STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WASTE MANAGEMENT COUNCIL

Docket No. 20-14 WMC

In re: Conservation Law Foundation, Inc. Appeal

PERMITTEE'S MOTION TO STAY

Pursuant to N.H. Code Adm. R. Env-WMC 204.15, North Country Environmental Services, Inc. ("NCES") respectfully requests that the council stay these proceedings pending the resolution of a separate action commenced in superior court yesterday, September 20, 2022. NCES sought the concurrence of the other parties in this appeal. CLF objects to the motion. NHDES assents only to the relief sought in this motion. This motion rests on the following grounds.

I. Introduction

The hearing officer's May 11, 2022, order on this appeal has created substantial regulatory and operational uncertainty not only for NCES and its customers but for other commercial landfill operators in the state. The council's appellate jurisdiction extends to the review of permitting decisions by the waste management division of NHDES, not to declaratory determinations of the law's meaning or its constitutionality.[1] Jurisdiction to grant declaratory relief lies in the first instance with the superior court. While the hearing officer's order is not an

[1] RSA ch. 541-A permits *state agencies* under certain circumstances to issue declaratory rulings as to the applicability of a statute, rule, or order of the agency, RSA 541-A:1, V, but the council's enabling legislation contains no such authority. The council's authority is limited to review of "department decisions," and even declaratory rulings made by NHDES under RSA ch. 541-A are specifically excluded from the definition of "department decision." RSA 21-O:14, I(c).

enforceable declaration of the law[2], its rationale draws into question the lawfulness of NCES's Stage VI permit and the Mt. Carberry facility's April 22, 2022, permit. It also exacerbates uncertainty regarding how applicants for new permits can establish the requisite public benefit. Because the hearing officer's order has already resulted in inconsistent application of the law and has cast doubt on how new applicants can conform their applications to the law's requirements, NCES and its affiliate, Granite State Landfill, LLC ("GSL"), have commenced a declaratory relief action in superior court to obtain a determination of the requirements of RSA 149-M:11, V, and, if necessary, of the statute's constitutionality.

The hearing officer's order has also revealed a substantial asymmetry in RSA 21-O:14 between the rights afforded an appellant seeking review of a department decision and those of an applicant aggrieved by a decision of the council. A party appealing a department decision has a multiplicity of rights calculated to give the party a full and fair hearing on the issues raised in the appeal. By contrast, an applicant whose approval has been found unlawful by the council has the right only to seek review of that finding on rehearing. This jarring disparity places the applicant at an enormous procedural and substantive disadvantage, yet there is no discernible compensating policy purpose to be achieved by depriving the aggrieved applicant of a plenary appeal of the decision against it.

Both to enable the superior court to declare the meaning of RSA 149-M:11, V, authoritatively and to redress the procedural and substantive disparity created by RSA 21-O:14, NCES respectfully requests that the council stay further proceedings in this appeal, including a

[2] The council's authority upon concluding that the division has acted unreasonably or unlawfully in connection with a permitting decision is limited to remanding the decision to the division for "action consistent with the [council's] determination, imposing such conditions as are necessary and consistent with the purposes of the chapter under which the department decision was issued." RSA 21-O:14, I-a(c)(1). The council has no authority to direct NHDES to take a specified course on remand.

decision on the pending motions, until the superior court has ruled on the declaratory relief petition.

II. Statement of Facts

Out of NHDES's consideration of NCES's Stage VI applications and the council's proceedings in this appeal, four interpretations of RSA 149-M:11, V, have emerged:

- The *aggregate capacity need approach*, which deducts the total permitted statewide capacity from the total projected statewide waste generation for the entire 20-year statutory planning period and finds a capacity need if the proposed facility will provide capacity equal to or less than any shortfall in currently permitted capacity irrespective of when in the 20-year period the shortfall will occur. The Department used this approach between the time the legislature adopted the public benefit requirement in the 1990s and 2019.
- The *partial function of time approach*, which makes a finding of capacity need dependent on whether the proposed facility will provide disposal capacity at least partially during that part of the 20-year planning period when there is a projected shortfall. The Department used this approach in its consideration of NCES's Stage VI permit applications and its most recent permit for the Mt. Carberry facility.
- The *pure function of time approach*, which makes a finding of capacity need dependent on whether the proposed facility will provide disposal capacity *entirely* during that part of the 20-year planning period when there is a projected shortfall. The Department considered and rejected this approach in 2000. The hearing officer's order appears to adopt this approach.

- The *discretionary approach*, under which it is in the Department's discretion to determine on a case-by-case basis whether the proposed facility's operation must "overlap" the shortfall period in whole, in part, or at all. NHDES argued for this interpretation of the statute in its pre-hearing memorandum and its motion for rehearing.

The interpretation NHDES uses to determine capacity need has a vast impact on which facilities can receive permits and when they will be able to operate. For example, under the pure function of time approach adopted by the hearing officer, NHDES could not have granted the permit for expansion of the Mt. Carberry facility that was approved on April 22, 2022. NCES has also identified five historical approvals of disposal capacity[3] by NHDES that would have been unlawful under the pure function of time approach. What's more, the pure function of time approach makes permitting of new facilities much more difficult because it means that an applicant must make the significant financial commitment necessary to acquire land, design the facility, and seek permits over a months-long regulatory process but must wait years in most cases to actually use the capacity and begin recovering on the investment. It also causes discontinuity in operations of existing facilities because newly permitted expansions cannot be brought into operation until there is a statewide shortfall in capacity, in most cases requiring the facility to shut down when it runs out of capacity and reopen only when the projected shortfall exists. This would result in interruptions of disposal services for the state's residents using those facilities and the loss of customers for the facilities' owners.

[3] These include the approvals Mt. Carberry expansions in 2003 and 2019, the Turnkey landfill expansion in 2018, and two NCES expansions in 2000 and 2014. *See* NCES Mot. for Rehearing (6/10/22) at 4-7; NCES Mot. to Supplement (8/12/22) at 5-6.

