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Attorneys At Law

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October 16, 2008



Thomas Burack, Commissioner  
Department of Environmental Services  
29 Hazen Drive, P.O. Box 95  
Concord, NH 03302-0095

By hand delivery

Re: North Country Environmental Services, Inc.'s  
Stage IV, Phase II, Type 1-B and II Modification Permit Application  
Standard Permit No. DES-SW-SP-03-002

Dear Commissioner Burack:

I represent the Town of Bethlehem. I am writing to supplement my comments at the public hearing on September 16, 2008 about these permit modification applications. As I have reviewed these applications, including the comments from engineering firms retained by the Town, I have become concerned that treating these applications as Type 1-B and Type II modifications is an impermissible risk allocation process that places the Town of Bethlehem in the position of having to stand as surety for long term risks allocated to it and away from the applicant, NCES. Some of my comments address issues particular to your personal expertise relating to insurance coverage that may require some direction from you.

**Structural Issues.**

The documentation supporting these modifications is inadequate to insure the long term stability of the proposed reinforced earth berm ("berm" or "REB"), its ability to contain the leachate, the integrity of the liner and whether the berm structure itself and its foundational soils are adequate to predict long term stability. The Town of Bethlehem has had to raise these issues itself. The DES has ignored these issues and NCES has never answered the questions that the Town's very competent environmental engineers have raised. These comments are in the record and contained in submissions by Aries Engineering dated August 7, 2007 (relative to NCES' initial applications), March 21, 2008, April 10, 2008, and June 9, 2008. Nor has the DES requested that the structural integrity of this proposed facility and its foundational soils be investigated by an independent geotechnical engineer. The DES admittedly has no such qualified person on staff and the applicant's engineer has specifically qualified its structural opinion on the basis that geotechnical engineering review was not included in its opinions and that it must be done.

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The issue is that DES lacks the information necessary to grant the permit or to have deemed it complete. It is the applicant's burden to produce this information and it has failed. On this basis, the application should be rejected. Past history of this facility shows that information on NCES' applications has been less than reliable. The DES previously approved a facility called the landfill gas utilization facility ("LGUF") which was nothing but an incinerator to destroy landfill gas and leachate. Although NCES adopted the fiction that this device was really an "evaporator," its use had to be abandoned because significant amounts of the landfill gases were not adequately destroyed in the "evaporator" as evidenced by the exposed flames of the "enclosed" flare. When asked to justify that the facility was operating properly to destroy landfill gases and leachate, NCES declined the DES' invitation to do the required stack testing and has abandoned the enclosed flare for use to destroy landfill leachate. The massive, above ground addition to the landfill called for in the permit modifications is not something that NCES could walk away from if it does not work. The dangers it poses in terms of potential instability and leakage are such that no reasonable regulator should have deemed the application complete, nor should it grant the application subject to conditions that attempt to correct permit application incompleteness or errors. Any such conditions, when written, will only manifest either the incompleteness of the application or a foolhardy pursuit of additional landfill capacity at the expense of significant public risk.

### **Financial Assurance.**

I have heard that the State has not provided for financial security in case of a structural failure. Moreover, the State presently has a limited financial security for closure costs and post closure monitoring for existing facilities only up to Stage III. The town requested a disclosure of any security held on account of Stage IV, Phase I and none was produced, nor is there any security for Stage IV, Phase II. However, that is not the only or most significant problem the state faces. To date, NCES has posted two surety bonds, in the amount of Five Million One Hundred Sixteen Thousand Four Hundred Thirty Three dollars (\$5,116,433.00), and Five Million Nine Hundred Nineteen Thousand Seven Hundred Sixty Dollars (\$5,919,760.00), respectively for closure costs and post closure costs related to Stages I, II and III. These sureties are inadequate, as discussed below, and provide no surety at all for structural failures of the landfill facilities that they pertain to.

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## Amount of Assurance.

