

RECEIVED

JUN 24 2022

NH DES
LEGAL UNIT

STATE OF NEW HAMPSHIRE
WASTE MANAGEMENT COUNCIL

Conservation Law Foundation, Inc. Appeal

Docket No. 20-14 WMC

**STATE OF NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL
SERVICES'S LIMITED OBJECTION TO NORTH COUNTRY
ENVIRONMENTAL SERVICES'S MOTION FOR REHEARING**

NOW COMES the State of New Hampshire Department of Environmental Services ("NHDES"), by and through its counsel, the Office of the Attorney General (collectively, the "State"), and hereby submits its Limited Objection to North Country Environmental Services's ("NCES") *Motion for Rehearing*.

The State objects to certain arguments within NCES's *Motion for Rehearing*, which claim: (1) that a long-standing NHDES interpretation of RSA 149-M:11 created binding administrative gloss (NCES *Motion for Rehearing*, page 18) and that NHDES changed its interpretation with the issuance of the October 9, 2020 permit ("Permit") to NCES; and, (2) that RSA 149-M:11 is unconstitutional under the Dormant Commerce Clause.

I. To the Extent NCES Challenges any Department Action as Unlawful or Unreasonable or any Statute as Unlawful, NCES is Precluded from Raising Those Challenges

To the extent NCES is claiming that NHDES acted unlawfully in any respect with regard to the October 9, 2020 permit decision or that any statute is unlawful or unconstitutional with regard to the Permit decision, NHDES objects to those arguments for the reasons stated herein and further states that NCES is precluded from raising any challenge at this time because NCES did not timely appeal the NHDES Permit decision to this council; instead NCES accepted the NHDES Permit and began operating pursuant

to it. *See* RSA 21-O:14, I-a(a) (requiring that an aggrieved party appeal within 30 days of the date of the decision and requiring that it set forth fully every ground upon which it is claimed NHDES acted unlawfully or unreasonably in a notice of appeal). If NCES felt that it was aggrieved by the NHDES Permit issuance due to either an alleged departure from a long-standing interpretation or because NHDES was acting pursuant to an alleged discriminatory statute that is contrary to the Commerce Clause, NCES was required to appeal to the Waste Management Council pursuant to RSA 21-O:14, I-a, RSA 21-O:9, V, and RSA 149-M:8. It failed to do so. Accordingly, any challenges to the decision now should be disregarded.

II. NCES's Motion for Rehearing Fails to Demonstrate that Its "Aggregated Capacity" Interpretation is Supported by a Long-Standing NHDES Application Subject to Administrative Gloss

NHDES objects to NCES's argument that its interpretation of RSA 149-M:11, III is supported by a long-standing interpretation by NHDES, which is entitled to administrative gloss. No argument of NCES within its *Motion for Rehearing* supports a determination of administrative gloss that supports NCES's interpretation of the statute.

NCES looks to six past decisions on solid waste facility applications, and its own reformulated data, to attempt to find support for its argument that NHDES has always applied an interpretation disregarding time as a factor and that NHDES routinely used an interpretation that permitted a facility whenever an applicant demonstrated that there was a shortfall anywhere within the 20-year planning period set forth in RSA 149-M:11, III (the alleged "aggregated capacity" method). NCES's exhibits and arguments demonstrate no such long-standing interpretation by NHDES. At best, the exhibits show no enunciated methodology applicable to the facts in this case. Nothing in these

documents is inconsistent with the interpretation NHDES has put forth throughout this appeal, which is found in both the NHDES *Prehearing Memorandum* and the NHDES May 31, 2022 *Motion for Reconsideration*. See May 11, 2022 Final Order, pages 7-8 (“NHDES’s current position [is] that “the exclusive overlap, minimal overlap, or lack of any overlap between the proposed operating life of a facility and a period of shortfall in capacity is not solely determinative of a RSA 149-M:11, III(a) capacity need finding,”” that “NHDES is charged with determining whether a proposed facility has a ‘meaningful effect, short- and long-term, on the capacity need,” and that “a proposed facility could be found to provide a substantial public benefit even if there exists no capacity need during the lifespan of the facility, if the existence of the proposed facility will have a positive effect on the state’s later capacity need.”).

NCES’s exhibits and arguments regarding NHDES’s alleged long-standing interpretation merely show that at various points NHDES granted permits to applicants to operate solid waste facilities both solely before, solely after, or both before and after a capacity shortfall point, as it did in this current decision on NCES Stage VI.¹ Additionally, it is speculation to view NCES’s provided exhibits as suggesting or stating that NHDES approved pre-shortfall capacity for the sake of addressing out-of-state waste or to avoid an alleged Commerce Clause violation.

¹ NCES, as part of their exhibits, includes select statements from portions of the *applicant’s* public benefit statements, rather than any statements or analysis from NHDES beyond the permit itself and the conditions pages. Those applicant statements are on Exhibit A-6 to A-7, Exhibit B-8 to B-12, Exhibit C-4 to C-9, Exhibit D-5 to D-6, and Exhibit E-5 to E-6. These applicant statements and tables cannot be used to support an alleged long-standing NHDES interpretation because they are not statements or reasoning by NHDES. NHDES does not merely accept the arguments and data supplied by applicants within their public benefit statements but performs its own analysis as well.

First, with respect to NCES Exhibit A, regarding a 2003 Mt. Carberry Secure Landfill (“Mt. Carberry”) decision, NCES merely demonstrates that the Mt. Carberry facility proposed to operate for at least the entire 20-year planning period and that a shortfall was not projected to start until 2011.² NCES *Motion for Rehearing*, pages 4-5; NCES *Motion for Rehearing*, Exhibit A. NHDES conditioned the Mt. Carberry permit approval on operating the facility for 20 years through December 2022. This exhibit also demonstrates that this application was not for a new or expanded facility to add capacity but rather an application for a permit modification to change the fill rate. *Id.* at Exhibit A-4. For this decision, as depicted by NCES, despite no change to the facility’s overall capacity in the application, NHDES engaged in a public benefit review anyway, presumably because a change to the fill rate may impact the short- and long-term need *analysis* and the overall life expectancy of the facility and have the effect of changing NHDES’s original assessment of short- and long-term need when it initially approved the capacity. If NHDES were unconcerned with time as a factor and merely applied an “aggregated capacity” review, as NCES alleges, NHDES would not have engaged in a second public benefit analysis to assess the impact of a changed fill rate on previously approved capacity. Accordingly, this past decision does not support NCES’s argument that NHDES has a long-standing interpretation of using the “aggregated capacity” method.

