

STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

SUPERIOR COURT
CASE NO. 217-2021-CV-0092

Conservation Law Foundation, Inc.
Plaintiff,

v.

Robert R. Scott, Commissioner, New Hampshire Department of Environmental Services,
Defendants.

**PLAINTIFF CONSERVATION LAW FOUNDATION'S MOTION FOR
RECONSIDERATION**

Pursuant to Superior Court Rule 12(e), Plaintiff Conservation Law Foundation (“CLF”) respectfully moves this Court to reconsider its May 14, 2021 Order (“Order”). In support thereof, CLF states as follows:

INTRODUCTION

This lawsuit addresses a systemic legal flaw in the New Hampshire Department of Environmental Services’ (“DES”) solid waste management planning and permitting process: DES’s failure to update the state solid waste plan as mandated by RSA 149-M:29, I and its ongoing reliance on its unlawfully outdated 2003 plan in reviewing waste facility permit applications.

In its Order dismissing CLF’s lawsuit, the Court considered and rejected several arguments raised by DES and the intervenor waste companies. Among other things, the Court concluded that:

- CLF is not collaterally estopped from bringing this action. Order at 8-9.
- CLF has organizational standing to bring the declaratory judgment claim. Order at 13.
- CLF’s allegations of harm are sufficiently concrete to support the declaratory judgment claim. Order at 15.

- CLF has sufficiently alleged that, if successful in demonstrating that DES may not lawfully issue permits without an updated solid waste plan, CLF members will face almost certain procedural harm. Order at 14.
- CLF’s declaratory judgment claim pertains to an actual, judicially justiciable controversy. Order at 15.
- The issues and relief invoked by CLF “involve pure questions of law fit for judicial determination” Order at 10 (internal citations omitted).
- DES has conceded it has failed to update the state plan and intends to continue to engage in permitting activities “in the absence of a statutorily-compliant plan.” Order at 15.
- “[T]he [Waste Management] Council lacks the statutory or equitable authority to issue injunctive, declaratory, or mandamus relief.” Order at 11 (citation omitted).
- “The Council’s jurisdiction is limited to hearing ‘administrative appeals from DES decisions relative to the functions and responsibilities of the division of waste management.’” Order at 11 (citing RSA 21-O:9, V).¹

Despite these findings, the Court granted the Intervenor Waste Companies’ motions to dismiss. The Court determined, in relevant part, that CLF’s declaratory judgment claim is not ripe for judicial review on the theory that CLF has an alternative, adequate remedy in the administrative appeals process before the Waste Management Council (“Council”). Order at 15-16. The Court further determined that CLF’s request for injunctive relief is not ripe on the grounds that the alleged harms are speculative and, again, that CLF has an alternative, adequate remedy in the administrative appeals process before the Council. Order at 11.

For the reasons set forth below, CLF seeks reconsideration of the Court’s dismissal of CLF’s requests for declaratory and injunctive relief on the grounds that it “overlooked or misapprehended” important points of law and fact. *See Broom v. Cont’l Cas. Co.*, 152 N.H. 749,

¹ Because the term “decision” within the context of the administrative appeals statute means a permitting decision, this finding necessarily means that the Council cannot consider broader systemic issues such as the issues in this matter. *See RSA 21-O:14, I(a), (c)*.

752 (2005) (“A motion for reconsideration allows a party to present points of law or fact that a court has overlooked or misapprehended.”); *see also* Super. Ct. R. 12(e).

ARGUMENT

I. The Court Should Reconsider Its Dismissal of CLF’s Declaratory Judgment Claim, Which Involves Pure Issues of Law Fit for Judicial Determination, and Which is Beyond the Council’s Jurisdiction

The Court correctly determined that CLF’s declaratory judgment claim “involves pure questions of law, capable of judicial redress.” Order at 15 (internal citation omitted). As set forth below, the Court, and not the Council, has jurisdiction over the declaratory judgment claim, and even if the Council had jurisdiction (which it does not), exhaustion of administrative remedies is not required.

This Court, and not the Council, is the appropriate body to hear CLF’s declaratory judgment claim. As recognized by the New Hampshire Supreme Court and this Court: “It is proper to permit the use of the declaratory judgment procedure to challenge the validity of agency action where the question is one peculiarly suited to judicial rather than administrative treatment and no other adequate remedy is available to the plaintiff.” Order at 15 – 16 (quoting *Prop. Portfolio Grp., LLC v. Town of Derry*, 154 N.H. 610, 616-17) (emphasis in Order).