GSL is the intended successor to NCES in the sense that GSL has contemplated having new capacity available when the NCES facility is scheduled to close in 2026. Application of the pure function of time approach not only calls into question whether NCES can maintain operations through 2026 but whether GSL can begin to accept waste upon closure of NCES or must wait for years until a projected shortfall occurs. GSL is preparing an application for a standard permit for a new facility in Dalton, but with the method for determination of capacity need unsettled it is not possible for GSL to discern how to demonstrate public benefit in its application or even to determine whether the project's economics work if, for example, GSL must wait ten years from receiving approval to construct and begin operation of the new facility.

Further complicating GSL's task is the effect, if any, of the hearing officer's ruling on Mt. Carberry's most recent approval. Under that approval, NHDES authorized Mt. Carberry to expand into the new landfill cell nine years before the Department projected there would be a statewide shortfall of capacity. If Mt. Carberry cannot begin to use its new cell until 2034 because of the rationale of the hearing officer's order, however, it would be necessary for GSL to take this new operating period into account in calculating when a shortfall would occur.

There is, moreover, already a substantial risk of inconsistent application of the law to identically situated parties based purely on CLF's election to appeal one permitting decision but not another. CLF appealed NCES's Stage VI approval on the ground that NHDES failed to apply the pure function of time test to determine capacity need, but it did not appeal Mt. Carberry's subsequent Phase IIIA approval issued in April even though Mt. Carberry's application did not establish capacity need using the pure function of time approach, and

NHDES did not use that approach[4] in assessing whether Mt. Carberry satisfied the public benefit requirement. The hearing officer's order calls directly into question the lawfulness of NCES's approval, but does not in and of itself have the same effect on Mt. Carberry's approval. As a result, NCES is at risk under the hearing officer's order that it will not be able to operate Stage VI because it does not meet the pure function of time test, yet Mt. Carberry currently has no such risk despite its inability to meet the same test. Hence, the application of RSA 149-M:11, V is made to depend upon the happenstance of whether a permitting decision is appealed instead of the language of the statute.

Not only does the hearing officer's order create disparities in application and uncertainty about the meaning of RSA 149-M:11,V, but under RSA 21-O:14 NCES does not have a full and fair opportunity before the council to litigate its theory that capacity need is to be determined under the aggregate capacity need method. By statute and rule, if NHDES had denied NCES's Stage VI application NCES would have been entitled to appeal that decision, engage in discovery, submit prehearing memoranda and evidence, and receive a full evidentiary hearing. RSA 21-O:14, I-a(a); *see, e.g.,* N.H. Code Adm. R. Env-WMC 205.03, 205.05-205.08. This is the procedure afforded CLF on its appeal. By contrast, a decision of the council that is essentially the functional equivalent of a denial of an application gives rise to only a right to seek rehearing. RSA 21-O:14, III (requiring that party aggrieved by a council ruling comply with RSA ch. 541 which requires rehearing as a prerequisite to appeal). A party seeking rehearing has no right to discovery, to submit evidence, or to receive a full evidentiary hearing. While NCES has sought to submit additional evidence and requested an evidentiary hearing through its papers,

[4] Because Mt. Carberry's application proposed operating for nine years before NHDES's projected capacity shortfall, the Department could not have found that Mt. Carberry's application satisfied the pure function of time method.

CLF has objected to these requests, arguing that in seeking rehearing NCES must make do on the record generated on CLF's appeal. The law does not provide otherwise.

Thus, under RSA 21-O:14, CLF – an ideological activist group and interloper in the issuance of NCES's Stage VI permit – is given a plenary set of rights to formulate, discover, brief, and try its claims while the permittee itself – the real party in interest and the party most directly affected by any permitting decision – is relegated to a bare motion for rehearing to challenge what is largely equivalent to a denial of its permit application.

On September 20, 2022, NCES and GSL filed a declaratory relief action in Merrimack Superior Court seeking a determination of the meaning of RSA 149-M:11, V, based in large part on the historical application of the public benefit requirement since its adoption. Exhibit A. The petition also seeks a declaration of the constitutionality of the statute if it is interpreted to employ anything but the aggregate capacity need method. *Id.* at ¶¶92-99. In the superior court action, NCES and GSL will be able to conduct discovery into NHDES's past public benefit determinations, build an evidentiary record, and receive a full hearing on the merits. Other parties with sufficient interests can intervene to protect those interests. NCES will not be straightjacketed by the narrow rehearing procedures[5] available to it under RSA 21-O:14, and the superior court (and ultimately the supreme court) will have the benefit of all relevant evidence before reaching any conclusion about the meaning of the capacity need requirement. Particularly in light of the pervasive public policy and economic consequences associated with the interpretation of the public benefit requirement, all of the constructions of the statute enumerated

[5] Given the robust procedural rights afforded an aggrieved party appealing a NHDES decision by the general court, it seems unlikely that the legislature intended that a de facto permit denial by the council could be challenged only under the constraints of rehearing, but the statute does not appear to contemplate such a circumstance.

at the outset of this motion should be given full and careful consideration, not just those interpretations that were germane to CLF's appeal.

Because the superior court's resolution of the declaratory relief action will necessarily construe the capacity need requirement of RSA 149-M:11, V, it makes little sense to proceed any further in this matter until the superior court has ruled. Accordingly, NCES respectfully requests that the council stay this proceeding until such time as the declaratory relief action is adjudicated.

III. Argument

The council now has before it two motions for rehearing, a motion to supplement the record, a motion for an evidentiary hearing, and CLF's motion to strike. Depending on how the council rules on these motions, an appeal to the New Hampshire Supreme Court may be imminent.[6] If the council rules for CLF on the pending motions, the council will not consider, for example, the evidence NCES has proffered about the historical application of the capacity need requirement (evidence NCES was able to gather only through a request for public records under RSA ch. 91-A but not through the more comprehensive mechanisms of discovery) and it will not hold an evidentiary hearing. Rather, the council will make determinations based solely on the record produced on CLF's appeal, a proceeding in which the aggregate capacity need approach was not at issue because that was not the approach NHDES used in granting the Stage VI permit. Under those circumstances, the New Hampshire Supreme Court will not have the benefit of the council's consideration of the evidence supporting administrative gloss and will either remand to the council so it may consider that evidence or possibly rule on NCES's appeal on an incomplete record.