Second, with respect to NCES Exhibit B and the NCES Stage IV decision from 2004, NCES again merely demonstrates that NHDES issued an approval for a facility that

² NHDES accepts NCES’s reconstructed data as true for the purposes of this objection only to demonstrate that, even if accepted as true reformulations of data, it does not support the position NCES asserts.

proposed to operate 10.5 years with a shortfall beginning in 2006. NCES *Motion for Rehearing*, page 6. This decision, as depicted by NCES, only shows another example of the scenario just approved within this Stage VI decision on appeal, i.e., operation during pre- and post-shortfall.

Third, NCES' Exhibit C points to the NCES Stage V permit. Even accepting NCES's exhibit and allegations of fact regarding this decision as true, this exhibit is not inconsistent with the NHDES position identified in its *Prehearing Memorandum* and its *Motion for Reconsideration* that it is possible that a facility could operate entirely before the shortfall occurs and still provide a public benefit.

Next, regarding the 2018 TLR-III Waste Management of New Hampshire, Inc. decision within NCES Exhibit D, NCES's "reconstruction" (NCES Exhibit D-1) is inaccurate. In this case, NHDES determined, after reviewing the applicant's submitted data, that a shortfall would occur in 2020 (contrary to NCES's reconstructed data, which finds the shortfall occurring in 2024 – NCES *Motion for Rehearing*, page 6). See Excerpt from June 11, 2018 TLR-III Application Review Summary (attached as NHDES Exhibit 1). Operations for TLR-III were also not supposed to begin until 2021. *Id.* Accordingly, this TLR-III decision instead indicates a scenario wherein the entirety of the proposed operation would occur after the identified shortfall. Additionally, NHDES records include a similar chart tracking and identifying the period of shortfall and closure of facilities to the one that exists within the October 9, 2020 Application Review Summary. NHDES Exhibit 2, TLR-III Capacity Shortfall Chart. This chart, while used by NHDES in its analysis, was not put into the TLR-III Application Review Summary because these review summaries were new and were still being refined.

Regarding NCES Exhibit E and the 2019 Mt. Carberry decision, a similar response to the above is applicable. This exhibit and this 2019 decision cannot demonstrate that the alleged “aggregated capacity” method was used. For this application review, like in the TLR-III decision from 2018, for this application review, NHDES created a similar chart to the one that exists within the October 9, 2020 Application Review Summary, for its review purposes, to determine the date when shortfall occurred and by how much. NHDES Exhibit 3, 2019 Mt. Carberry Capacity Shortfall Chart. Accordingly, since 2018, over the course of at least two decisions, NHDES has utilized the same chart to track the date of shortfall and extent of shortfall.

With respect to NCES Exhibit F and the 2013 Mt. Carberry denial, NCES seems to claim that NHDES’s denial of an application for a facility that was on pace to operate until 2048 with its existing capacity, well beyond the 20-year planning period, somehow supports NCES’s claim of a long-standing use of an “aggregated capacity” method. In actuality, it simply supports the notion that a shortfall within the 20-year planning period does not automatically equate to permission to operate well beyond the planning period. Therefore, this 2013 Mt. Carberry denial also does not support NCES’s argument.

To be clear, NHDES is unable to recreate the detailed analyses performed on all of these past decisions, especially when decisions, at the time, were not drafted with the detail provided today. That lack of detail in prior decision documents does not imply, however, that NHDES exercised the interpretation NCES espouses or that it did not analyze the entirety of RSA 149-M:11, III and the short- and long-term need for each decision consistent with its stated interpretation.

Overall, NCES does not demonstrate a long-standing interpretation by NHDES of using this supposed “aggregated capacity” method. Contrary to NCES’s claims that NHDES “only recently assessed when the shortfall would occur in 2020,” the above objection makes clear that since 2018, NHDES has created documents clearly demonstrating when the shortfall would occur, may have done so each of the past decisions cited as well, and at least one NCES cited applicant from 2003 determined a shortfall point in time in their public benefit application as well (NCES Exhibit F-5). *See NCES Motion for Rehearing*, page 21. Accordingly, no departure from a long-standing interpretation by NHDES has been demonstrated. *See NHDES May 31, 2022 Motion for Reconsideration*.

III. RSA 149-M:11 Does Not Violate the Dormant Commerce Clause Facially or As-Applied

NHDES objects to NCES’s arguments that RSA 149-M:11 violates the dormant Commerce Clause. RSA 149-M:11 is neither facially discriminatory nor discriminatory as-applied and does not violate the dormant Commerce Clause. In addition, NHDES’s interpretation, as detailed throughout this appeal, does not reveal or effectuate any discriminatory intent. Simply put, RSA 149-M:11 acts as a limitation on the permitting of solid waste capacity, but it in no way restricts the source of waste to those in-state to the burden of out-of-state participants. Once the capacity is approved, anyone, either in-state or out-of-state, can use it – it is up to the permitted facility. No NHDES statute, regulation, policy, enforcement action, or permit conditions prohibit a facility from accepting waste from one source or another.

The negative implication within the Commerce Clause of the United States Constitution, referred to as the dormant Commerce Clause, “prevents state and local

governments from impeding the free flow of goods from one state to another.” *Constr. Materials Recycling Ass’n Issues and Educ. Fund, Inc. v. Burack*, 686 F. Supp. 2d 162, 166 (D.N.H. 2010) (internal citations omitted). It provides that:

Laws that discriminate against out-of-state interests are treated differently under the dormant Commerce Clause from laws that affect interstate commerce evenhandedly. “A discriminatory law is virtually per se invalid...and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives.” In contrast, a non-discriminatory law that nevertheless burdens interstate commerce “will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.”

In the context of a dormant Commerce Clause challenge, discrimination “means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” Even a facially neutral law will be considered discriminatory if it is discriminatory in either its purpose or its effect. As the First Circuit has recognized, however, “[i]ncidental purpose, like incidental effect, cannot suffice to trigger strict scrutiny under the dormant Commerce Clause.”

Id. at 166-70 (internal citations omitted).

First, a statute is either facially discriminatory or it is not. It is inaccurate for NCES to argue that NHDES’s interpretation or the “hearing officer’s application of RSA 149-M:11 is facially discriminatory...” NCES *Motion for Rehearing*, page 32. An interpretation by NHDES, which NCES alleges changed (see above section), or by the Hearing Officer cannot “reveal” that a statute is facially discriminatory. NCES *Motion for Rehearing*, page 29. Further, similar to the argument above in section II, while NCES seems to argue that NHDES approved additional or excess capacity in order to avoid a dormant Commerce Clause challenge, NHDES may have merely approved capacity consistent with its analysis. NHDES objects to the assumption that it ever approved

capacity because there was a constitutional implication for not doing so. *NCES Motion for Rehearing*, page 31.