Administrative remedies cannot address the systemic harms that arise from DES’s violation of RSA 149-M:29, I.² As the Court has already determined, CLF has standing to bring the declaratory judgment claim (Order at 14); the harm alleged by CLF is sufficiently concrete to support declaratory judgment and “pertains to an actual, judicially justiciable controversy”

² Even if CLF is successful in challenging individual waste permits, including the Bethlehem and Dalton permits, before the Council, those appeals will not and cannot address the larger issue of DES’s systemic failure to comply with the solid waste statute and DES’s ongoing engagement in solid waste facility permitting without a statutorily-compliant plan. *See infra* at 8-9.

(Order at 15) (internal citation omitted); and the issues raised by the claim are “fit for judicial determination.” Order at 16 (internal citation omitted).

As recognized by the Court, the Council does not have jurisdiction over the issue of DES compliance with RSA 149-M:29, I. Specifically, in finding that CLF is not collaterally estopped from bringing this matter, the Court took note of the Council’s 2019 determination that the issue is outside of the Council’s jurisdiction. Order at 4 (quoting the Council’s finding that Council jurisdiction does not extend to the question of DES compliance with RSA 149-M:29). The Court found that the very reason the Council did not address DES’s statutory compliance was because it believed it lacked jurisdiction to do so:

However, the 2019 action before the Council did not resolve the issue of DES’s compliance with RSA 149-M:29, I finally or on the merits, and no findings of the Council with respect to that issue were essential to the Council’s judgment. In fact, the Council never reached whether DES ‘has failed to comply’ with RSA 149-M:29, I because, in its view, it lacked jurisdiction to consider the issue. Accordingly, no findings respecting DES’s compliance with the statute could possibly have been ‘resolved’ or ‘essential’ to the Council’s judgment. No aspect of Conservation Law’s claims is collaterally estopped, therefore, for its failure to raise the RSA 149-M:29, I issue in its appeal of the Council’s 2019 Order.

Order at 9 (internal citations omitted) (emphasis added). The Court further explained that the Council lacks the authority to issue declaratory relief, and its jurisdiction is limited to administrative appeals of DES decisions:

Moreover, the Council lacks the statutory or equitable authority to issue injunctive, declaratory, or mandamus relief. RSA 21-O:9, V. The Council’s jurisdiction is limited to hearing ‘administrative appeals from DES decisions relative to the functions and responsibilities of the division of waste management.’ *Id.*

Order at 11 (citing RSA 21-O:9, V).

Nevertheless, despite finding that the Council lacks jurisdiction over CLF’s declaratory judgment claim, the Court determined that the claim “is not ripe for judicial review” because

“Conservation Law has an alternative, adequate remedy in the administrative appeals process available to persons ‘aggrieved by a . . . decision’ of DES.” Order at 16 (citing RSA 21-O:14). Specifically, the Court found that CLF “is to pursue an appeal before the Council.” Order at 16. This finding conflicts with the Court’s determination that the issue raised in CLF’s declaratory judgment claim – DES’s failure to comply with RSA 149-M:29, I – is beyond the jurisdiction of the Council. As this Court and the Council have held, CLF *cannot* pursue this issue on appeal before the Council. *See supra* at 4. CLF simply does not have an alternative, adequate remedy in the administrative appeals process, and consequently the claim is ripe for judicial review.

Even if the Court had determined (which it did not) that the Council has jurisdiction over the declaratory judgment issue raised by CLF, where, as here, a declaratory judgment claim raises a question of law, there is no need for the petitioner to exhaust administrative remedies. “In New Hampshire, a petitioner may bring a declaratory judgment action and bypass the exhaustion of administrative remedies if he seeks to challenge an action that raises a ‘question of law.’” *Russell v. Town of Farmington*, 2005 WL 6437660 (N.H. Super. Dec. 15, 2005) (attached as Exhibit A) (citing *Bedford Residents Grp. v. Town of Bedford*, 130 N.H. 632, 639 (1988)).³ “A party is not required to exhaust administrative remedies where the issue on appeal is a question of law rather than a question of the exercise of administrative discretion.” *Bedford Residents Grp.*, 130 N.H. at 639; *see also Prop. Portfolio Grp.*, 154 N.H. at 616 (noting that

³ The *Russell* court collected numerous New Hampshire decisions that support the practice of courts adjudicating declaratory judgment matters addressing questions of law without first requiring the exhaustion of administrative remedies. *Russell*, 2005 WL 6437660 at 3 (citing *Taylor v. Town of Plaistow*, 152 N.H. 142, 144 (2005); *Pheasant Lane Realty Trust v. City of Nashua*, 143 N.H. 140, 142 (1998); *City of Portsmouth v. Schlesinger*, 140 N.H. 733, 735 (1996); *Delude v. Town of Amherst*, 137 N.H. 361, 364-65 (1993); *Blue Jay Realty Trust v. City of Franklin*, 132 N.H. 502, 509 (1989); *Bedford Residents Grp.*, 130 N.H. at 639; *Bougeois v. Town of Bedford*, 120 N.H. 145, 149 (1980)).