[6] If the council denies rehearing, NCES intends to appeal immediately to the New Hampshire Supreme Court.

Meanwhile, the declaratory relief action seeking a determination of the meaning of RSA 149-M:11, V, and perhaps the constitutionality of the public benefit statute, will be proceeding in the superior court.[7] NCES and GSL will have the right to discovery from any source on its claims, including with respect to the historical application of RSA 149-M:11, V. The owners of the other facilities affected by the rationale of the hearing officer's decision will have the right to seek intervention. NCES and GSL will have the right to a full evidentiary hearing on the merits of its administrative gloss and constitutional arguments. And the superior court will issue a decision as to which approach to determining capacity need is correct and, if necessary, whether the approaches other than the aggregate capacity need method render the statute unconstitutional. The council has no jurisdiction to adjudicate such declaratory relief claims. RSA 21-O:14, I-a (council jurisdiction limited to review of "department decision"); RSA 491:22 (superior court has exclusive jurisdiction to issue declaratory judgments); *see also In re AlphaDirections, Inc.*, 152 N.H. 477, 482 (2005) (courts are the proper arbiters of the legislature's intent regarding a statute). The constitutionality of the competing interpretations of RSA 149-M:11, V, moreover, is "particularly appropriate" for declaratory relief in the superior court especially where, as is the case here, there is a public need that warrants "speedy determination of important public interests." *Chronicle & Gazette Pub. Co. v. Att'y Gen'l*, 94 N.H. 148, 150 (1946).

The council has reached its determination of CLF's appeal, but it lacks the statutory authority to give full and fair review of NCES's claims arising out of the hearing officer's decision. It also lacks jurisdiction over GSL's declaratory relief claims. Rather than rule on the pending motions and trigger an appeal to the supreme court on an incomplete record, the

[7] NCES recognizes that there are complex jurisdictional issues arising from its participation as a plaintiff in the declaratory relief action. For the reasons discussed below, NCES anticipates that the court will exercise jurisdiction over its claims, but even if the court determines it will not exercise such jurisdiction the claims presented by GSL will proceed.

interests of administrative and judicial efficiency are best served by staying this proceeding until the superior court has ruled on the pending declaratory relief claims. The council may then lift the stay and rule on the pending motions in light of the superior court's determination. If there is an appeal from the superior court's order then any appeal from the council's ruling can be consolidated with the superior court appeal, and the supreme court can resolve the common issues with finality.

Like any tribunal, the council has authority to stay the proceedings before it if it will conserve the resources of the council and the parties and promote the orderly and complete resolution of the issues being litigated. *See generally Pereira v. Mortg. Electronic Registration Sys., Inc.*, No. 226-2015-CV-00641, 2016 WL 11270880, at *4 (N.H. Super. Feb. 4, 2016); *see also SCVNGR, Inc. v. eCharge Licensing, LLC*, Civ. Action No. 13-12418-DJC, 2014 WL 4804738, at *2 (D. Mass. Sept. 25, 2014) (a stay is "appropriate where it is likely to conserve judicial and party time, resources, and energy").

In *Frost v. Comm'r, N.H. Banking Dept.*, 163 N.H. 365 (2012), the New Hampshire Banking Department initiated administrative proceedings against a mortgage loan originator and sought fines for alleged statutory violations. Rather than respond to the administrative proceedings, the loan originator sought declaratory relief in the superior court and also requested a temporary restraining order, arguing that the department lacked subject matter jurisdiction to proceed with its complaint. *Id.* at 370. The court granted the preliminary injunction, and on appeal, the department argued that the petitioner should not have been permitted to "bypass the statutory administrative procedures" by seeking remedies from the superior court when it did not exhaust administrative remedies. *Id.* The supreme court disagreed and upheld the trial court's exercise of its discretion, concluding that issues "involv[ing] purely questions of law . . . will not

be referred to an agency," and because the matter required statutory analysis, the trial court could properly resolve the legal issue. *Id.* at 371-72. Hence, the existence of a pending administrative action against a party does not preclude the party from obtaining declaratory relief from the courts with respect to legal issues underlying the administrative proceeding.

Here, NCES does not have a full and fair opportunity under RSA 21-O:14 to discover, present evidence upon, and otherwise litigate its claims regarding the proper interpretation of RSA 149-M:11, V, and the statute's constitutionality. Instead it is confined to a motion for rehearing on a record generated by litigation of a different claim. In this case, then, not only does the declaratory relief petition seek purely legal determinations of the meaning of the capacity need portion of the public benefit statute and its constitutionality, there is also no complete administrative remedy available to which the superior court could defer under the principles of primary jurisdiction even if those principles were applicable.

The correct determination of the meaning of RSA 149-M:11, V, has profound consequences for the availability and cost of waste disposal capacity in New Hampshire. If the pure function of time approach is indeed the correct reading of the statute and it survives constitutional scrutiny it could lead to the termination of Stage VI operations with no provision for the more than 50,000 New Hampshire customers NCES serves. It would make the Mt. Carberry facility vulnerable to an invalidation of the approval it received this past April or an order that it cannot commence operations in its new cell until 2034. It is difficult to project the severity of the impact such a closure or disruption would have on Mt. Carberry's customers and the members of the municipal disposal district that owns it. It also would create substantial business risk for future applicants like GSL if those applicants could not expect a return on their capital investment in real estate and permitting until years after they have made it. Such a

delayed return could well make projects uneconomic or, at a minimum, significantly increase the cost of disposal capacity once it comes on line.