With regard to whether RSA 149-M:11 is facially discriminatory, while the statute references State-generated waste and State goals and plans, the treatment of the economic interests are evenhanded and without discrimination in purpose or effect. *See* RSA 149-M:11, III. This section of the statute, combined with RSA 149-M:11, V, which provides the mechanisms by which NHDES is to evaluate capacity shortfall and need, is nothing more than a limitation on capacity, which is either universally burdensome or liberating on all waste commerce.

NCES has only alleged that the statute's use of State generated waste as a means of measuring how much overall capacity to permit at the time of any one facility application, if any, seems to include a discriminatory purpose, i.e., to impede the importation of out-of-state waste or conversely to protect capacity for only in-state uses. *NCES Motion for Rehearing*, page 32. However, nothing in the law prohibits out-of-state waste or conversely preserves capacity for only in-state waste. Importantly, the purpose of limiting capacity must be put in its proper context of the statute as a whole. RSA 149-M is a chapter that is "primarily concerned with the public health and environmental protection" with a purpose "to protect public health, preserve the natural environment, and to conserve precious and dwindling natural resources through the proper and integrated management of solid waste." *Constr. Materials Recycling Ass'n Issues and Educ. Fund, Inc.*, 686 F. Supp. 2d at 167 (citing RSA 149-M:1 (2009)). NCES assumes that the statute is targeted at out-of-state waste but the statute principally attempts to set a limitation on available landfill capacity in order to protect the development and use of the

State's natural resources. Increased landfill capacity may also affect the state waste hierarchy and the state's diversion goals. *See* RSA 149-M:2-3 and RSA 149-M:11, III(b)-(c). In the context of construction and demolition debris within New Hampshire air, waste, and public utility statutes, the U.S. District Court for the District of New Hampshire determined that:

If, as plaintiffs argue, the legislation was enacted to protect local commercial interests in the biomass fuel market, one would expect the legislation to be targeted at this market exclusively. The legislation sweeps more broadly, however, and bans the combustion of C&D debris whether it is burned as a fuel or merely to effect disposal. Thus, the scope of the legislation better fits the State's contention that it was aimed primarily at public health and environmental protection rather than the promotion of local commercial interests

Constr. Materials Recycling Ass'n Issues and Educ. Fund, Inc., 686 F. Supp. 2d at 167-68. Here too, had the legislature actually intended to limit capacity to New Hampshire waste only, it would have prohibited out-of-state waste. Instead, to the detriment of the State's economic interests, permitted facilities may presently take 100% out-of-state waste, leaving New Hampshire negatively impacted. When a statute allows regulated facilities this kind of control and leaves the rest to market pressures, it can hardly be said to be discriminatory.

Furthermore, NCES, has not alleged any actual or incidental effect or burden on interstate commerce or its ability to accept waste from out-of-state. In essence, NCES seems to have a concern with the metric by which the legislature chose to have NHDES measure when to permit capacity and by how much. The legislature could have used any metric, or it could simply have mandated that in certain years NHDES may only permit certain amounts of capacity. The effect on interstate commerce does not change regardless of the metric used.

Finally, since the statute, for the reasons stated above, is not discriminatory in purpose or effect, the rigorous scrutiny standard does not apply. Instead, the *Pike v. Bruce Church, Inc.* balancing test is used for any remaining claim of burden on interstate commerce. The *Pike* balancing test provides that ‘laws that regulate evenhandedly and only incidentally burden commerce are subjected to less searching scrutiny’ and are therefore upheld unless the burdens they impose upon commerce ‘clearly outweigh’ their state or local benefits.” *Constr. Materials Recycling Ass’n Issues and Educ. Fund, Inc.*, 686 F. Supp. 2d at 171. The *Pike* test requires three steps: (1) evaluating the nature of the putative local benefits advanced by the statute; (2) examining the burden the state places on interstate commerce; and (3) considering whether the burden is clearly excessive as compared to the putative local benefits. *Id.* at 171. Here, the putative local benefits of the statute are as stated above: limiting available capacity to ensure that waste is managed in a proper and integrated way to best protect the State’s natural resources and assist with the statutory waste hierarchy and goals. *See* RSA 149-M:1-3. Second, NCES, as stated, has not alleged an actual burden on interstate commerce. Under the statute, no State economic resource is given greater value or protection to the burden or detriment of out-of-state commerce – facilities may accept in-state or out-of-state waste without restriction. Accordingly, because there is no identified burden on interstate commerce and the putative benefits are reasonably related to the important purpose of natural resource preservation and environmental protection, the *Pike* balancing test also fails to demonstrate any dormant Commerce Clause violation.

For the reasons stated herein, NHDES objects to NCES's arguments regarding an alleged change in interpretation by NHDES and any existence of administrative gloss as purported by NCES and that RSA 149-M:11 violates the dormant Commerce Clause.

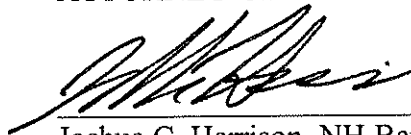
Respectfully submitted,

State of New Hampshire
Department of Environmental
Services

By its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

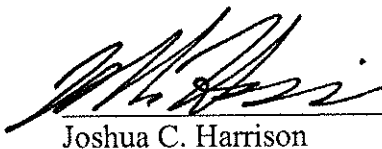
Dated: June 24, 2022



Joshua C. Harrison, NH Bar #269564
Assistant Attorney General
Environmental Protection Bureau
Office of the Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679
Joshua.C.Harrison@doj.nh.gov

Certificate of Service

I hereby certify that a copy of the foregoing has been e-mailed this day to Thomas Irwin, Esq. and Heidi Trimarco, Esq., Conservation Law Foundation, Inc., counsel for the Appellant, and Morgan Tanafon, Esq., Cooley Arroyo, Esq., and Bryan Gould, Esq., Cleveland Waters and Bass, P.A., counsel for Permittee.



Joshua C. Harrison

EXHIBIT 1

ATTACHMENT A—Application Review Summary

Public Benefit Determination

Application for Landfill Expansion---Permit No. DES-SW-SP-95-001
Waste Management of New Hampshire, Inc. (WMNH)
TLR-III Refuse Disposal Facility, Phases 15-17
June 11, 2018

The New Hampshire Solid Waste Rules, Env-Sw 100 et seq., and the New Hampshire Solid Waste Management Act, RSA 149-M, require that NHDES determine whether a proposed solid waste facility provides a substantial public benefit based on the criteria specified in RSA 149-M:11,III. NHDES' assessment and determination of the public benefit criteria is described below. Statutes are presented in quoted "underline". Information pertaining to NHDES' related assessments is presented in regular type. NHDES' determinations are presented in ***bold italics***.