From a review of the file, the amount of the financial assurance required has been reduced instead of increased. As recently as Jan. 17, 2008, NCES requested permission from DES to reduce its coverage from \$5.3 million down to \$5.1 million for closure (insured through Evergreen National Indemnity Company Insurance ("Evergreen") Policy #850599), and down from \$6.1 million to \$5.9 million for post closure care (insured through Evergreen Policy # 850600). I note that the Solid Waste Management Bureau approved the reduced amounts on February 21, 2008. For reasons set forth below, these decisions were irresponsible and should be revisited.

I have also examined the Standby Trust Agreement between NCES and Citizens Bank of New Hampshire (now JP Morgan), which appears to relate only to Stages I, II, and III. Although the DES files contained three amendments to the trust agreement, including the addition of the Transfer Station, the files did not contain an amendment adding Stage IV. Why was NCES allowed to bring Stage IV, Phase I on line without an update to its financial assurance plan? RSA 149-M:9, X requires NCES to show financial responsibility before the DES issued the permit.<sup>1</sup> We have asked Laura Kieronski of Solid Waste Management Bureau whether there is an amendment missing from the DES financial assurance files. None has been found. Most important is that Stage III contains an above-grade, containing berm which is subject to similar failure risks as the berm in the current Stage IV, Phase II application, risks that are magnified because the new berm is to be built over the existing Stage III berm. There is no surety at all to cover the consequences of any such failure. Although the Solid Waste Rules apparently require only financial assurance for closure and post closure care, the statute specifically requires an amount to "protect the public health and welfare and the environment; and [i]nsure that appropriate measures will be taken to prevent present and future damage to the public health and safety or to the environment, in the event that the operations at the facility are abandoned, interrupted, or stopped." See RSA 149-M:9, X, (a), (b). This broad statutory language supports the requirement to cover the risk for consequences of a potential, future containment failure.

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<sup>1</sup> RSA 149-M:9, X states: The department shall not issue a permit for a solid waste facility unless the facility meets the terms and conditions required in rules adopted by the commissioner. These terms and conditions include, but are not limited to, monitoring, contingency plans, closure, and evidence of financial responsibility in the amount set by the department after consultation with the commissioner of insurance (emphasis added).

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## Cost Estimates.

I have reviewed the most recent estimates for closure and post-closure costs for the Stage IV, Phase II application. The assumptions that are set out in the document are hardly reasonable. NCES has missed some critical areas. First, although NCES has noted a cost of "cap subsidence repairs" for years 15 – 30 (post closing), NCES has failed to include any repair allowance for the berm or its liner. There could be unforeseen contingencies, especially where the Reinforced Earth Berm ("REB") design has only been used for landfills for the last 10 years. Presentations made by CMA (NCES' engineer) have indicated that, while berms have been used in civil engineering projects, such as highways, for about 30 years, REBs have only been used in landfill designs for 10 years. There is a significant difference between a soil retention berm used for civil projects such as roads and an impervious landfill berm designed to contain landfill gas and leachate and to accommodate years of daily compaction activities followed by a virtually unlimited post closure period. Because of the lack of berm experience in the landfill setting, and due to landfill gas migration, berm loads and underlying liners that are known to leak, NCES should have included an allowance for REB repairs and maintenance just as they did to repair damage to the landfill cap (two 4-acre subsidence failures over a 30-year period). This cost should be calculated to support the same or greater frequency as cap repair (15 and 30 year intervals).