Given the implications of the pure function of time approach, it is critical not only to NCES but to the State of New Hampshire as a whole that the interpretation of the statute be made on a complete record by a tribunal with all necessary jurisdiction to declare the statute's meaning authoritatively and rule on its constitutionality if necessary. Until the superior court has made these determinations, the council should take no further action that could precipitate the abrupt loss of disposal capacity in the state. Accordingly, NCES respectfully requests that the council stay this matter until the superior court has ruled on the declaratory relief claims in the complaint NCES and GSL filed on September 20, 2022.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that, in accordance with the Pre-hearing Order issued on this matter on June 8, 2021, the within document was this day sent by e-mail transmission to:

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EXHIBIT A

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.

and

GRANITE STATE LANDFILL, LLC

v. Docket #_____

ROBERT R. SCOTT, COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES

PETITION FOR DECLARATORY JUDGMENT

Plaintiffs North Country Environmental Services, Inc. and Granite State Landfill, LLC, by and through their attorneys, Cleveland, Waters and Bass, P.A., complain against the defendant, Robert R. Scott, in his capacity as commissioner of the New Hampshire Department of Environmental Services ("NHDES" or the "Department"), and seek relief in the form of declaratory judgment from this court pursuant to RSA 491:22. The Department's recent departure from its decades-long construction of RSA 149-M:11 together with an administrative hearing officer's inconsistent construction of the same statute have clouded the statute's meaning and created uncertainty about the requirements for obtaining a permit for solid waste disposal facilities in New Hampshire, including facilities owned or proposed by plaintiffs. Both the Department's new construction and the hearing officer's interpretation of RSA 149-M:11 render it violative of the dormant commerce clause of the United States Constitution. Plaintiffs seek a declaration that RSA 149-M:11 has the meaning NHDES has given it since adoption of the statute in 1991 and until 2019 or, in the alternative, that RSA 149-M:11 is unconstitutional.

1. Plaintiff North Country Environmental Services, Inc. ("NCES") is a corporation organized under the laws of Virginia. NCES's principal office address is 25 Greens Hill Lane, Rutland, VT 05701, and it owns and operates a landfill located at 581 Trudeau Road, Bethlehem, NH 03574. NCES's Bethlehem landfill is a solid waste facility permitted and regulated by the Department pursuant to RSA ch. 149-M.

2. Plaintiff Granite State Landfill, LLC ("GSL") is a limited liability company organized under the laws of New Hampshire. GSL's principal office address is 581 Trudeau Road, Bethlehem, NH 03574. GSL has sought and will continue to seek permits for a new landfill facility to be sited in Dalton, New Hampshire. GSL's proposed Dalton landfill is a solid waste facility that must be permitted and regulated by the Department pursuant to RSA ch. 149-M. NCES and GSL are subsidiaries of Casella Waste Systems, Inc., a publicly traded Delaware corporation.

3. Defendant Robert R. Scott is the commissioner of the New Hampshire Department of Environmental Services and named as a defendant in his official capacity. The Department is a state agency established pursuant to RSA ch. 21-O and its principal address is 29 Hazen Drive, Concord, NH 03301. The Department is responsible for administering and enforcing the solid waste management statute, RSA ch. 149-M, including the regulation of solid waste facilities through a permit system.

4. Pursuant to RSA 491:7 and RSA 491:22, this court has subject matter jurisdiction over this action, which seeks declaratory relief.

5. The court has personal jurisdiction over the defendant because he is the commissioner of an agency of the State of New Hampshire with its primary place of business in New Hampshire.

6. Pursuant to RSA 507:9, the Merrimack Superior Court is the proper venue for this action.

7. The solid waste management statute, RSA ch. 149-M, governs the planning and regulation of solid waste management in this state. The statute designates the Department as the state agency responsible for carrying out these functions. NHDES is also responsible for regulating solid waste facilities through administration of a permit system.

8. The overall purpose of the solid waste management statute is to protect human health, to preserve the natural environment, and to conserve precious and dwindling natural resources through the proper and integrated management of solid waste, while also satisfying the general court's obligation to provide for the waste disposal needs of the state and its citizens.

9. Under RSA ch. 149-M any proposed waste disposal facility must obtain a permit from NHDES before it can be constructed and operated. The statutory permitting process includes the requirement that a proposed facility will provide a "substantial public benefit." The criteria for determining public benefit are set forth in RSA 149-M:11.

10. The public benefit criteria set forth in RSA 149-M:11 have not been substantively changed since 1991 when the legislature amended the statute to include them. The legislature's repeal and reenactment of RSA ch. 149-M in 1996 left the public benefit criteria unchanged.

11. In evaluating whether a facility will provide a substantial public benefit, the Department must consider three general categories of information, the first of which is 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). It is the meaning and application of this capacity need requirement that is at issue in this petition.

12. RSA 149-M:11, V requires the Department to complete the following steps to identify a capacity need:

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

13. The Department has employed the public benefit criteria set forth in RSA 149-M:11 on multiple occasions since 1996 when evaluating solid waste permitting applications.

14. In 2000, NCES submitted an application for a solid waste permit for the Stage III expansion of the Bethlehem facility. In connection with that permit application, NCES provided a public benefit demonstration to address the criteria set forth in RSA 149-M:11.

15. In the course of reviewing the Stage III permit application, NHDES determined that the public benefit submittal did not comport with the requirements of the statute. In a letter from NHDES to NCES, Richard S. Reed, the administrator of the solid waste management bureau at NHDES, notified NCES of the "acceptable method for determining capacity need" pursuant to RSA 149-M:11, V. Mr. Reed provided steps for the analysis and concluded that if, over the statutory 20-year planning period, the total projected amount of New Hampshire waste

exceeds the amount of then-permitted disposal capacity, "there is a shortfall and a capacity need is deemed to exist."

16. NHDES's determination in 2000 that capacity need is assessed by comparing total projected waste generation to total permitted capacity for the entire 20-year planning period is referred to in this petition as the "aggregate capacity need" method.