- RSA 149-M:11,III(a): "The short- and long-term need for a SW 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."

Facility Type: Lined Landfill
Service Type: Unlimited
Size: 58.6 additional acres, 15.9 million cy (Life expectancy through June 30, 2034)
Location: Rochester, NH

Naming Conventions:

Landfill: TLR-III Refuse Disposal Facility (TLR-III, Landfill)
Nicknames: Turnkey Landfill, Rochester Landfill

WMNH Campus in Rochester: Turnkey Recycling and Environmental Enterprise (TREE) facility or site, which is comprised of active landfill TLR-III, closed landfill TLR-II and closed landfill TLR-I, a limited public transfer station for residents of Rochester, and a material recovery facility (MRF, permitted separately)

- Paragraph 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."

WMNH projected waste quantities for 2017 through 2036. Refer to Table 1 of the Public Benefit Statement in Section XI of the application. Waste quantity data inputs were gathered from: 2015 annual facility reports for the eight active landfills in New Hampshire; exported waste data from receiving states; 2015 annual facility reports for two C&D processing facilities in NH (i.e., Environmental Resource Return Corporation (ERRCO) and LL&S, Inc. Lowell Road Wood Processing Facility); and an estimated recycling rate provided by NHDES (31%). In addition, WMNH's projections include a separate calculation for the generation of special wastes (e.g., industrial process wastes, remediation wastes). To calculate waste quantities on a per capita basis, population projections from the NH Office of Energy & Planning were used. WMNH projects New Hampshire's total per capita generation rate is 1.39 tons per year per capita, or 7.6 pounds per day per capita.

NHDES Assessment

NHDES conducted independent calculations and generally concurs with WMNH's projected waste generation rates.

- (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.”

NHDES Assessment

The proposed facility can receive solid waste not banned or otherwise prohibited from landfilling. The facility often receives “special wastes.” The facility’s authorized waste list includes: MSW, C&D, bulky wastes, incinerator ash, asbestos, special wastes (e.g., sludge, industrial process waste, pollution control processes waste, remediation waste, contaminated soils and media, off-specification materials, treated infectious wastes, bulked liquid wastes).^{6,7}

- (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.”

NHDES Assessment

The proposed facility can receive all solid waste types not banned or otherwise prohibited from landfilling; therefore, the facility can receive most solid waste types for final disposal. In addition to TLR-III, there are five other operating, lined, municipal solid waste landfills in New Hampshire. Authorized waste types for each of these landfills are listed in the table below. Waste types that TLR-III is authorized accept, but which the other landfills are not authorized to accept, are noted in the last column.

Landfill	Location	Service Type	Authorized Waste Types	TLR-III Authorized Waste Prohibited at Subject Landfill
North Country Environmental Services, Inc. (NCES)	Bethlehem, NH	Unlimited	MSW, C&D, Pre-approved special wastes (e.g., industrial processes waste including WWTP sludge and APC wastes, remediation wastes, contaminated soils and media, off-specification materials, incinerator ash) ^{8,9}	Asbestos, Bulked liquid wastes
Lower Mount Washington Valley Secure Solid Waste Landfill	Conway, NH	Limited	Solid waste, ¹⁰ WWTP sludge from N. Conway Water Precinct, ¹¹ MSW, C&D ¹²	Asbestos, Treated infectious waste, Incinerator ash, Other sludge, ⁴ Special wastes, Bulked liquid wastes
Lebanon Regional Solid Waste Facility	Lebanon, NH	Limited	MSW, C&D, Bulky waste, ¹³ WWTP sludge from Lebanon, ¹⁴ WWTP grit/grease/screenings, ¹⁵ Treated infectious waste ¹⁶	Asbestos, Special wastes, Other sludge, Bulked liquid wastes
Four Hills Secure Landfill Expansion	Nashua, NH	Limited	MSW, C&D, asbestos, ¹⁷ bulky waste, street sweepings, WWTP sludge/grit/grease ^{18,19}	Special wastes, Bulked liquid wastes
Mount Carberry Secure Landfill	Success, NH	Unlimited	MSW, C&D, asbestos, incinerator ash, contaminated soils and media, ²⁰ mill wastes (i.e., MSW, ash, grit, lime, WWTP sludge) ²¹	Treated infectious waste, Other sludge, Special wastes, Bulked liquid wastes

⁶ NHDES. *Solid Waste Management Facility Standard Permit, Permit No. DES-SW-SP-95-001*. Approved April 10, 1995.

⁷ Sanborn, Head & Associates, Inc. *Facility Operating Plan: TLR-III Refuse Disposal Facility*. Revised August 6, 2017.

⁸ NHDES. *Solid Waste Management Facility Standard Permit*. Approved March 13, 2003.

⁹ CMA Engineers, Inc. *Facility Operating Plan: North Country Environmental Services, Inc.* Dated July 2014.

¹⁰ NHDES. *Authorization to Manage Solid Waste, Permit No. DES-SW-90-028*. Approved October 22, 1990.

¹¹ NHDES. *Record of Modification to Solid Waste Management Facility Permit*. Approved July 12, 1995.

¹² CMA Engineers, Inc. *Lower Mount Washington Valley Secure Solid Waste Landfill: Facility Operating Plan*. Dated November 2012.

¹³ NHDES. *Solid Waste Management Facility Standard Permit*. Approved March 19, 1999.

¹⁴ NHDES. *Record of Modification to Solid Waste Management Facility Permit*. Approved August 9, 2000.

¹⁵ NHDES. *Record of Modification to Solid Waste Management Facility Permit*. Approved December 20, 1999.

¹⁶ City of Lebanon. *Operating Plan: Phase II Secure Expansion*. Revised April 2013.

¹⁷ NHDES. *Solid Waste Management Facility Standard Permit*. Approved June 26, 1995.

¹⁸ City of Nashua. *Operating Plan: Phase II Secure Landfill Expansion*. Revised June 2013.

¹⁹ NHDES. *Record of Modification to Solid Waste Management Facility Permit*. Approved February 7, 2003.

²⁰ NHDES. *Record of Modification to Solid Waste Management Facility Permit*. Approved March 7, 2003.

- (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.”

