motion for reconsideration, once again ruling that NCES's arguments related to standing were meritless. *See* Decision & Order on Permittee's Motion for Reconsideration (May 11, 2021).

At no time during the extensive litigation of standing described, and at no time since, did NHDES challenge or in any way contest CLF's standing.

NCES now seeks a third bite at the apple, requesting – yet again – that the Council dismiss CLF's appeal for lack of standing. *See* Motion for Rehearing at 39-44. In doing so, however, NCES simply recycles arguments previously made to, and rejected by, the Council. *Id.* It presents no new argument or basis to justify its request for rehearing but instead simply repeats

failed arguments already made multiple times. Because a motion for rehearing pursuant to RSA 541:3 "must do more than merely restate prior arguments and ask for a different outcome," NCES's motion for rehearing as to standing fails as a matter of law. *See Freedom Energy Logistics*, N.H. Public Utilities Comm'n, Order No. 25,810 at 4 (Sept. 8, 2015) (denying motion for rehearing where motion presented no new information and commission did not overlook or misunderstand issues raised during the proceeding); *Town of Hampton*, N.H. Public Utilities Comm'n, Order No. 26,287, 2019 WL 3890228, at *2 (Aug. 14, 2019) ("A successful Motion for Rehearing does not merely reassert prior arguments and request a different outcome."); *id.* (the "standard for rehearing" is not met when a party "repeat[s] the same arguments it made" in previous filings).

In addition to simply rehashing prior argument and presenting nothing new for the Council's consideration, NCES's claim that it is entitled to an evidentiary hearing on standing must be rejected on an additional ground: it is untimely and has been waived. NCES had the opportunity to identify witnesses in advance of the final hearing, and to attempt to examine those witnesses during the final hearing, to challenge standing. It failed to do so. Having not taken advantage of the final hearing as a potential opportunity to examine witnesses relative to standing, NCES cannot credibly claim it is entitled to the hearing – well past the eleventh hour – it now seeks yet again.

B. <u>CLF unequivocally has standing.</u>

In both its March 17, 2021 order denying NCES's motion to dismiss for lack of standing, and its May 11, 2021 order denying NCES's motion for reconsideration, the Council correctly rejected the arguments that NCES seeks to re-litigate yet again. CLF hereby incorporates by reference, as if fully set forth herein, the arguments and information (including the sworn

statements of CLF members) set forth in its above-referenced pleadings (i.e., its February 19, 2021 Objection to Motion to Dismiss; March 5, 2021 Surreply to Intervener NCES's Reply to Appellant's Objection to Motion to Dismiss; and March 31, 2021 Objection to Motion for Reconsideration). As set forth in those filings, and as determined by the Council, NCES's arguments are wholly without merit and its request for rehearing on the topic of standing should be denied.

V. NCES's Arguments that the Hearing Officer Improperly Resolved Mixed Questions of Law and Fact and Improperly Failed to Consult the Council are Without Merit and Should be Rejected.

NCES claims the Hearing Officer acted improperly, in contravention of the role for hearing officers set forth in RSA 21-M:3, by improperly engaging in fact-finding and by improperly failing to consult members of the Council, including in a public meeting noticed to the public. *See* Motion for Rehearing at 34-39. Its claims – resting on a creative attempt to incorrectly recast [Section C] the Council's decision as one involving mixed questions of law and fact – are without merit.

Contrary to NCES's manufactured argument that the Hearing Officer improperly engaged in fact-finding, Section C of the Council's decision is premised on statutory interpretation to address the "lawfulness" element of CLF's appeal as it relates to RSA 149-M:III(a). That interpretation, applied to the undisputed fact that NHDES projected a capacity shortfall only in 2026, is purely a question of law and is one that the Hearing Officer was fully authorized to resolve. *See* RSA 21-M:3, IX ("the hearing officer shall: . . . (d) Decide all questions of law presented during the pendency of the appeal. . . ."). Moreover, contrary to NCES's claim, the

Hearing Officer acted properly and in full compliance with RSA 21-M:3 in its process working with the Council to issue the decision. *See* RSA 21-M:3, IX(f).[12]

NCES's arguments that the Hearing Officer improperly resolved mixed questions of law and fact, and failed to properly consult members of the Council, should be rejected.