17. When NCES submitted a revised public benefit demonstration in response to Mr. Reed's guidance, it prompted a debate among NHDES senior staff as to whether the statute required NHDES to determine *when* there would be a projected shortfall in capacity in the 20-year period. One school of thought was that the timing of the shortfall was a necessary consideration because the proposed capacity would only meet a need if it was provided when there was actually a shortfall (this construct is referred to in this petition as the "function of time" approach), whereas the aggregate capacity need method prescribed by Mr. Reed's letter did not take into account when in the 20-year period there would be a shortfall.

18. NCES's Stage III application demonstrated that there was a capacity shortfall over the 20-year planning period, but the shortfall was not projected to occur until 2010, years after the proposed operations of the Stage III expansion would be concluded. Had NHDES adopted the function of time interpretation of RSA 149-M:11, V, the agency could not have approved the Stage III application.

19. After seeking legal advice from the New Hampshire Department of Justice in connection with the Stage III application, the Department approved the application, authorizing NCES to operate for a period for 4.5 years, entirely before the anticipated 2010 shortfall in capacity. NHDES therefore considered and rejected the function of time approach and construed RSA 149-M:11, V, to be satisfied by the aggregate capacity need method.

20. Until 2019, NHDES consistently applied the aggregate capacity need approach. On several occasions, NHDES permitted facilities that would operate either entirely or in part before a projected shortfall in capacity would occur.

21. In 2003, NHDES approved an expansion of the Mt. Carberry landfill located in Success Township, New Hampshire. Based on the data set forth in the application, the waste capacity shortfall would not occur until 2011, but on March 7, 2003, NHDES approved a permit enabling Mt. Carberry to operate for years before the projected shortfall would occur.

22. Also in 2003, NHDES approved NCES's application for its Stage IV expansion of the Bethlehem landfill. The expansion had a life expectancy of 10.5 years. Based on the information set forth in the application, the amount of the projected shortfall for the first three years of operations was less than the amount of annual capacity of waste to be received by the facility.

23. In 2014, NHDES approved NCES's application for its Stage V expansion of the Bethlehem landfill. The facility had a life expectancy of 5.3 years. NCES demonstrated in its application that a shortfall of at least 6.3 million tons would occur during the 20-year planning period. Based on the data set forth in the application, however, the anticipated shortfall would not occur until after Stage V completed operations. At the time it issued the Stage V approval NHDES refuted public comments arguing that the facility was unnecessary because it would operate before a shortfall in capacity occurred.

24. In 2018, Waste Management of New Hampshire, Inc. ("WMNH") obtained a permit for an expansion of its Turnkey landfill in Rochester. Turnkey is by far the largest landfill in the state, accepting over one million tons of waste each year. Based on the data set forth in the WMNH application, the anticipated shortfall would not occur until 2024, and there

would be a surplus of statewide permitted capacity for the first three years of the new facility's operations, yet the Department approved this permit and authorized 13 years of capacity.

25. In 2019, Mt. Carberry sought and obtained a permit for another expansion. Based on the data set forth in the application, the anticipated shortfall in capacity would not occur until 2024, nearly two years into the projected operating period for the facility. NHDES approved that permit on February 25, 2019.

26. On January 14, 2019, NCES filed an application seeking approval for the Stage VI expansion of the Bethlehem landfill. NCES supplied a public benefit demonstration in accordance with RSA 149-M:11 that showed a shortfall in capacity using the aggregate capacity need method.

27. In this 2019 application, NCES established that a shortfall of at least 3.8 million tons would occur during the 20-year planning period. It did not identify when this shortfall would take place, but because Stage VI proposed only 2.3 years of disposal capacity, it was evident that the shortfall would occur after the lifespan of Stage VI expired.

28. NHDES accepted the application as administratively complete, conducted a technical review of the application, and held a public hearing on the application.

29. In January of 2020, as the statutory deadline for a decision on the application approached, NHDES informed NCES that the application would be denied because it did not demonstrate a substantial public benefit. Specifically, NHDES concluded that the statewide shortfall in capacity would occur in 2025, after Stage VI completed its operations, and thus there was no capacity need for the project.

30. Because NCES had established a capacity shortfall over the 20-year planning period that was greater than the amount of the proposed Stage VI capacity, the Stage VI

application satisfied the aggregate capacity need approach adopted by NHDES nearly twenty years earlier.

31. When NCES inquired of NHDES what the agency would require to show public benefit, the Department responded with yet a third interpretation of RSA 149-M:11, V, namely that a facility must operate for *some period* during the time of the projected shortfall to receive approval. This petition refers to this third interpretation as the "partial function of time method."

32. NCES contemporaneously objected to the partial function of time method as contrary to the Department's historical construction and application of the statute and as unsupported by the language of the statute.

33. Rather than accept a denial of the 2019 Stage VI application, NCES withdrew the application before the Department reached a final permitting decision. In the letter withdrawing the application, NCES articulated its objections to the Department's change in interpretation of RSA 149-M:11 and reserved its rights to challenge the new construction of the statute.

34. Although it did not reach a final decision on the withdrawn Stage VI application, NHDES prepared an application review summary for the application and observed that "[t]he proposed facility would operate during a period without any shortfall in New Hampshire's waste capacity need," and thus it "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." This reasoning was identical to the function of time approach NHDES had explicitly considered and rejected in 2000.

35. Based on guidance received from NHDES, NCES submitted a new application for Stage VI of the landfill on March 24, 2020. The second application did not change the proposed volume of disposal capacity at the facility but rather proposed extending the lifespan of Stage VI

so that one year of its six-year operating period would occur after the projected shortfall in 2025. The application memorialized the review and withdrawal of the 2019 Stage VI application and reserved NCES's objections to the "partial function of time" approach.

36. NHDES granted NCES's second Stage VI application on October 9, 2020. The permit required that the facility operate until December 31, 2026, more than a year after the capacity shortfall was projected to occur in 2025.

37. NCES filed its notice of intent to operate Stage VI in February 2021, and with the Department's approval, NCES has been operating the facility and depositing waste in the first cell of the Stage VI facility since that time.