There is currently no other permitted landfill in New Hampshire that can accept bulked liquid wastes. Two facilities that are similar to TLR-III include the NCES Landfill in Bethlehem, NH, which has a permitted life expectancy through 12/1/2019; and the Mt. Carberry Secure Landfill in Success, NH, which has a permitted life expectancy through 12/31/2022.

WMNH has projected the waste disposal capacity for New Hampshire from 2017 through 2036. Refer to Table 4 of the Public Benefit Statement in Section XI of the application for WMNH’s assumptions. The projections predict a shortfall in waste disposal capacity starting in 2023.

NHDES Assessment & Determination-- RSA 149-M:11,III(a):

NHDES reviewed WMNH’s waste disposal capacity calculations and notes the following:

- Mt. Carberry Secure Landfill in Success, NH has an approved capacity through 2022; as such, WMNH’s calculations overestimate the disposal capacity available in NH starting in the year 2023.
- Facilities with unlimited service areas (i.e., commercial facilities) have a minimum permitted life expectancy; that is, the facility must remain operational at non-token capacity levels through a specified date. The following facilities must remain operational as follows:
 - Mt. Carberry Secure Landfill, Success, NH: December 31, 2022
 - North Country Environmental Services (NCES), Bethlehem, NH: December 1, 2019
 - TLR-III Refuse Disposal Facility (not including the subject expansion), Rochester, NH: December 31, 2020.
- WMNH’s calculations overestimate the disposal capacity available in NH if these facilities cease operations at the minimum permitted life expectancy date. If these facilities cease operations on the permitted schedule, New Hampshire will experience a shortfall in disposal capacity starting in 2020.
- While the limited service area landfills (Four Hills Secure Landfill Expansion in Nashua, NH; Lebanon Regional Solid Waste Facility in Lebanon, NH; Lower Mount Washington Valley Secure Solid Waste Landfill in Conway, NH) and the solid waste waste-to-energy facility (Wheelabrator in Concord, NH) have sufficient capacity to dispose of wastes generated in the New Hampshire communities that they serve, they are not authorized to accept waste from sources outside of their limited service area. TLR-III is currently authorized to accept waste from any source. Numerous New Hampshire sources currently send their waste to TLR-III for disposal (approximately 38% of New Hampshire’s solid waste was disposed of at TLR-III in 2017).

The planning period for this evaluation is 2018 through 2038. Without the proposed expansion of TLR-III, NHDES projects a shortfall in disposal capacity starting in 2020. If the application is approved, New Hampshire will have a short-term excess of disposal capacity from 2021 through about 2025, disposal capacity approximately equal to projected need from 2026 through 2034, and a shortfall from 2035 through the end of the planning period of this evaluation (2038).

²¹ NHDES. Record of Modification to Solid Waste Management Facility Permit. Approved August 12, 2002.

Based on projected disposal need and capacity, a capacity need for the proposed type of facility exists within the planning period. While NH has a short-term capacity need for this type of facility, NH will not need the proposed waste disposal rate until later in the lifespan of the facility. To ensure that capacity provided by the expansion remains available into the future where the need is projected, NHDES has established permit conditions that limit the maximum airspace usage to 1.55 million cubic yards per year on a rolling three year average and that require the facility to remain operational through June 30, 2034 (see permit conditions IV.21(a) and (b), respectively).

An example calculation of the first five years of the rolling three year average airspace usage is provided in the table below.

Year No.	Operating Year	Annual Airspace Usage (CY)	Rolling Three Year Average Airspace Usage (CY)	Description
1	2021	1,450,000	n/a	n/a
2	2022	1,550,000	n/a	n/a
3	2023	1,600,000	1,533,333	Average of Year 1, Year 2, and Year 3
4	2024	1,500,000	1,550,000	Average of Year 2, Year 3, and Year 4
5	2025	1,500,000	1,533,333	Average of Year 3, Year 4, and Year 5

➤ **RSA 149-M:11,III(b): “Ability of 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.”**

Landfilling is the least preferred method of solid waste management in the hierarchy described in RSA 149-M:3, and landfilling does not, in itself, support waste diversion as identified in RSA 149-M:2. In its public benefit statement, WMNH states that the disposal facility serves as an integral component of the waste management hierarchy by serving multiple New Hampshire businesses and municipalities, and provides various services to support waste diversion.

WMNH states that integrated waste management is achieved through the following services:

- (a) Source reduction – WMNH assists customers with waste audits and establishing and implementing waste reduction/recycling programs. Further, WMNH consults with and assists municipalities with implementing Pay-As-You-Throw (PAYT) programs, which have been shown to increase recyclables recovery.
- (b) Recycling and Reuse – WMNH encourages curbside collection of recyclables, provides education to municipalities and schools, and provides educational pamphlets free of charge to communities it serves. Further, WMNH manages the collection and transfer of recyclables at the co-located MRF, and periodically identifies and redirects customers with recyclables away from the landfill to the MRF. WMNH also provides a transfer station for residential wastes, and has an on-site liquid waste bulking operation that provides a disposal option for industrial liquid wastes.
- (c) Composting – WMNH provides on-site leaf and yard waste composting.
- (d) Waste-to-energy – Waste-to-energy (WTE) incineration is prohibited on the TREE property by local zoning ordinance. However, energy recovery from landfill gas collection and combustion is allowed. WMNH states that landfill gas-to-energy (LFGTE) operations at the facility have saved 225,000 barrels of crude oil. Landfill gas is refined and delivered to UNH for power generation, and it is used in on-site turbines to generate electricity. TLR-III is also a back-up facility for ash disposal from regional WTE plants including

Wheelabrator Concord. Further, wood waste is diverted to processing facilities that refine the material for use as a composting bulk agent or as fuel.

- (e) Incineration without Resource Recovery – TLR-III supports incineration facilities without resource recovery by providing a disposal facility for ash.
- (f) Landfilling – WMNH provides a final disposal service for wastes for which there are no, or limited, alternative management methods available in New Hampshire (e.g., asbestos, WWTP sludge, contaminated soil and media). WMNH states that the use of alternative daily cover (ADC) materials such as geosynthetic tarps has preserved landfill capacity and provided a cost effective outlet for residual wastes from waste processing and treatment facilities (e.g., C&D debris, auto shredder residue), as well as reduced use of clean natural soil.

WMNH states that the TREE facility (to include the TLR-III landfill, the MRF, and the on-site transfer station) represents an integrated approach to long-term solid waste management, and that WMNH strives to achieve an integrated facility that is environmentally safe, economically sound, and a benefit to the people of the State of New Hampshire. WMNH does not propose a quantifiable way to measure these benefits.