CONCLUSION

As set forth above, NCES has failed to demonstrate good cause for rehearing and NCES's Motion for Rehearing should be denied.

Wherefore, CLF respectfully requests that the Council deny NCES's Motion for Rehearing and strike from the record, and not consider, the exhibits accompanying NCES's Motion for Rehearing.

[12] RSA 21-M:3, IX states in pertinent part:

> When designated as the hearing officer for a particular appeal, the hearing officer shall:
> . . . .
> (f) Prepare and issue written decisions on all motions and on the merits of the appeal within 100 days of the conclusion of the hearing on the merits. The hearing officer shall provide the council with a proposed written decision on the merits within 45 days of the conclusion of the hearing on the merits. *If requested to do so by the members of the council participating in the discussion*, the hearing officer shall meet with those members within the 100 day period to discuss the decision.

(Emphasis added). As NCES is aware, the Hearing Officer provided the proposed written decision to the Council, requested confirmation from the Council whether it desired to meet with him, and was informed that members of the Council did not request such a meeting. Motion for Rehearing, Exh. I-1.

Dated: June 24, 2022

Respectfully submitted,

CONSERVATION LAW FOUNDATION
By its attorneys,

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CERTIFICATE OF SERVICE

I certify that the original and thirteen copies of the foregoing Memorandum was this 24th day of June, 2022 hand-delivered to the Waste Management Council and a copy of the foregoing is being sent by electronic mail to Joshua C. Harrison, Esq., Bryan K. Gould, Esq., Cooley Arroyo, Esq. and Morgan C. Tanafon, Esq.

Heidi H. Trimarco

THE STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

Docket No. 20-14 WMC

Appeal of North Country Environmental Services, Inc.'s Type I-A Permit Modification for Expansion (Permit No. DES-SW-SP-03-002) by Conservation Law Foundation

RESPONSES OF NORTH COUNTRY ENVIRONMENTAL SERVICES, INC. TO CONSERVATION LAW FOUNDATION'S FIRST SET OF REQUESTS FOR INFORMATION

North Country Environmental Services, Inc. ("NCES") provides the following responses to the first set of requests for information propounded by Conservation Law Foundation ("CLF") subject to and without waiving the objections interposed below:

Instructions

Please answer these requests for information under oath and return them no later than August 18, 2021, pursuant to the Pre-hearing Order in this matter. If there are any questions or concerns as to the meaning or scope of the requests below, please promptly contact Heidi Trimarco at htrimarco@clf.org for clarification.

If for any reason you are unable to answer any portion of a request for information, please answer all remaining portions of each request to the best of your ability.

If you feel that any request is ambiguous or otherwise confusing, please notify CLF so that the request may be clarified prior to the submission of a written response.

These requests for information seek answers as of this date but are continuing so that any additional responsive information or materials that you acquire or become aware of up to and including the time of hearing must be provided promptly.

In answering these requests for information, divulge all information in your possession or control, or previously in your possession or control, or that of any other person or entity acting on your behalf, in connection with you, or at your behest.

Please organize the responses to each request for information so that it is clear which specific information and/or documents are being furnished in response to each request for information. In addition, please describe with specificity precisely which portion or portions of a document are responsive to a particular request for information. If a document is responsive to more than one request for information, it is not necessary to supply duplicate copies. Instead, please simply state that the document has already been provided, state which request the document has already been provided under, and state which portion or portions of the document are responsive to each portion of each of the requests to which the document applies.

For each response, please identify the person who provided the response and who will be responsible for testimony concerning each request. Also, for each response, identify each individual who supplied any information in response to the question.

If the responding party knows of the location of any requested document but does not produce the document on the ground that the document is not in the responding party's possession, custody, or control, the responding party shall identify the document and identify the person who the responding party believes does have possession, custody, or control of the document.

Documents, information, and communications should be provided unaltered and in their entirety. Where requests could be interpreted to call for production of electronic and or interactive documents, information, and communications, such as models, spreadsheets, etc., the form of production shall be the form that will most likely enable the requestor to use the document, information, and communication, for example by inputting variable data to discover differences in outputs based on specific inputs, and to identify what inputs were used. Should you have any question whether the requestor possesses software or other means necessary to run the document, information, and/or communication, please notify us as soon as possible so that we can arrive at a mutually agreeable arrangement regarding production prior to the submission of your written response. In the event that the document, information, and/or communication to be produced requires specialized software or other means to run it, we reserve the right to request copies of or access to such software or other means. Data dictionaries and/or variable names should be provided. All GIS data layers shall include Federal Geographic Data Committee (FGDC) compliant metadata which for intermediate and derived layers shall describe the processing steps used to develop that data. Source data obtained from state or federal agencies may be provided by reference to a publicly accessible web site from which this data may be obtained without charge.