“generally, when the issue in an appeal involves a question of law rather than a question of the exercise of administrative discretion, administrative remedies need not always be exhausted.”) (internal citation omitted).

In *Russell*, the petitioners moved the court to reconsider, among other things, the court’s order dismissing their declaratory judgment action on the grounds that it could only be addressed through administrative appeal. *Russell*, 2005 WL 6437660 at 1. On reconsideration the court held that, while “most of the petitioners’ claims are questions of the exercise of administrative discretion” that must be pursued through administrative procedures, “the court finds the petitioners make one allegation in their petition for declaratory judgment that is deemed a question of law in New Hampshire.” *Id.* at 4 (internal citations omitted). The court granted in part the plaintiff’s motion to reconsider, finding that the question of law (compliance with statutory notice requirements) was appropriate for declaratory judgment action and should not have been dismissed. *Id.*

As in *Russell*, CLF’s declaratory judgment claim involves questions of law. Indeed, as the Court itself determined, “the declaratory relief sought involves pure questions of law capable of judicial redress, as Conservation Law seeks an order clarifying whether DES may lawfully issue permits in the absence of an updated solid waste plan.” Order at 15 (internal citations omitted). As such, administrative remedies, even if they were available (which they are not), need not be exhausted.

In sum, the Court correctly determined that CLF’s declaratory judgment claim involves justiciable legal issues, that CLF has standing to assert the claim and is not collaterally estopped from doing so, and that the Council neither has the authority to grant declaratory relief nor jurisdiction over the systemic permitting issue raised. The Court’s determination that CLF can

pursue the issue before the Council is inconsistent with this determination and contrary to New Hampshire case law excepting legal issues such as the one raised in this case from the requirement that administrative remedies be exhausted. Accordingly, the Court should reconsider its dismissal of CLF's declaratory judgment claim, reinstate that claim, and issue an order declaring that DES is violating RSA 149-M:29, I by having failed to update its solid waste plan and RSA 149-M:11, III(c) and RSA 149-M:12 by engaging in permitting activities absent a lawfully updated plan.

II. The Court Should Reconsider Its Dismissal of CLF's Request for Injunctive Relief: The Administrative Appeals Process Does Not Provide A Remedy To Address The Systemic Violations Of Law At Issue

The Court misapprehended CLF's allegations of harm when it dismissed CLF's request for injunctive relief on the grounds that "the harm is speculative and the administrative appeals process constitutes an adequate alternative remedy." *See* Order at 11. The Court considered the harms that may result from the permitting of *individual waste facilities* but did not account for the *systemic* harms that result from DES engaging in solid waste permitting on the basis of a severely outdated state waste plan:

Any concrete harm alleged resulting from the permitting of new or modified waste disposal facilities, including the facilities in Dalton and Bethlehem, may be appealed before the Council and, ultimately, the State Supreme Court, following an administrative decision whose effects have been felt in a concrete way.

Order at 11.

Much of this litigation focused on specific landfill proposals, particularly Granite State Landfill, LLC's proposed 130-acre landfill in Dalton. This focus was out of necessity for two reasons: to demonstrate that CLF has members who are directly affected by DES's failure to comply with mandatory statutory duties, and to demonstrate the exigency of addressing the issue

presented by CLF to the Court.⁴ This focus, however, should not distract the Court from the fact that this case is about a *systemic* failure on the part of DES – one that affects *all* DES waste facility permitting, including *but not limited to* the proposed Dalton landfill.

The Court’s analysis fails to account for CLF’s allegations of systemic harms that result from DES’s failure to update the 2003 state plan. Because DES has failed to update the state plan, DES’s entire permitting process is flawed, and relies on incomplete and out-of-date information, including goals and related activities that are simply obsolete. At the hearing CLF provided an offer of proof from Michael Durfor that documented widespread systemic harms caused by DES’s failure to update the plan.⁵ CLF demonstrated how, with an updated plan, DES could have addressed widespread waste management issues that are significantly different now than they were in 2003. Hearing Tr. at 66:22 – 71:20. An updated plan could have addressed, through updated goals and associated activities, a modernized understanding of recycling, recycling markets, the importation of out-of-state waste, composting, defining and measuring waste diversion, landfill siting and capacity concerns, and DES’s progress towards advancing the 2003 state plan. *See id.* Critically, “an updated plan is an important part of DES’s permit review process and its ability to consider permits within the context of a current larger plan for the State,

⁴ The Dalton landfill is a focus of Granite State Landfill, LLC (“GSL”), in particular, given its private interest in advancing its proposed landfill. It is worth noting that despite GSL’s eleventh hour, implausible argument that its proposed landfill will cause no environmental or other impacts whatsoever (*see* Intervenor Granite State Landfill, LLC’s Post-Hearing Memorandum), GSL’s corporate sibling, North Country Environmental Services (“NCES”), recently experienced a 154,000 gallon spill of landfill leachate at its landfill in Bethlehem. *See* NCES May 3 Incident Report, attached as Exhibit B. *See also* “Leachate Spill Under Investigation at Bethlehem Landfill Could be Largest in N.H.” New Hampshire Public Radio, May 20, 2021, attached as Exhibit C, and available at <https://www.nhpr.org/post/leachate-spill-under-investigation-bethlehem-landfill-could-be-largest-nh-0> (last accessed on May 21, 2021).

