BCM Environmental & Land Law, PLLC
Solutions for Northern New England

November 28, 2023

Via Email Only
N.H. Department of Environmental Services, Solid Waste Division

Michael Wimsatt
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Jaime Colby, P.E.
Jaime.M.Colby@des.nh.gov

Re: NHDES File Number: 2023-66600 Solid Waste Standard Permit Application; Subject Properties: Dalton Tax Map 406, Lots 2.1, 2.3, 2.4, 2.5, 3, and 3A and Bethlehem Tax Map 406, Lots 1 and 2 ("Application")

Dear Director Wimsatt and Ms. Colby,

I write in continued representation of North Country Alliance for Balanced Change ("NCABC"). On October 31, 2023, Granite State Landfill, LLC, a subsidiary of Casella Waste Systems, Inc., ("GSL") submitted a new application for a Standard Permit for Solid Waste Landfill (the "Application") to the Solid Waste Management Bureau ("Bureau") of the New Hampshire Department of Environmental Services (the "Department") for its proposed landfill on the private road of Douglas Drive in Dalton, New Hampshire (the "Landfill" or "Proposal").

For the reasons that follow, NCABC requests that the Department suspend its processing of the Application.

Please make this letter part of your record in this matter.

Summary

Normally, the Department would have sixty days (until December 31, 2023) to determine whether the Application is complete based on the Department's solid waste rules. Env-Sw 304.03(a). However, under Env-Sw 304.03(e), the Department "shall suspend the processing of any application when required by . . . provisions of law." In this case, the Department should suspend its processing of the Application because: (1) cases now pending before the New Hampshire Supreme Court will interpret the law the Department will need to use to process the Application; and (2) the Department's solid waste rules are on the verge of a major update and any new or revised rules concerning public health, safety, and welfare must be applied to the Application. Each of these bases is discussed in turn below.

Pending New Hampshire Supreme Court Cases

As the Department is aware, currently multiple cases are pending before the New Hampshire Supreme Court related to the public benefit test RSA 149-M:11 establishes. Pursuant to RSA 149-M:11, III, the Department must determine whether a proposed facility provides a "substantial public benefit" based on several criteria. One of these criteria is the short- and long-term need for the facility. RSA 149-M:11, III(a). If the Department identifies a shortfall in solid waste capacity, "a capacity need for the proposed type of facility shall be deemed to exist *to the extent that the proposed facility satisfies that need*." RSA 149-M:11, V(d). The interpretation of these provisions—which are integral to the Department's review of a solid waste application—are subject to legal challenges.

Specifically, a Waste Management Council decision interpreting the public benefit test under RSA 149-M:11 is subject to two appeals before the New Hampshire Supreme Court, dockets 2022-0690 and 2022-0691. The outcomes of these appeals could drastically affect the interpretation of RSA 149-M:11 and, consequently, the application of the public benefit test to solid waste applications. As such, the Department should suspend GSL's Application until the law surrounding the public benefit test is settled. It would be a waste of Department time and resources to begin processing an application when a significant portion of that process—the application of the public benefit test—could completely change in the midst of the Department's consideration. It makes much more sense for the Department to wait for the New Hampshire Supreme Court to resolve the law, especially when the Department is empowered to suspend the Application under Env-Sw 304.03(e) for exactly these circumstances.

There is also a challenge of the Department's interpretation of RSA 149-M:11 before the Merrimack County Superior Court, which is docket number 217-2022-CV-00942. While this case has likely been rendered moot by GSL's filing of the Application, it is worth mentioning because GSL itself acknowledged the need to resolve the public benefit test for the sake of solid waste applications. In its Petition for Declaratory Judgment, attached as **Exhibit A**, GSL (as one of the plaintiffs) explained that the haze surrounding the public benefit test has "created uncertainty about the requirements for obtaining a permit for solid waste disposal facilities in New Hampshire." Petition for Declaratory Judgment at 1. As it pertains to GSL's Proposal specifically, GSL explained that "[i]n preparing [the 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." *Id.* ¶ 85 (emphasis added). Further, it asserted that the uncertainty surrounding the public benefit test "interfered with GSL's ability to submit a waste disposal facility permit application that complies with RSA 149-M:11, V." *Id.* ¶ 86. Again, GSL's claims are likely moot because it evidently decided to submit a new application despite the concerns expressed in its petition, but this does not change the fact that the public benefit test is still unresolved and the correct procedure for processing solid waste applications remains up in the air.