Further, according to the estimates supplied by NCES and its engineer, CMA, the landfill will continue to generate leachate after closure. Following the calculations supplied—which are somewhat difficult to follow—NCES expects that the closed landfill will generate leachate at a rate of 53 gallons per day at the end of the 30-year period after closure. At that rate, CMA estimated that the landfill will continue to generate 19,345 gallons per year of leachate 30 years after landfill closure. That, of course, is a substantial amount of leachate during and after the post-closing period and will still require management. What will occur at the end of the 30-year period? Based on CMA's analysis, it is obvious that landfill post-closure care is required even after 30 years. The REB management, including removal of any trees that seed and begin to grow on the berm, must also be continued for a virtually unlimited period beyond the 30-year period covered. Once again, because of the lack of experience using REBs for landfills—nothing longer than approximately 10 years according to CMA's public hearing presentation—the REB may require periodic inspection and repair well beyond the 30 years. Yet there is no cost estimate for any of these additional functions. Even if NCES/CMA's calculations are correct, they ignore the unlimited time period following the 30-year post closure period. Financial assurance must be

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adequate with this realization in mind. And there also must be a contingency for berm or liner failure, given that the facility is entirely above grade.

## **Form of Assurance.**

The State is deceiving itself if it thinks these policies as written provide any real protection. Although the insurance carrier has a Best rating of A-, it is a small, thinly capitalized company, one-third of whose reserves would be eaten up by claims in the amount of these surety bonds. It is also a captive insurer of the waste industry, much like AEGIS (Associated Electric and Gas Insurance Services) is to the gas utilities. Since NCES appears to own a 19.8% stake in its insurer, it is clearly an affiliated entity.<sup>2</sup> More disturbing still is that these sureties are nothing more than claims-made insurance policies. Annual premiums approach \$100,000.00. If the premium is not paid annually, the policies lapse. If the State does not bring a claim within an annual policy period and the policy lapses, there is no surety. I cannot image a sensible business corporation accepting this type of policy as a surety for a liability that extends over a 30 to 50 year period. We also note that the DES' own Solid Waste rules appear to prohibit NCES from using Evergreen National Indemnity Company to insure its project. Env-Sw 1403.03 (2) indicates that an insurance policy may be used, "except that insurance issued by an affiliated captive insurance company shall not be acceptable."

NCES is a wholly owned subsidiary of another corporation. It was formed to own the Bethlehem landfill. When it is no longer of any use to its parent corporation as a liability shield, it will be dissolved. Who then will pay for the surety?

## **Risk Contingency.**

I am quite certain that the State is unlikely to pay for continuing the bond if NCES ceases to exist or is bankrupt. Like most other government obligations in New Hampshire, there is no constituency for State funding to cover either the surety or the potential liability if and when something goes wrong. There is little doubt that this above-ground physical containment of over one million tons of leachate-producing trash is a substantial risk over the period of operation and for the following 30 year monitoring period. It is likely to remain a risk even after that, since the landfill will require perpetual care and monitoring to prevent and repair structural failures. If the

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<sup>2</sup> NCES is a wholly-owned subsidiary of Casella Waste Systems, Inc. According to Casella's Form 10-K (Annual Report) for 2008, Casella owns 19.8% of Evergreen National Indemnity Company. See 2008 Annual Report at p. 73. Other waste management companies also have significant ownership stakes in this insurer.

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DES were to approve this application, the only way to do so is to require a cash facility taking into account the extraordinary costs of either reconstructing substantial portions of the landfill structures, or removing the waste to another lined facility, in the event the structure fails, the liner fails or there is a leachate breakout of sufficient magnitude to create a contaminant plume threat. The State can take no comfort that there may be Comprehensive General Liability coverage for groundwater damage or damage to property of others, in view of the fact that modern policies have comprehensive exclusions for contamination. It is doubtful that EIL coverage will be written for such a risk. Even if it were, the policy would have to be closely studied to see if it provided any coverage at all for the risks described in this paragraph. This problem is exacerbated because NCES provides a liability shield for Casella. In the event of any property damage, NCES' first line of defense will be the State's comprehensive regulatory power, whether or not wisely used.

The State, as the beneficiary of the surety bonds, has some issues of proof of its own before bond proceeds can be recovered, even if the claim is made during an annual period for which payment has been made. Surety bond issuers are notorious for delaying or denying payment if the exact terms of the surety are not met. This is not reassuring to Bethlehem and should not be reassuring to the State.