38. Conservation Law Foundation, Inc. ("CLF"), a non-profit organization that opposes development of landfills as a matter of public policy, appealed the permitting decision for Stage VI to the waste management council on November 9, 2020, pursuant to RSA 21-O:14 arguing among other things that it was unlawful and unreasonable for the Department to determine that the facility provides a public benefit when only one year of its operations would occur during a period of shortfall.

39. CLF had previously, and unsuccessfully, appealed NHDES's 2018 permitting decision for the Turnkey landfill expansion described in ¶24. On that appeal, CLF did not challenge the capacity need component of the Department's permitting decision, even though the Turnkey facility also proposed operating for a period when there was no shortfall in disposal capacity.

40. Attorney David Conley, formerly with the Sulloway & Hollis firm in Concord, was originally appointed to serve as the hearing officer for CLF's appeal of the Stage VI permit. Mr. Conley had served as the hearing officer for all of the environmental appeals councils (see

RSA 21-O: 5-a (wetlands council), :7 (water council), :9 (waste management council), and :11 (air resources council)) since the creation of the hearing officer position in 2009 (see RSA 21-M:3, VIII – IX).

41. On September 3, 2021, Mr. Conley granted NCES's motion to dismiss CLF's claim that a facility must operate entirely in a period of statewide shortfall to meet the capacity need requirement. Mr. Conley held that the statute "does not currently provide for a further temporal or other inquiry" beyond identification of the capacity need shortfall, and since the statute did not require these further inquiries, NHDES did not act unlawfully or unreasonably in issuing the Stage VI permit.

42. CLF sought reconsideration of the dismissal of its claim, and while the motion for reconsideration was pending Mr. Conley retired. Instead of appointing another attorney from the private sector to replace him, the attorney general appointed Attorney Zachary Towle, a lawyer with the NHDOJ's division of public protection, to serve as the hearing officer.

43. In appeals to the environmental councils, separate attorneys from NHDOJ represent the Department and the relevant council. With the appointment of Mr. Towle, yet a third lawyer employed by NHDOJ became responsible for presiding over and adjudicating the legal issues presented in CLF's appeal. Mr. Towle's first ruling as hearing officer was to overrule Mr. Conley's dismissal of CLF's capacity need claim.

44. In CLF's appeal of the Stage VI approval, both NCES and the Department defended the lawfulness of the approval at the hearing on the merits on February 18, 2022.

45. Before the hearing on the merits, the parties submitted pre-hearing memoranda to brief the council on the issues in dispute.

46. In its pre-hearing memorandum, NHDES adopted yet a fourth construction of RSA 149-M:11, V, arguing 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 finding of capacity need. NHDES maintained in its prehearing memorandum that whether any such "overlap" was necessary was a matter of the Department's discretion.

47. In its prehearing memorandum NCES noted its disagreement with NHDES's partial function of time approach and reserved its right to challenge that approach, but because NCES had received the Stage VI permit, it defended the decision granting the permit, including its rationale.

48. Following the presentation of evidence and arguments on February 18, 2022, the waste management council deliberated on February 22, 2022, with Mr. Towle presiding over those deliberations.

49. The waste management council voted unanimously on February 22, 2022, to approve a motion that NHDES acted reasonably in measuring long-term capacity need as required by RSA 149-M:11 in issuing the Stage VI permit.

50. The waste management council also voted unanimously on February 22, 2022, to approve a motion that NHDES acted lawfully in finding a capacity need during the life of the Stage VI permit.

51. The waste management council also voted unanimously on February 22, 2022, to approve a motion that NHDES acted reasonably in issuing a permit to address the state's capacity need during the life of the Stage VI permit.

52. The waste management council also approved a motion on February 22, 2022, that NHDES was reasonable in issuing a permit with respect to public benefit, as stated in RSA 149-M:11.

53. The waste management council rejected each of CLF's claims during deliberations on February 22, 2022.

54. On May 11, 2022, the hearing officer issued a 20-page order on CLF's appeal of NCES's Stage VI permit. This order affirmed each of the council's votes from the February 22, 2022, deliberations with one exception: the hearing officer determined that NHDES acted unlawfully in finding a capacity need for the Stage VI facility, in effect overruling the council's decision on February 22.

55. In the May 11, 2022 order, Mr. Towle ruled that "the language of paragraph V [of RSA 149-M:11] explicitly limits a finding of capacity need to only instances where a proposed facility will satisfy a shortfall. If there is no shortfall, there can be no capacity need. It is ultimately irrelevant that a proposed facility will provide a capacity need for only some of its lifespan, because NHDES is required to evaluate the entire lifespan of a proposed facility when measuring capacity need." The hearing officer rejected the aggregate capacity need method, NHDES's partial function of time approach, and NHDES's discretionary standard and adopted instead the function of time approach that NHDES had rejected two decades earlier. The hearing officer's interpretation further narrowed the function of time approach by specifically prohibiting the issuance of a permit for a facility that would operate at *any* time before an anticipated shortfall. Under the hearing officer's reasoning, each of the approvals described in paragraphs 19, 21-25, and 79 of this petition were unlawful.

56. The effect of the hearing officer's order was to transform NCES from a permittee defending the issuance of its permit into a party aggrieved by a decision equivalent to denial of the permit. Under RSA 21-O:14, however, NCES could not file a separate appeal of this decision but was left under RSA ch. 541 with only a motion for rehearing as a remedy for the complete reversal of outcome. Neither the governing statutes nor the council's rules allow discovery on rehearing.

57. Pursuant to RSA ch. 541 and the waste management council rules, NCES filed a motion for rehearing on June 10, 2022. NHDES filed a motion for rehearing on May 31, 2022.

58. NCES's motion identified four issues requiring rehearing:

a. The language and long-standing construction and application of RSA ch. 149-M by the Department establish that the aggregate capacity need approach is the required method for assessing public benefit and that the hearing officer disregarded the administrative gloss placed on this statute by the Department;

b. The hearing officer's interpretation of RSA 149-M:11 results in the invalidity of the statute under the dormant commerce clause;

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

d. The hearing office erred in prior orders by not dismissing the case on jurisdictional grounds for CLF's lack of standing.