Until the New Hampshire Supreme Court resolves the interpretation and application of the public benefit test, the Department should exercise its authority to suspend the processing of GSL's Application in accordance with Env-Sw 304.03(e). GSL would have no basis to challenge such a suspension as GSL itself brought suit challenging the interpretation of RSA 149-M:11 and acknowledged the obscurity surrounding the public benefit test until judicial interpretation is complete. GSL submitted the Application at its own risk with full knowledge of the pending court cases and the Department's being handcuffed to process applications in the meantime. Therefore, the Department should not hesitate to exercise its authority (and, indeed, obligation) to suspend the Application.

New Solid Waste Rules

The Department's administrative rules related to solid waste management (the "Rules") are currently in the process of undergoing review, revision, and readoption. Most of the Rules were last adopted in 2014 and are therefore due to be readopted by next year (specifically, July 1, 2024), which marks the ten-year period for which administrative rules remain valid without administrative extension. The Bureau is currently in the early stages of the process, taking ideas and concerns from interested parties in 2023 before working to draft proposed rule amendments. The formal rulemaking process has not commenced yet. Solid Waste Rules Undergoing Readoption. Given that many of the new, revised, and readopted rules (the "New Rules") will likely address public health, safety, and welfare and the Landfill will far, far outlive the current rules, the Department should suspend the Application until the New Rules are adopted and it can assess the Application under those rules.

Although the law generally prohibits the retrospective application of laws and the doctrine of vested rights protects developers from subsequently enacted regulations (laws) under certain circumstances, there is an exception when the law promotes public health, safety, and welfare pursuant to the state's police powers. For example, the prohibition of retrospective laws in the New Hampshire Constitution was not intended to prevent the legislature from amending laws which regulate contracts in the public interest where such laws have proven inadequate to accomplish their task. *Hayes v. Le Blanc*, 114 N.H. 141, 146 (1974) (holding that the legislature's retroactive raising of minimum levels of automobile insurance coverage was constitutional because the amended statute was "necessary to protect the public"). Likewise, an agency such as the Department would not be prohibited from adopting and applying rules that are designed to protect public health, safety, and welfare, such as laws regulating solid waste facilities.

The prohibition on retrospective laws generally does not apply to laws the purpose of which is to protect the health and safety of the community. *See Fischer v. N.H. State Bldg. Code Review Bd.*, 154 N.H. 585, 588 (2006). In *Fischer*, the court held that a landowner's two-family buildings no longer qualified as two-family buildings under the

new interpretation of the building code. "The constitutional ban of retrospective legislation does not prevent the city from enacting and enforcing ordinances to protect the public health and safety of the community." *Id.* (quoting *Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990)). The court also agreed with the following quote:

> There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community … . It would be a sad commentary on the law, if municipalities were powerless to compel the adoption of the best methods for protecting life in such cases simply because the confessedly faulty method in use was the method provided by law at the time of its construction.

Id. (quoting *City of Seattle v. Hinckley*, 82 P. 747, 748–49 (Wash. 1905)).

Therefore, although GSL submitted its Application just before the New Rules are set to be adopted, it does not have an inherent right to imperil the health, safety, and welfare of the community, especially in the case of a largescale, decades-long landfill project. GSL should not be permitted to escape stricter standards based on the timing of its submission; any New Rules that address public health, safety, and welfare must be applied to the Application. Therefore, the Department should suspend the Application until the New Rules are adopted so that the Application can be evaluated against those rules.

Conclusion

The public benefit test that the Department must apply to the Application remains unresolved while cases make their way through the New Hampshire Supreme Court. What is more, the Department is close to implementing new solid waste rules that will likely have public health, safety, and welfare considerations that must be applied to the Application regardless of its date of submission. Therefore, NCABC respectfully requests that the Department suspend its review of the Application pursuant to Env-Sw 304.03(e).

Thank you for your attention to this matter. I look forward to your response.

Very truly yours,

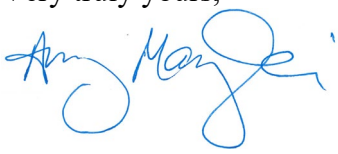

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EXHIBIT A

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.

and

GRANITE STATE LANDFILL, LLC

217-2022-CV-00942

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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