NHDES Assessment and Determination-- RSA 149-M:11,III(b):

Based on a review of WMNH's public benefit statement, NHDES finds that the TLR-III Refuse Disposal Facility (landfill) provides disposal capacity which supports the goals and hierarchy under RSA 149-M:2 and RSA 149-M:3. For example, the landfill provides disposal capacity for wastes for which there are no, or limited, alternative management methods available in New Hampshire. NHDES has placed conditions in the facility's permit to ensure that the landfill continues to assist the state in achieving the implementation of the hierarchy and goals under RSA 149-M:2 and RSA 149-M:3.

Specifically, Condition (21)(d) of the permit states the following:

- (d) The permittee shall, for each calendar year in which the facility operates:
 - 1. Demonstrate that the sources, in aggregate, from which the permittee accepted municipal solid waste (MSW) and/or construction and demolition (C&D) debris for disposal achieved a minimum 30 percent waste diversion rate to more preferred methods than landfilling as outlined in the hierarchy in RSA 149-M:3. If a minimum 30 percent diversion rate cannot be demonstrated, then the permittee shall submit to NHDES by July 1 of the following year a waste diversion report which presents the permittee's evaluation of:
 - a. The actual MSW and C&D debris waste diversion rate achieved;
 - b. The primary factors affecting that diversion rate; and
 - c. The practicable measures that the permittee will undertake to improve the diversion rate and an implementation schedule for doing so.
 - 2. The demonstration under Condition (21)(d)1 above shall not be required to include certain sub-types of MSW and C&D debris waste based upon a demonstration by the permittee that there are no environmentally safe or economically sound diversion alternatives to landfilling such wastes.

NHDES has limited the diversion requirement to MSW and C&D wastes because NHDES finds that environmentally safe and economically sound alternatives to landfilling do exist for a portion, but not necessarily all, of the sub-types of MSW and C&D waste. By definition of MSW (ref. Env-Sw 103.47), the following waste types are not included in the diversion requirement: automobile scrap and other motor vehicle waste, infectious waste, asbestos waste, contaminated soil and other absorbent media, and ash other than ash from household stoves.

There may be other sub-types of MSW and C&D debris wastes for which environmentally safe and economically sound alternatives to landfilling are limited (e.g., sludges, and special wastes including waste

from industrial processes, waste from pollution control devices, residue from a spill of a non-hazardous substance or commercial product, and off-specification commercial products). As provided in Condition (21)(d)(2), WMNH may propose to exclude certain wastes from the permit condition.

- **RSA 149-M:11,III(c): “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.”**

WMNH states that the facility assists in achieving the goals of the State of New Hampshire Solid Waste Plan²² as follows:

1. Reduce the volume of the solid waste stream – WMNH provides education, provides reuse options (e.g., Goodwill collection bins) at transfer facilities, conducts facility audits, consults on and implements PAYT programs, and uses ADC.
2. Reduce the toxicity of the solid waste stream – WMNH provides facility audits that include a focus on reducing toxicity, supports an annual household hazardous waste (HHW) collection day, and provides separate electronics collection.
3. Maximize diversion of residential and commercial/industrial solid wastes – WMNH provides education, encourages recycling, assists with PAYT programs, operates a co-located MRF, recovers recyclable components of C&D, and promotes composting.
4. Assure disposal capacity for New Hampshire – WMNH states that TREE is designed and operated to meet State and Federal requirements, and provides regional disposal capacity. The proposed expansion will serve to increase site life and eliminate the capacity shortfall in New Hampshire into 2034.
5. Assure that solid waste management activities are conducted in a manner protective of human health and the environment – TLR-III is a double-lined landfill, built in accordance with regulations and WMNH’s Construction Quality Assurance (CQA) plan. TLR-III also has a leachate collection and on-site leachate treatment plant, and on-site LFG recovery and reuse systems. WMNH staff are trained in a variety of topics including authorized and prohibited wastes, current environmental regulations, and permit conditions. WMNH has implemented a computerized tracking system to ensure compliance with numerous permits.

NHDES Assessment & Determination—RSA 149-M:11,III(c)

Based on a review of WMNH’s public benefit statement, NHDES finds that the integrated TREE facility, including the TLR-III Refuse Disposal Facility, assists the state in achieving the goals of the state solid waste management plan. Further, WMNH has stated that it provides services to New Hampshire municipalities and solid waste districts; as such, NHDES finds that the integrated TREE facility, including the TLR-III Refuse Disposal Facility, assists New Hampshire municipalities and districts with meeting the requirements of their solid waste management plans.

NHDES has placed conditions in the facility’s permit to ensure that the landfill continues to assist the state in achieving the implementation of the hierarchy and goals of the state solid waste management plan as well as district solid waste plans.

Specifically, Condition (21)(e) requires the permittee to assist at least 15 New Hampshire solid waste generators per year with establishing or improving programs that assist in the implementation of the goals and hierarchy under RSA 149-M:2 and M:3. NHDES established the number of generators to be assisted based upon the approved annual airspace use rate (approximately one generator assisted per 100,000

²² New Hampshire Department of Environmental Services. *State of New Hampshire Solid Waste Plan*. Dated April 2003.

cubic yards of capacity authorized to be used per year). The permittee's assistance may take many different forms, including but not limited to those presented in the permittee's public benefit statement.

- **RSA 149-M:11,IV(a):** "The department shall also consider as part of its public benefit determination: The concerns of the citizens and governing bodies of the host municipality, county, and district and other affected persons. For any proposed solid waste facility, including transfer stations, designed to accommodate in excess of 30 tons of solid waste per day, the department shall hold at least one public hearing in the host municipality, or in the case of an unincorporated town or unorganized place in the host county, in order to take testimony to identify those concerns."

NHDES hosted a public hearing in accordance with the New Hampshire Solid Waste Rules, specifically Env-Sw 304.08, on December 19, 2017 at 6:00 p.m. in the host municipality. The public comment period ended January 25, 2018 at 4:00 p.m. Public comments and NHDES' response to public comments are summarized under separate cover. In making its decision, NHDES considered the many public concerns expressed during the public comment and hearing process.

NHDES Assessment & Determination---RSA 149-M:11,IV(a)

See Response to Public Comment.

- **RSA 149-M:11,IV(b):** "The department shall also consider as part of its public benefit determination: The economic viability of the proposed facility, including but not limited to, its ability to secure financing."

NHDES reviewed the following: (1) financial information submitted by WMNH regarding the proposed expansion, (2) Financial Report provided with the application, and (3) the estimated closure and post-closure cost estimates submitted on September 1, 2017.