59. In support of this motion, and to substantiate the Department's administrative gloss, NCES appended exhibits summarizing prior permit applications and resulting NHDES permitting decisions for solid waste facilities, which established that the Department previously approved facilities that would operate either entirely or in part for a period before an anticipated capacity shortfall. In other words, the Department never adopted the "function of time" approach until it suddenly shifted to that interpretation when evaluating NCES's first Stage VI application in 2019.

60. CLF objected to both motions for rehearing and also filed a motion to strike the exhibits appended to NCES's motion.

61. To continue its discovery into the Department's historical interpretation of the public benefit statute on its motion for rehearing, NCES submitted a public records request to NHDES pursuant to RSA ch. 91-A, seeking access to permit applications in which the applicant was required to establish a substantial public benefit and the resulting permitting decisions.

62. NHDES produced documents responsive to the RSA ch, 91-A request in rolling productions, one facility at a time.

63. Through its review of these records, NCES has further confirmed its understanding of the Department's historical approach to the capacity need criteria and its administrative gloss on the statute.

64. Accordingly, on August 12, 2022, NCES filed a motion with the council seeking to supplement the record for the pending motion for rehearing with additional documentary evidence gleaned from the public records produced by NHDES.

65. The public records included the documents and correspondence regarding NCES's Stage III permit application, described above in ¶¶15-19. NCES's motion to supplement sought to add Mr. Reed's correspondence and internal NHDES memoranda, along with certain correspondence from NHDES responding to public comments for permit applications, to the record for the motion for rehearing.

66. Recognizing that CLF had challenged the admissibility of these documents, and mindful that the council may also wish to inquire about these materials, NCES requested an evidentiary hearing in its motion to supplement on August 12, 2022. Under RSA ch. 541, NCES is not entitled on rehearing to an evidentiary hearing, nor is it entitled to any discovery into

NHDES's historical construction of the statute and what prompted NHDES's sudden departure from the aggregate capacity need method.

67. NHDES and CLF objected to the motion to supplement the record on the motion for rehearing and to hold an evidentiary hearing, and if those objections are sustained the effect would be to confine NCES to the record on CLF's appeal even though the hearing officer's decision is the functional equivalent of a denial of the Stage VI application. The hearing officer has not yet issued orders on the motions for rehearing, CLF's motion to strike, or NCES's motion to supplement.

68. By statute, the waste management council is comprised of thirteen members, eight of whom represent the "public interest," while the remaining five members are a licensed private sector engineer and representatives of the waste management industry, municipal public works, the business or financial sector, and industrial hazardous waste generators.

69. No member of the waste management council has legal training.

70. The waste management council is statutorily authorized to decide appeals of "department decisions," such as permitting decisions and enforcement actions. It decides those appeals based on a detailed regulatory record; in the case of a permitting decision, that record contains the permit application and the resulting decision.

71. The waste management council does not have jurisdiction to grant declaratory relief and has no authority to adjudicate the constitutionality of a state statute.

72. RSA ch. 541 and the council's rules do not provide an adequate or meaningful remedy for NCES. The hearing officer's order rendered NCES an aggrieved party, but RSA ch. 21-O does not allow NCES to commence a new council appeal from that ruling. NCES does not have the right on rehearing to supplement the record, conduct discovery on its theories as to why

the hearing officer's ruling is unlawful or into why the Department discontinued the aggregate capacity need method, or even receive an evidentiary hearing. Instead, it is left to seek declaratory relief – including a declaration that RSA 149-M:11 is unconstitutional – on a motion for rehearing from a tribunal having no jurisdiction to grant declaratory relief. Notwithstanding the draconian impact the hearing officer's ruling would have on NCES and the implications of that ruling for the permitting of future disposal capacity in the state, RSA ch. 541 and the council's rules afford NCES no right to conduct discovery on its claims. Under the literal terms of RSA ch. 541, NCES must mount a challenge to the hearing officer's radical reconstruction of RSA 149-M:11 through a motion for rehearing based entirely on a record generated on another party's appeal and as to which NCES's posture and harm have changed diametrically.

73. NCES is currently operating the first of two cells in Stage VI of the Bethlehem landfill. This part of the facility will exhaust its capacity in approximately July 2024.

74. NCES must apply to NHDES in the near future for construction approval to develop and build the second cell of Stage VI. It can take between six and fourteen months for the Department to reach a decision on such an application, so it must be submitted in the fall of 2022 to ensure that it can be reviewed and approved in a timely manner so construction can commence in May 2023.

75. If NCES cannot develop or is delayed in developing Cell 2 of Stage VI because of the hearing officer's order, then NCES will be forced to either curtail substantially the amount of waste it can take from its current New Hampshire customers or to close.

76. The hearing officer's May 11, 2022 order remands NCES's Stage VI permit to the Department for further consideration in light of his determination that the Department acted unlawfully in finding that the facility provides a substantial public benefit. The order has been

suspended pending a decision on the motion for rehearing, but if the hearing officer denies rehearing the Department will have to decide whether NCES can continue to operate Stage VI while NCES appeals the denial of rehearing to the supreme court.

77. All of the state's commercial landfills, which accept the vast majority of the waste generated in the state, are operating at their respective permitted annual capacities. If NCES must shut down pending a supreme court appeal, the thousands of New Hampshire customers who now rely on the NCES facility will have no destination for their solid waste.

78. The owner of the Mt. Carberry facility has confirmed that it cannot accommodate the waste currently being disposed of at NCES.

79. On April 22, 2022, NHDES issued a permit to Mt. Carberry that extended the facility's life expectancy by approximately 16.3 years. The operating period for the new cell as approved by NHDES is from 2025 to 2041, but NHDES's application review summary determined that the anticipated capacity shortfall would occur in 2034, midway through the new cell's operating period.

