

December 17, 2024

Via email

Joint Legislative Committee on Administrative Rules
adminrules@leg.state.nh.us

**Re: Request for Revised Objection
Public Testimony in Opposition to NHDES Rulemaking: Env-Sw 800 –
Landfill Requirements (OLS Notice Number 2024-74)**

Dear Esteemed Members of the Joint Legislative Committee on Administrative Rules:

I write to you in continued representation of North Country Alliance for Balanced Change (“NCABC”) to offer testimony in opposition to the Env-Sw 800 Final Proposed Rules provided by the New Hampshire Department of Environmental Services (the “Department”).

Pursuant to Rule 301.02(d)(2) of the Joint Legislative Committee on Administrative Rules (the “Committee”), NCABC respectfully clarifies that nature of its November 15, 2024 opposition and requests the Committee make a final objection to the Env-Sw 800 Final Proposed Rules.

Please make this letter and its supporting attachments a part of your record on this matter.

Committee Correctly Made Preliminary Objection with Three Bases

We applaud the Committee for correctly making a preliminary objection when it determined that the Env-Sw Final Proposed Rules are:

1. contrary to the public interest due to a lack of responsiveness to the public, pursuant to RSA 541-A:12, IV(c) and Committee Rule 403.01(a)(2),
2. designed to benefit the administrative convenience of the agency to the detriment of the public, pursuant to RSA 541-A:13, IV(c) and Committee Rule 403.01(g), and
3. contrary to the legislative intent of RSA 149-M:1, the purpose statement of the enabling solid waste management statute.

We urge the Committee to stay the correct course with respect to the Env-Sw 800 Final Proposed Rules and issue a final objection because the Department has made no changes.

The NCABC Team: A Wealth of Experience and Knowledge

After listening to the Committee’s deliberations on November 21, 2024, we wanted to assure the Committee that the NCABC team has a full and complete understanding of the

substance of the Env-Sw 800 Final Proposed Rules and the process used to generate them. The NCABC has a deep, competent, experienced, and professional team comprised of:

1. The board members of NCABC, who consist of full-time and part-time North Country residents coming from all walks of life, and who collectively hold master's degrees in mathematics and business administration and advanced yoga certifications, have authored more than forty textbooks, have worked at Fortune 500 companies, serve in churches and in government, and so much more.
2. Dr. Anirban De, a civil engineer who received his Ph.D. in Civil Engineering from Rensselaer Polytechnic Institute. Dr. De has over thirty years of experience and his current research interests include design of geosynthetic systems, site characterization, and settlement of landfills.
3. Professional Geologist Muriel Robinette, who received her Master of Science in Engineering (Groundwater) from Washington State University and her Ph.D. in Mining Engineering from the University of Idaho. Ms. Robinette has extensive experience in forensic field studies for evaluation of contaminant impacts on environmental media in support of source determination and fate and transport of contaminants.
4. Damon Burt, Certified Wetland Scientist. Mr. Burt has over twenty years specializing in wetland science, sediment and erosion control, and environmental permitting. Within the N.H. Office of Professional Licensure and Certification, Mr. Burt is the Chair of the Board of Natural Scientists, representing Wetland Scientists.
5. Undersigned counsel, with my Juris Doctor and Master's in Environmental Law from Vermont Law School. I have focused on environmental law for almost twenty years. The legal team includes similarly qualified and experienced legal professionals from BCM Law.

Together, we are the NCABC team, and NCABC has invested significantly, both by measure of time and by measure of money, to be maximally involved in this important rulemaking.

***Clarification on the Nature of November 15, 2024 Opposition:
Department Explanation Cannot Address Three Bases for Objection***

We wanted to clarify the above so we can be certain the Committee appreciates the depth of our understanding when the qualified scientists on our team provide written testimony, as was included in my November 15, 2024 letter to the Committee, that *peer-reviewed scientific evidence does not support the Env-Sw 800 Final Proposed Rules and the Department has ignored that.*

The issue is not, as some Committee members may have suggested, that the Department simply needs to provide more or better explanations of how it “fully considered” public comment. The issue is that the Env-Sw 800 Final Proposed Rules lack scientific bases, and the rule-making record amply demonstrates that. Lacking any scientific basis means the Department cannot have overruled public comment on the merits pursuant to Committee Rule 403.01(a)(2). The Department cannot simply “consider” the scientific evidence in the record and then ignore it, especially when the Department provides absolutely no countervailing science. The Department mistakes the quantity of public process for the quality of public process; the Department provided ample opportunity for the public to provide input, but the Department then ignored the input.

The rule-making record also demonstrates the root cause of the lack of scientific bases is for the administrative convenience of the Department to the detriment of the public. And that leads to the final flaw which is that the Env-Sw 800 Final Proposed Rules are contrary to the legislative intent of RSA 149-M:1, the purpose statement of the enabling statute.

