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January 18, 2008

Attorney General Kelly A. Ayotte
NH Department of Justice
33 Capitol Street
Concord, NH 03301

Re: State v. North Country Environmental Services, Inc.

Dear General Ayotte:

Your letter of January 7, 2008, to the chairman of the Bethlehem Board of Selectmen has come to my attention. I am writing to express my respectful disagreement with certain portions of your letter.

While it is true that the state's petition implied that NCES failed to "identify and reject" asbestos-containing materials (ACM) from the Mountain View Grand renovation, the premise of the consent decree was that the state was alleging only that NCES's inspection procedures were inadequate, not that NCES actually accepted ACM. During the negotiation of the consent decree, your office told me that NCES would have to waive its indemnity claims because its allegedly improper conduct was its failure to follow inspection protocols, and there was therefore no basis for indemnity. That was the sole basis upon which NCES agreed not to seek indemnity against those individuals and entities who had allegedly concealed ACM in loads of construction and demolition debris from the hotel. There would have been no basis for NCES to have waived its rights to indemnity if the consent decree were premised on NCES's acceptance of ACM, yet your letter asserts that NCES did accept ACM.

Under the consent decree, moreover, both DES and the OAG "release and covenant not . . . to take any administrative action against NCES . . . for . . . the violations alleged in the Petition and violations of environmental statutes, rules, or permits or NCES's operating plan . . . that could have been asserted through the effective date of this Decree on the basis of . . . NCES's alleged

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acceptance of [ACM] from the renovation of the Mountain View Grand Hotel” Consent Decree at ¶17. Thus, your letter’s suggestion that DES could impose permit conditions premised on the presence of ACM in the landfill is inconsistent with the consent decree.

Finally, your letter states that the consent decree “requires NCES to go beyond existing regulatory requirements in developing methods to protect the citizens of Bethlehem from future risks associated with unintended acceptance and burial of prohibited waste.” It goes on to say that the purpose of the “Waste Control Evaluation Report” is to propose steps to “ensure detection and rejection of prohibited wastes” Neither statement is accurate. Nothing in the consent decree requires NCES to exceed existing regulatory requirements, and nothing in the decree imposes the standard for detection your letter suggests.

As you are aware, the consent decree was the result of long and contentious negotiations. NCES made a significant concession to the state – that it would not pursue indemnity against the convicted criminals who allegedly placed ACM in containers bound for the NCES landfill – based upon the OAG’s representation that it was not alleging that ACM was deposited in the landfill. After we had agreed to the consent decree, the state filed a petition implying that ACM went into the landfill, and the OAG thereafter reportedly made explicit remarks to the media to the same effect. Your letter not only perpetuates this unproven allegation, it also suggests that DES is contemplating some kind of administrative action in reliance upon it.

It is disappointing that the OAG has made public statements that are contrary to the terms of the consent decree and to the representations it made to NCES in the negotiations. Predictably, these statements have provoked public outrage. Had the OAG simply conceded publicly the fact that the evidence of disposal of ACM in the landfill was inconclusive and that the basis of the state’s claims was alleged shortcomings in NCES’s inspection procedures, the unfounded recriminations we are now witnessing could have been avoided.

Please consider clarifying your letter to the Bethlehem selectmen so that the OAG does not appear to be committed to a position that is unsustainable under the consent decree.

Thank you for giving this matter your attention.

Very truly yours,


Bryan K. Gould, Esq.

BKG:bmb