80. Under the reasoning of the hearing officer's order in CLF's appeal of NCES's Stage VI permit, the April 2022 approval of Mt. Carberry's new cell is unlawful because NHDES used the partial function of time approach to determine whether the cell satisfied the public benefit requirement. Despite the patent conflict between the hearing officer's rationale and the Mt. Carberry approval, CLF did not appeal the Mt. Carberry approval. On information and belief, no one has appealed the Mt. Carberry approval. The hearing officer's order nonetheless places a cloud over the lawfulness of the Mt. Carberry approval.

81. The inconsistency of the positions taken by CLF on its appeal of the WMNH permit (no challenge to NHDES's failure to use the function of time approach), its appeal of the

NCES Stage VI permit (arguing for application of the function of time approach), and its decision not to appeal the Mt. Carberry permit (failing to use the function of time approach) illustrates not only the hazards of making state waste management policy dependent on the whims of a single "public interest" litigant but the need for declaratory relief so that similarly situated parties are treated equally by the law.

82. On its face, RSA ch. 149-M explicitly discriminates against the disposal of waste generated outside of New Hampshire. For example, RSA 149-M:6, XI requires NHDES to impose a "surcharge" on out-of-state solid waste to be disposed of in New Hampshire. RSA 149-M:11, moreover, expressly confines NHDES to consideration of waste generated in the state in determining whether to permit privately-owned disposal facilities.

83. NHDES has historically sought to mitigate the discriminatory impact of RSA ch. 149-M on the disposal of out-of-state waste in New Hampshire. It has not enforced the surcharge on such waste, and through the aggregate disposal capacity method it has avoided limiting approval of new waste disposal capacity to that needed only for waste generated in the state. NHDES's adoption of the partial function of time approach increased the discriminatory effect of RSA 149-M:11, and the hearing officer's construction of the statute maximizes the discriminatory impact.

84. GSL filed a waste disposal facility permit application for its proposed Dalton landfill on February 9, 2021. The timing of the approval sought by GSL is designed to enable GSL to begin accepting New Hampshire waste upon the closure of the NCES facility at the end of 2026.

85. In response to technical comments from NHDES, GSL withdrew its application for a standard waste disposal facility permit on May 31, 2022, but it intends to file a new

application in the coming months. In preparing that application GSL must include a public benefit determination, and it is entitled to know beforehand how capacity need is to be established under RSA 149-M:11. V.

86. The uncertainty created by NHDES's departure from the aggregate capacity need method and its adoption of the partial function of time approach followed by its adoption of the discretionary standard it now espouses, together with the hearing officer's adoption of a strict function of time construction of RSA 149-M:11, V, has (a) placed a cloud on NCES's continued right to operate Stage VI and its right to obtain operating approval for Cell 2 of Stage VI and (b) interfered with GSL's ability to submit a waste disposal facility permit application that complies with RSA 149-M:11, V.

Count I

87. Plaintiffs restate and incorporate herein by reference each and every preceding paragraph as if fully set forth herein.

88. By virtue of its permit, which was issued by the Department on October 9, 2020, NCES has a right to operate and seek the right to construct and operate Cell 2 of Stage VI of its solid waste landfill in Bethlehem, and those rights are adversely affected by the Department's evolving construction of RSA 149-M:11 and the hearing officer's adoption of the function of time approach.

89. NCES and GSL are entitled to a declaration that RSA 149-M:11, V, unambiguously requires the application of the aggregate capacity need method.

Count II

90. Plaintiffs restate and incorporate herein by reference each and every preceding paragraph as if fully set forth herein.

91. If the court concludes that RSA 149-M:11, V is ambiguous, then NCES and GSL are entitled to a declaration that the Department's long-standing interpretation of the statutory public benefit criteria as being satisfied by the aggregate capacity need method and the legislature's failure to modify the statute in response to that interpretation created an administrative gloss on the statute that cannot be modified except by the legislature and the statute is therefore satisfied by the aggregate capacity need method.

Count III

92. Plaintiffs restate and incorporate herein by reference each and every preceding paragraph as if fully set forth herein.

93. The dormant commerce clause of the United States Constitution forbids the states from discriminating against interstate commerce to favor their citizens.

94. On its face, RSA ch. 149-M discriminates against the in-state disposal of waste originating out of state.

95. On its face, RSA 149-M:11, V, seeks to regulate the availability of waste disposal capacity in New Hampshire by considering only waste generated in New Hampshire in determining capacity need.

96. NHDES's historical construction of RSA ch. 149-M – and of RSA 149-M:11, V, specifically – has mitigated the facially discriminatory impact the statute has on waste originating out of state and has enabled the state to moderate the importation of waste without provoking a commerce-clause challenge to the statute.

97. NHDES's departure from the aggregate capacity need analysis and its adoption of the partial function of time approach, and its later advocacy for an entirely discretionary standard, accentuated the facially discriminatory characteristics of the statute.

98. The hearing officer's adoption of the strict function of time approach, if legally correct, places the most discriminatory construction possible on the statute, effectuating its facially discriminatory intent.

99. NCES and GSL are entitled to a declaration that the strict function of time approach, the partial function of time approach, and the discretionary approach NHDES now advocates for promote the facially discriminatory purpose of RSA 149-M:11, V, rendering the statute unconstitutional under the dormant commerce clause.

WHEREFORE, plaintiffs respectfully request that this Honorable Court:

A. Issue an order declaring that the aggregate capacity need method is explicitly required for assessing capacity need pursuant to RSA 149-M:11, V;

B. Issue an order declaring that, if RSA 149-M:11, V is ambiguous, the Department's long-standing application and interpretation of the statute utilizing the aggregate capacity need approach constitutes an administrative gloss that cannot be set aside without an amendment of the statute by the legislature;

C. Issue an order declaring that the strict function of time approach, the partial function of time approach, and the discretionary approach for determining capacity need pursuant to RSA 149-M:11, V, violates the dormant commerce clause of the United States Constitution; and

D. Grant plaintiffs such other and further relief as justice and equity require.

Respectfully submitted,

NORTH COUNTRY ENVIRONMENTAL SERVICES, INC. and
GRANITE STATE LANDFILL, LLC

By Their Attorneys,

Date: 9/20/22

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