No amount of explanation can cure these flaws. When a proposed regulation is contrary peer-reviewed science, no matter how much explanation is provided, it will remain contrary to peer-reviewed science. Only certain revisions to the proposed regulation would bring it into conformity with science. Similarly, when a proposed regulation exceeds the bounds of its enabling statute and the legislative intent behind the statute, no amount of explanation will bring that proposed regulation into the bounds of legality. Only certain revisions would do so.

We must also correct a false statement in the Department’s December 12, 2024 letter. The public comments the Department received were not “made available to the public through the standard information request process pursuant to RSA 91-A.” See p. 3 of the Department’s December 12, 2024 Letter to JLCAR. Indeed, as noted in my November 15, 2024 letter to the Committee, NCABC had to resort to commencing an action through the Right-to-Know Ombudsman against the Department in order to obtain the public comments, because the Department did not respond to two prior “standard information requests.”

***Department Presents False Choice:
Env-Sw 800 Final Proposed Rules are Not More Protective of the Environment***

It is also with the tremendous background of experience and understanding described above that the NCABC team can confidently say the Department presents an entirely false choice when it threatens that if the Env-Sw 800 Final Proposed Rules do not pass, solid waste applications will be reviewed with the existing rules, as if that would lead to a disastrous outcome.

Notably, the qualified scientists on the NCABC team performed a comprehensive qualitative analysis of how the Env-Sw Final Proposed Rules differ from the existing rules and concluded *the Env-Sw 800 Final Proposed Rules are not more protective of the environment.*

(This analysis is included in my November 15, 2024 letter to you as Exhibit A of the attached June 4, 2024 letter.) The NCABC team found that where the Env-Sw 800 Final Proposed Rules are more protective of the environment, they are only very slightly more protective. However, for the Env-Sw 800 Final Proposed Rules that are less protective of the environment, they are significantly and in a marked degree less protective.

Nothing in the record supports the Department's oft-repeated claim that the Env-Sw 800 Final Proposed Rules are more protective of the environment. The Committee will note the obvious, glaring, and complete absence of any support whatsoever in the Department's December 12, 2024 submission. Unlike the materials in the Department's record, which contain peer-reviewed science and which the Department has entirely ignored, to support its position that the Env-Sw 800 Final Proposed Rules are more protective of the environment, the Department provides only belief statements from Commissioner Scott and others. *See* p. 2, 4, 5, page 4 of Exhibit 3 of the Department's December 12, 2024 Letter to JLCAR.

Request for Final Objection

Since the Committee's November 21, 2024 meeting and its letter of even date to Commissioner Scott, Director Wimsatt has spoken publicly, including remarks at the Solid Waste Working Group on November 22, 2024 and in [media accounts](#). His comments suggested what the Department's December 12, 2024 letter made clear: of the three options available to the Department (amending the Env-Sw Final Proposed Rules to resolve the three bases for the preliminary objection, withdrawing the Env-Sw 800 Final Proposed Rules, or making no changes), the Department opted to make no changes.

Accordingly, on behalf of NCABC, we respectfully request that the Committee, pursuant to RSA 541-A:13, I, make a final objection.

No matter what explanation or information the Department may provide, absent substantial further revisions to the Env-Sw 800 Final Proposed Rules, the flaws that served as the three bases for the preliminary objection will persist. In the words of RSA 541-A: 13, V(f), if the Department responds with no change and only further explanation, then the bases for the Committee's preliminary objection have not been removed.

Conclusion

The Committee correctly performed its statutory duty to apply Legislative oversight to the administrative rulemaking process when it determined the Env-Sw 800 Final Proposed Rules are:

1. contrary to the public interest due to a lack of responsiveness to the public, pursuant to RSA 541-A:12, IV(c) and Committee Rule 403.01(a)(2),

2. designed to benefit the administrative convenience of the agency to the detriment of the public, pursuant to RSA 541-A:13, IV(c) and Committee Rule 403.01(g), and
3. contrary to the legislative intent of RSA 149-M:1, the purpose statement of the enabling solid waste statute.

The Department responded to the Committee's preliminary objection only to provide more explanation, so, none of those three bases have been cured. In particular, the specific nature of the Department's lack of responsiveness to the public is the Department's inability to show it overruled public comments on the merits because the peer-reviewed science in the record does not support the Env-Sw 800 Final Proposed Rules. As such, in this instance, the Committee should make a final objection to the rules on the same three grounds.

Thank you for your time and attention to NCABC's input. Please reach out to me with any questions. I can be reached via phone at (603) 225-2585 or via email at manzelli@nhlandlaw.com.

Very truly yours,



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