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VIA E-MAIL TRANSMISSION

Jaime M. Colby, P.E. (jaime.colby@des.nh.gov)
Solid Waste Management Bureau
Waste Management Division
29 Hazen Drive, PO Box 95
Concord, NH 03302-0095

Re: North Country Environmental Services, Inc., Landfill, 581 Trudeau Road, Bethlehem, NH - Permit No. DES-SW-SP-03-002 - Type I-A Permit Modification Application for Facility Expansion (Stage VI) / Application No. 2019-36785

Dear Ms. Colby:

We represent North Country Environmental Services, Inc. ("NCES").

I am writing in response to DES's notification to NCES that its pending application for a Type I-A permit modification for Stage VI of the NCES landfill does not meet the requirements of RSA 149-M:11. DES has informed NCES that it is now interpreting that statute to require that a facility's proposed capacity must extend to some undefined degree into a period of a projected shortfall of permitted disposal capacity.

As we have pointed out DES has never, over the approximately thirty years that the public benefit requirement has been part of the law, construed the statute to require proposed capacity to extend into the projected shortfall period. Rather, it has applied the statute as written. It has compared the projected needs of the state to the amount of permitted capacity over the requisite twenty-year planning period and found that the proposed capacity provides a public benefit if there is a shortfall over the planning period.

Indeed, DES applied the statute this way in August of 2014 when it granted NCES's Stage V application. All of the proposed Stage V capacity was to be used before there was a shortfall of permitted capacity, yet DES found that Stage V provided a substantial public benefit. In fact, when explaining this decision in its response to public comments DES said that Stage V

provided a public benefit because it "will be used for disposal of New Hampshire generated waste well within, rather than beyond, the statutory 20-year planning period."

DES has provided us with no justification for its abandonment of the plain language of the statute and its new construction of the public benefit requirement. It has alluded to the last sentence of RSA 149-M:11, V(d) as supporting its interpretation because that sentence says that a "capacity need for the proposed . . . facility shall be deemed to exist to the extent the proposed facility satisfies that need." That sentence has been in the law for decades, however, and it has never been used as DES is purporting to use it now.

In the past, DES's application of RSA 149-M:11, V has recognized that, because the legislature required DES to plan for sufficient capacity for twenty years, any capacity made available during that twenty-year period either meets or defers any shortfall. That was the meaning given to the "to the extent" language. DES has now jettisoned that construction, and we submit that it has done so heedless of the implications.

If "to the extent the proposed facility satisfies that need" no longer means "to the extent the facility meets or defers a capacity shortfall" there is only one other permissible construction of the language, and it is not the one DES has proposed. DES's new interpretation would mean that if a proposed facility provides two weeks of capacity in the shortfall period it would meet public benefit, but if its capacity expires two weeks earlier it would not. That is an absurd result. The fact that DES cannot tell us how far into the shortfall period the proposed capacity must extend to provide a public benefit also demonstrates that the statute does not mean what DES now says it means. An entirely subjective standard is no standard at all.

Assuming that the courts permit it, the logical result of DES's departure from the language and historical application of the statute is that "to the extent" will be construed by the courts to mean "only to the extent." In other words, new capacity would satisfy the public benefit requirement only if it will be used *entirely* within the shortfall period. This would mean that DES could not find there is a public benefit – and therefore could not approve new capacity – if *any* of that capacity would be consumed during a period of excess statewide capacity.

Notwithstanding the discontinuity and other disruptions this will cause not only for NCES but also for the availability of reasonably priced disposal capacity in New Hampshire, DES has refused to retreat from its novel interpretation of a statute of thirty years' standing. Accordingly, NCES has told DES that it will accept a permit condition in a Stage VI approval that would extend the life of Stage VI into the projected shortfall period. DES has refused this solution and has given NCES the ultimatum that it can either submit a new Stage VI application

complying with DES's new construction of RSA 149-M:11 or it can take a denial of its pending application.

Despite several conversations with you and DES leadership, the agency has yet to explain why it has raised this claimed defect in the application with NCES a year after it was submitted. The only thing in the record that raises this issue is a December 20, 2019, comment email from a Bethlehem resident suggesting that DES interpret the statute exactly as it now is interpreting it. The rationale offered by this resident is that approval of Stage VI will result in public benefit "going to other states" and "serve not only to enable, but indeed encourage further acceptance of out-of-state waste."

On the record, then, it appears that DES has adopted a construction of the statute that is intended to discriminate against acceptance of out of state waste. Setting aside the obvious constitutional infirmities of such discrimination, it is at the very least ironic that about 70% of the capacity of the Turnkey facility is used to dispose of imported waste but DES is using that same capacity to conclude that there is excess capacity available for New Hampshire waste.

DES's ultimatum is premised on a construction of the statute that is contrary to its language and historical application, that can only make New Hampshire's impending disposal crisis more acute, that rewards the state's largest waste importer, and that ignores what effect imported waste is having on the state's capacity projections. Absent reconsideration by DES, however, NCES has little choice but to withdraw its pending application and submit a substitute application as rapidly as it can. Please accept this letter as NCES's formal withdrawal of its January 2019 application for a Type I-A modification to its permit.

NCES reserves all of its rights, claims, and objections arising out of DES's construction of the statute and its rights to challenge the facial constitutionality of the public benefit statute in the context of RSA ch. 149-M as well as the manner in which it is now being applied.

Very truly yours,

Bryan K. Gould

Bryan K. Gould, Esq.

BKG:bmb

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