### **Weather Extremes.**

I am also concerned that there is compelling evidence that the DES' regulations may be out of date as they relate to design features based upon past observed weather conditions rather than anticipated future weather conditions. In view of increasing storm frequency and intensity progressively observed over recent years, designing landfill stormwater management systems to a 25-year storm standard based on less frequent and intense past storms, for a structure that sits 120 feet above ground is far too risky. The application should be denied until the DES can update its regulations to provide for design features sufficient to modern and more intense weather conditions. I believe that your Department has issued a recent call to action entitled "New Hampshire Climate Change Policy Task Force Draft Action Reports under Development." Although the final Task Force report will not be presented to the Governor until December, in the September 8, 2008 Draft Report, ADP-5 addresses these weather related risks and the need to update regulations.<sup>3</sup> I also understand that you have acknowledged these anticipated extreme

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<sup>3</sup> See the DES website, for copy of the report. (<http://des.nh.gov/organization/divisions/air/tsb/tps/>)

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storm events, their adverse economic impacts, and the need to take action now rather than to delay in your Regional Greenhouse Gas Initiative presentations to the public.

## **Leachate Releases.**

The current state of affairs also allocates a risk to the Town of Bethlehem in that your agency has detected apparent leachate releases along the landfill northern boundary. These leachate release manifestations have yet to be explained, but they are extensive enough along an entire northern boundary of the landfill to suggest a potential defect in the liner. NCS' current explanation of leachate spills has not satisfied your Department, nor does it satisfy Bethlehem, when it ascribes the leachate manifestations to a leachate handling facility located at one end of the landfill boundary witnessing the contamination. Certainly no approval should be granted for the existing applications unless and until the sources of the present leachate release manifestations are identified, particularly if leachate releases are found to occur through the liner proposed to contain leachate for the current permit modification applications. Given the scope of these leachate manifestations, it is likely that their explanation may affect the proposed design of the current Stage IV, Phase II facility.

## **Conclusion.**

I hope that you will consider these comments in reviewing any ultimate decision by your department. I am particularly concerned that Bethlehem has taken the step to spend thousands of dollars on experienced, environmental engineering review in order to present the DES with the best scientific information. So far these concerns have not been addressed. I believe that Bethlehem has demonstrated the inadequacies of this application and the engineering deficiencies apparent in it. Based on the analysis of Bethlehem's engineers and on the unacceptable risk allocation you are being asked to make, Bethlehem requests that the application be denied. In addition, because of the scope of this new facility, any further submissions should be an adjudicatory proceeding under the rules applicable for new facilities; and the process should begin, from the start, as a new application.

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**Incorporation By Reference.**

Along with the testimony presented at the two hearings by various Town Officials and the Town's legal counsel, the Town, through either counsel, its engineering firm, or directly from the Selectboard has issued the following reports, which are part of the record in this matter:

1. Aries Engineering, Inc. reports of August 7, 2007, March 21, 2008, April 10, 2008, and June 9, 2008.
2. Boutin & Altieri, PLLC correspondence to: i) Wayne Wheeler dated August 8, 2007 ii) Director Wimsatt and AAG Richard Head dated October 1, 2008, and iii) to Laura Kieronski dated October 14, 2008
3. Bethlehem Selectboard correspondence dated February 19, 2008, September 16, 2008 and Bethlehem Selectboard correspondence dated October 7, 2008.
4. Bethlehem Conservation Commission correspondence dated September 29, 2008.

Sincerely,



Edmund J. Boutin

- c. Governor John Lynch (by USPS)  
AAG Richard W. Head (by Fax and USPS)  
Michael Wimsatt (by hand delivery)  
Tom Roy (by Email)  
Bryan Gould (by Fax and USPS)  
Clients  
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