NHDES Assessment & Determination—RSA 149-M:11,IV(b)

Based on a review of the information provided, NHDES takes no exception to the permittee's assertion that they have the financial resources to construct, operate and close the facility, and maintain the facility after closure.

Overall NHDES Determination—RSA 149-M:11

Based on the information provided and the projected disposal capacity needs and shortfalls for New Hampshire generators, NHDES finds that the proposed facility provides a substantial public benefit based on the criteria specified in RSA 149-M:11, subject to permit conditions. To maintain status as providing a substantial public benefit, WMNH must comply with the public benefit requirements of the permit.

ATTACHMENT B—Application Review Summary

Waiver Determination

Application for Waiver to Solid Waste Rule

Relative to Application for Landfill Expansion--Permit No. DES-SW-SP-95-001

Waste Management of New Hampshire, Inc. (WMNH)

TLR-III Refuse Disposal Facility, Phases 15-17

June 11, 2018

Summary: The applicant has requested a waiver of Env-Sw 804.03(e) which states, "The footprint of a landfill shall not be located within 200 feet upgradient and 100 feet downgradient of a wetland within the jurisdiction of RSA 482-A, excluding any drainage appurtenances related to the site, that is not allowed to be filled under the authority of RSA 482-A."

The term "Footprint" as it relates to a proposed landfill, is defined in Env-Sw 103.05(b) to mean: "... the area in which solid waste is to be placed as proposed in the permit application."

The application for waiver proposes a minimum 125 foot setback from downgradient wetlands (200 feet required by Rule). The total area of wetlands located inside the 200 foot setback is 9,183 square feet (0.218 acres).

WMNH has applied to the NHDES Wetlands Bureau for approval to fill some wetlands to accommodate the proposed expansion. The wetlands proposed to be filled are located within the expanded landfill footprint or footprint support (see Sheet W-1 of the application for waiver). If allowed to be filled by the NHDES Wetlands Bureau under the authority of RSA 485-A, the filled wetlands are not subject to the setback requirement of Env-Sw 804.03(e). WMNH has not applied for approval from the NHDES Wetlands Bureau to fill the area of wetlands that are the subject of this setback waiver application.

The following documents constitute the setback waiver application:

- Waste Management of New Hampshire, Inc. (2017 May 19). *Type I-A Permit Modification Application: TLR-III South Area*. Received May 24, 2017. Assigned WMD Log No. 2017-28465-01.
- Waste Management of New Hampshire, Inc. (2017 August 28). Letter regarding Response to Administrative Comments – Waiver Application, Standard Permit Application – TLR-III South Area Expansion. Received August 30, 2017. Assigned WMD Log No. 2017-28465-04.
- Waste Management of New Hampshire, Inc. (2018 March 28). Letter regarding Response to Request for Additional Information, Standard Permit Application – TLR-III South Area Expansion (Public Benefit and Waiver Request). Received March 28, 2018. Assigned WMD Log No. 2017-28465-11.

The New Hampshire Solid Waste Rules, Env-Sw 100 et seq., specifically Env-Sw 202, *Waiver of Solid Waste Rules*, require that NHDES grant a waiver if the criteria in Env-Sw 202.04 are met. NHDES reviewed the waiver criteria specified in the rule as follows. The criteria are presented in "underline". Information pertaining to NHDES' related assessments is presented in regular type. NHDES' determination is presented in ***bold italics***.

Env-Sw 202.04 – Criteria

- 202.04(a) "Subject to (b), below, a request for a waiver shall be granted if:
 - (1) Exemption from complying with the rule will:
 - a. Not result in an adverse effect to the environment or natural resources of the state, public health or to public safety;"

The applicant asserts that granting the waiver will not result in adverse impacts to the environment or natural resources of the State, public health or safety because the facility will be constructed with a double liner system to protect groundwater resources and is designed so that stormwater runoff

will be collected in swales upgradient of these wetland areas and directed to detention basins such that the only direct flow of stormwater into the wetland is from the grassed slope of the perimeter berm.

NHDES Determination

NHDES concurs with the applicant's assertion and has determined that granting the waiver request is unlikely to result in adverse effects to the environment or natural resources of the State, public health or to public safety if the facility is designed and operated as proposed.

- b. "Not result in an impact on abutting properties that is more significant than that which would result from complying with the rule; and"

The applicant asserts that the proposed waiver does not result in impacts to abutting properties.

NHDES Determination

NHDES concurs with the applicant's assertion and has determined that granting the waiver request is unlikely to result in impacts on abutting properties that are more significant than that which would result from complying with the rule, if the facility is designed and operated as proposed.

- c. "Be in keeping with the intent and purpose of the rule being waived; and"

The intent and purpose of the rule being waived is two-fold: to prohibit the construction of new municipal solid waste landfills and lateral expansions in wetlands consistent with 40 CFR 258.12, and to protect wetlands.

The applicant provided a full explanation (ref. WMD Log # 2017-28465-12) of how the proposed waiver will be in keeping with the intent and purpose of Env-Sw 804.03(e) including the following:

- The facility is designed in accordance with Alteration of Terrain rule requirements (Env-Wq 1500) regarding land disturbance, construction erosion and sediment controls, and long-term stormwater management;
- The facility is designed and will be constructed, operated and maintained to prevent stormwater from coming into contact with landfilled waste, and, if stormwater does contact waste, those contact waters will be diverted to the leachate collection system;
- The applicant states that it will minimize construction and facility operations within the setback area;
- The facility is designed to direct stormwater from landfill sideslopes and access roads to detention basins such that the only direct flow of stormwater into the wetland is from the grassed slope of the perimeter berm; and
- The applicant states it will use fencing to inhibit litter from entering the wetlands.

NHDES Assessment & Determination

NHDES notes that the first two measures noted by the applicant to protect the wetlands are required regardless of whether the landfill complied with the setback requirements of Env-Sw 804.03(e). The applicant has proposed three additional measures (minimizing activities within the setback, grassed slope treatment of runoff, and litter fencing) which would not specifically be required if the landfill met the setback requirement of Env-Sw 804.03(e). **Considering that the**

applicant proposes to retain a substantial portion of the setback (at least approximately 125 feet versus the 200 foot requirement) and implement alternative design and operation measures to protect the wetlands, NHDES has determined that the proposal is in keeping with the intent and purpose of the rule being waived.

(2) "One or more of the following conditions is satisfied:

- a. Strict compliance with the rule will result in an adverse effect on the environment, public health and safety;"

NHDES Assessment & Determination

NHDES did not assess compliance with this condition and makes no determination.