If there is an objection to any request for information, please state the basis of the objection. If the objection is based on privilege, please identify the privilege and the facts on which privilege is based. If a claim of privilege is asserted with respect to a document, provide the date, title, or number of the document, the identity of the person who prepared or signed it, the identity of the person to whom it was directed, a general description of the subject matter, the identity of the person holding it and the location of its custody. If any document requested has been destroyed, lost or is otherwise unavailable, please list and identify the document, describe the document with as much detail as possible, and state the circumstances of its loss, destruction or unavailability.

To the extent that you consider any of the following requests objectionable, answer or respond to so much of the request and each part thereof as is not objectionable in your view, and separately state that part of each request as to which you raise objection and each ground for each such objection.

Prior to lodging an objection as to overbreadth or excess burden, NCES may wish to contact CLF to ensure that they have properly interpreted the intent of the request for information in concern and/or to discuss scope.

These instructions shall apply to any additional sets of requests for information issued by CLF to NCES in the instant proceeding.

Definitions

As used herein, "NCES" and "you" or "your" shall mean North Country Environmental Services, Inc.

As used herein, "DES" shall mean the New Hampshire Department of Environmental Services, including but not limited to the Waste Management Division.

As used herein, "WMNH" shall mean Waste Management of New Hampshire, Inc.

As used herein, "Facility" shall mean the Bethlehem landfill and all associated property owned and operated by NCES in Bethlehem, New Hampshire.

As used herein, "Turnkey Facility" means the Turnkey landfill and all associated property owned and operated by WMNH in Rochester, New Hampshire.

As used herein, "Permit" means the Type I-A Modification – Landfill Expansion (Stage VI) Permit No. DES-SW-SP-03-002, issued to NCES in October, 2020.

As used herein, "Stage V Permit Condition 13(b)" means Condition 13(b) of the Type I- A Modification Permit No. DES-SW-SP-03-002, issued to NCES in August, 2014.

As used herein, "2018 Turnkey Permit" means the Type 1-A Modification Permit No. DES-SW-Sp-95-001, issued to WMNH in June, 2018.

As used herein, "original Permit application" means the application for the Stage VI Permit submitted by NCES to DES in or around January 2019.

As used herein, "resubmitted Permit application" means the application for the Stage VI Permit submitted by NCES to DES in or around March 2020.

As used herein, "state solid waste plan" shall mean the state solid waste plan prepared pursuant to RSA 149-M:29, I.

The word "document" or "documentation" is used in its broadest sense and means all original writing of any nature whatsoever and all non-identical copies and drafts thereof, in your possession, custody, or control, regardless of where located, and without limitation the following items, whether printed or recorded or filmed or reproduced by any other mechanical or electrical process, or written or produced by hand, including all originals, masters, and copies, namely: reports, agreements, contracts, correspondence, and communications, e-mails, telefax, notes, memoranda, manuals, publications, technical and engineering reports, data sheets, worksheets, manifests, photographs, audio and videotapes and discs, models and mockups, expert and consultant reports, and drafts of originals with marginal comments or other markings that differentiate such copies from the original.

The term "produce" shall mean that, when production of any document in your possession is requested, such request includes documents subject to your possession, custody, or control. These documents are to be provided unaltered and in their entirety. In the event that you are able to

provide only part of the document called for in any particular data request, provide all relevant documentation that you are able to provide and state the reason, if any, for the inability to provide the remainder.

The term “possession” shall include actual possession by you, actual possession by you with another, or constructive possession by you in that you are legally entitled or able to obtain actual possession.

"Identify" or "identity" when used in connection with: (1) a natural person means to state the person's name, employer and business address; (2) a municipality means to state the name of the municipal entity and the state in which it is located; (3) a corporation or other entity means to state the name of the entity, "d/b/a" designation if any, address of its principal place of business, and address of its principal place of business in New Hampshire; (3) a document means to state a description, including name of author or source, date and addressee(s); (4) a communication means to state a description, including participants, date and content of the communication; and a place means to state a description of a precise geographic location or address.