- b. "Strict compliance with the rule will result in a circumvention of the goals and objectives of the state's solid waste management program, as specified in RSA 149-M:1-3 and the state solid waste management plan; or"

NHDES Assessment & Determination

NHDES did not assess compliance with this condition and makes no determination.

- c. "Strict compliance with the rule will provide no benefit to the public and will cause an operational or economic hardship to the applicant."

WMNH asserts that strict compliance with the rules may benefit the public in reducing the amount of wetlands taken, but may harm the public by reducing landfill disposal capacity. Further, WMNH asserts that loss of disposal capacity at TLR-III may result in increased taxes for NH residents that rely on the local facility for final disposal.

WMNH asserts that compliance would cause a hardship on the public, and the applicant would be required to re-design the proposal after it has been vetted by multiple local, state and federal agencies. Re-designing the facility to meet the setback may significantly reduce the capacity of the expansion and could make the project non-viable. WMNH asserts that it has worked in good faith and put significant time and effort into working with state and federal agencies to develop a plan which minimizes impacts to wetlands while accommodating development of the property. Re-designing the facility to meet the setback requirement would necessitate applying for approval to fill the wetlands WMNH currently proposes to preserve under this waiver request, which would likely conflict with other local, state and federal agencies' desire to limit filling of wetlands, and would result in delays caused by having to amend wetland approval applications already well into their review process.

NHDES Assessment and Determination

NHDES understands that WMNH has two primary options to comply with the rule: either change the landfill design to reduce the footprint to meet the setback requirement, or obtain approval to fill the wetlands in the setback area.

Given the alternative measures proposed to maintain protection of the wetlands remaining within the required 200 foot setback area, NHDES concurs that maintaining strict compliance with the rule by exercising either of the two primary options provides no benefit to the public. In addition, as

noted in NHDES' evaluation of public benefit presented in Attachment A, NHDES has determined that expansion of the landfill does provide a substantial public benefit as defined by the statute.

Based on a review of the information provided, NHDES also determined that reducing the proposed landfill footprint (and therefore capacity) to comply with the rule would cause an economic and/or operational hardship on the applicant. NHDES also determined that amending the wetlands and alteration of terrain applications to request approval to fill the wetlands to comply with the rule would cause economic and/or operational hardship on the applicant.

NHDES determined that strict compliance with the rule will provide no benefit to the public and will cause an operational or economic hardship to the applicant.

Overall NHDES Determination

Based on a review of the information provided, the waiver request meets the requirements of Env-Sw 202.04 and NHDES is therefore approving the waiver.

EXHIBIT 2

Projected Waste Quantities for New Hampshire

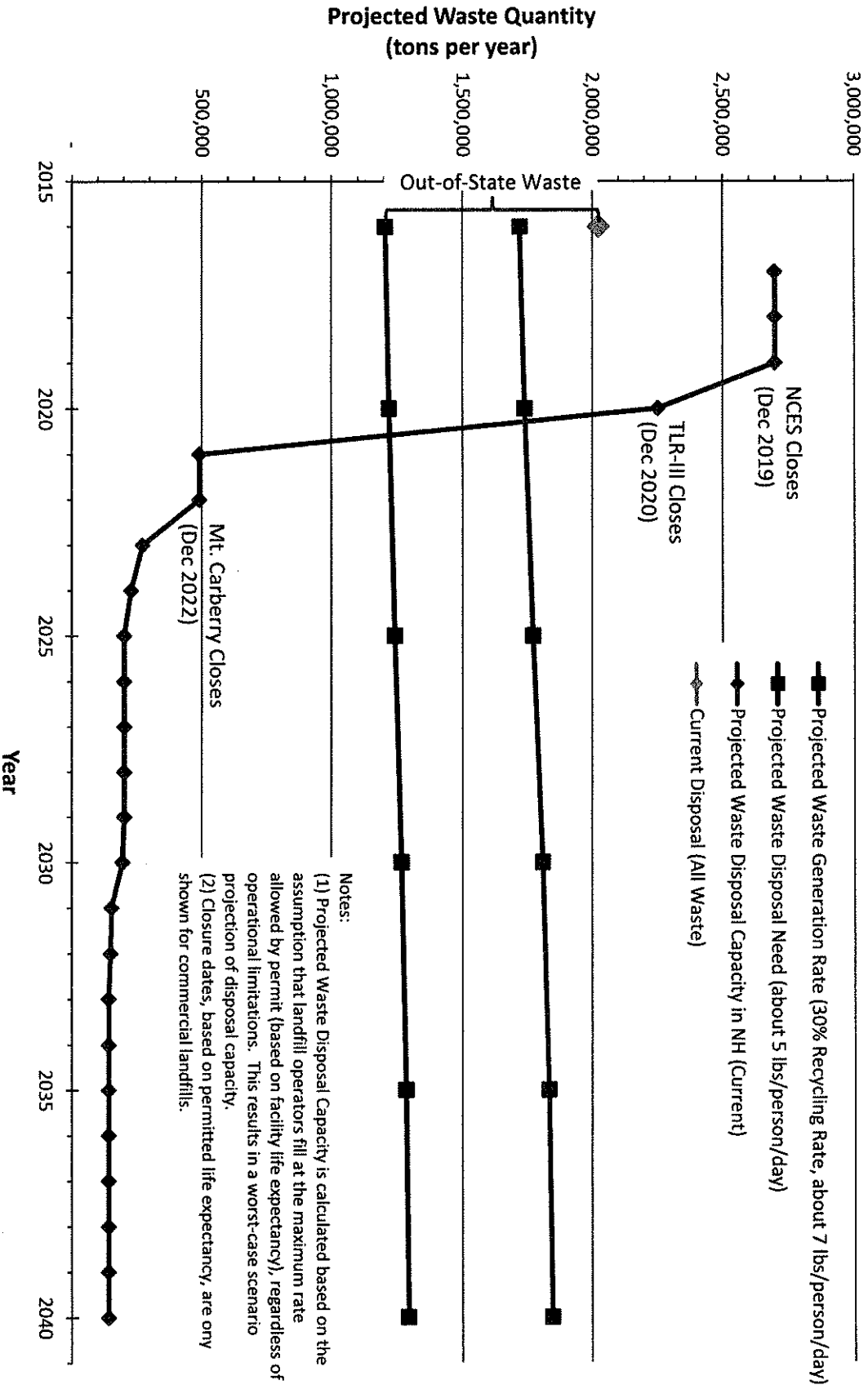


EXHIBIT 3

Projected Waste Disposal Need for New Hampshire

*** DRAFT ***