The terms “information,” “data,” “documentation,” and “analysis” shall be expansively construed and shall include but not be limited to: facts, data, opinions, images, impressions, concepts, and formulae.

The term “communication” shall mean the act or fact of communicating or transmitting information, including telephone conversations, letters, emails, memoranda, or any other written communications, meetings, or any occasion of joint or mutual presence as well as transfer of any document from one person to another, or any other electronic communication of any type or form.

The terms “and” and “or” shall be construed either conjunctively or disjunctively so as to bring within the scope of the request any documents that might otherwise be considered outside the scope.

Wherever appropriate, the singular form of a word shall be interpreted in the plural and vice versa so as to bring within the scope of the request any documents that might otherwise be considered outside its scope.

Variations on root word: Wherever appropriate, root words shall be interpreted to include variable suffixes and prefixes of the root word so as to bring within the scope of the request any documents, information, and communications that might otherwise be considered outside its scope. For example, the word “communications” shall be interpreted to include the word “communicate” if such an interpretation would bring within the scope of the request any document, information, and communications that might be considered outside its scope if the word “communications” was not interpreted to include the word “communicate.”

OBJECTION TO INSTRUCTIONS AND DEFINITIONS

NCES objects to the instructions and definitions set forth in CLF's requests to the extent they seek to impose obligations on NCES and its responses that are not required by rule, order, or any other authority or they purport to modify the plain language of CLF's requests.

Requests for Information

1. Please produce all communications with DES regarding the state solid waste plan, including but not limited to DES efforts to update the 2003 state solid waste plan, or lack thereof.

RESPONSE: NCES objects to this request on the grounds that it is overbroad to the extent it seeks information irrelevant to the issues CLF has raised in this appeal. Subject to and without waiving this objection, and pursuant to the clarification provided by CLF's counsel on July 19, 2021 concerning the time frame for responsive documents, NCES searched for responsive documents created from January 1, 2009 to present, but did not locate any such documents.

2. Please produce all documents related to Stage V Permit Condition 13(b), including but not limited to all documents and communications with DES regarding NCES's efforts to avoid to the extent possible the disposal of recyclable material at the Facility.

RESPONSE: NCES objects to this request on the grounds that Stage V Permit and NCES's compliance with permit conditions in the Stage V Permit is irrelevant to the NHDES decision that is on appeal.

3. Please produce any and all communications between NCES and WMNH regarding Condition 21 of WMNH's 2018 Turnkey Permit.

RESPONSE: NCES objects to this request to the extent it seeks communications between and among WMNH, NCES, and counsel for those parties related to *CLF v. NHDES*, Docket No. 217-2021-CV-00092 (N.H. Super. Ct.). WMNH and NCES were intervenors in that litigation and coordinated their defense of CLF's claims. Their communications are therefore protected by the work-product and common interest doctrines. A privilege log identifying responsive communications between and among counsel for WMNH and NCES is provided with these responses. There are no unprivileged communications responsive to this request.

4. Please produce any and all communications between NCES and WMNH regarding the public benefit requirement of RSA 149-M:11, including but not limited to compliance with public benefit permit conditions.

RESPONSE: NCES objects to this request to the extent it seeks communications between and among WMNH, NCES, and counsel for those parties related to *CLF v. NHDES*, Docket No. 217-2021-CV-00092 (N.H. Super. Ct.). WMNH and NCES were intervenors in that litigation and coordinated their defense of CLF's claims. Their communications are therefore protected by the work-product and common interest doctrines. A privilege log identifying responsive communications between and among counsel for WMNH and NCES is provided with these responses. There are no unprivileged communications responsive to this request.

18. Please describe how, if at all, the leachate spill that occurred at the Facility on or about May 2021 involved in any way Stage VI of the Facility, including but not limited to equipment or systems that service Stage VI of the Facility.

RESPONSE: NCES objects to this request as irrelevant.

Respectfully submitted,

NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.,
By Its Attorneys,

Date: 9/1/21

By: /s/ Morgan G. Tanafon
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As to Objections:

Date: 9/1/21

/s/ Morgan G. Tanafon
Morgan G. Tanafon, Esq.