⁵ Hearing Transcript (4/9/21) at 64:3 – 71:20; Michael Durfor Overview of Offer of Proof, Basis of Testimony, Qualifications, Biography, and Affidavit; provided as Exhibits A and B to CLF’s Limited Reply to Post-Hearing Memoranda and attached here as Exhibit D.

and . . . because it has not updated the plan over the years with new and updated goals, it's [*sic.*] permit review process is relying on incomplete information." Hearing Tr. 70:17-22.

The harm of DES engaging in permit application reviews on the basis of an unlawfully outdated plan is not speculative and cannot be addressed on a systemic basis by the Council. The harms extend well beyond the scope of individual permits and the jurisdiction of the Council. Moreover, it cannot be assumed that CLF or any member of the public will appeal all permits, meaning that not every permit will be subjected to appeal and reviewed by the Council. It would be woefully inefficient and ineffective to attempt to address a defined, pervasive systemic failure (one that violates clear statutory mandates) in a piecemeal fashion through individual permit appeals.

Finally, the Court erred in determining that the procedural harms alleged by CLF are asserted in a vacuum. *See* Order at 11-12. These harms are not asserted *in vacuo*. *See* Order at 12 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 494-96 (2009)). On the contrary, the procedural harms alleged by CLF are real, and made in the context of, *inter alia*, CLF's decades-long environmental advocacy in New Hampshire (*see* Order at 2, 4-5), CLF members' highly detailed affidavits (*see* Order at 5, 14), and very real landfills that are either in operation (i.e., Bethlehem) or currently being permitted by DES (Dalton) (*see* Order at 5). The *Summers* case is readily distinguished from this one. In *Summers*, the plaintiffs failed to connect their allegations of procedural harms (their inability to comment on certain Forest Service actions) with any concrete interests, namely, specific regulations and parcels of land. *Summers*, 555 U.S. at 495. Accordingly, the Supreme Court found the procedural right to be in a vacuum. In contrast, and as the Court itself determined, CLF has clearly identified the concrete interests and specific context giving rise to CLF's claims. Moreover, the Court erred in determining that the procedural harms

alleged by CLF are inadequate for purposes of injunctive relief. *See* Order at 11-12 (finding that “a procedural right,’ without more, is insufficient to confer standing for purposes of injunctive relief.”) (citing *Summers*, 555 U.S. at 494-96). The Court erred in determining that CLF has standing to bring the declaratory judgment claim (*supra* at 1) but somehow lacks standing to seek injunctive relief.

Because the systemic violations of New Hampshire’s solid waste statute cannot be adjudicated before the Council, which lacks authority to issue injunctive relief, and because CLF has not raised the issue *in vacuo* and has standing to seek an injunction, the Court should reconsider its decision to dismiss, and should grant CLF’s request for injunctive relief.

CONCLUSION

For the reasons stated above, CLF respectfully requests that the Court:

- A. Reconsider its dismissal of CLF’s claim for declaratory judgment, reinstate such claim, and grant CLF’s request for declaratory relief;
- B. Reconsider its dismissal of CLF’s request for injunctive relief, reinstate CLF’s request for injunctive relief, and grant such relief; and
- C. Grant such other relief as it deems equitable and just.

Respectfully submitted,

Dated: May 24, 2021

CONSERVATION LAW FOUNDATION

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Motion for Reconsideration have on this day, May 24, 2021, been sent to all counsel of record via the court's electronic filing system.

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2005 WL 6437660 (N.H.Super.) (Trial Order)
Superior Court of New Hampshire.
Strafford County

Margaret RUSSELL, Norman Russell, Paul Parker, and Paula Proulx,

v.

TOWN OF FARMINGTON.

No. 05-E-0073.
December 15, 2005.

Order on Motion to Reconsider

Peter H. Fauver, Presiding Justice.

The petitioners move the court to reconsider its October 31, 2005 order in which the court (Fauver, J.) dismissed the petitioners' ZBA appeal for lack of subject matter jurisdiction, and dismissed the petitioners' declaratory judgment action, finding the allegations contained in the petitioners' claim were "questions of administrative treatment, which may only be addressed ... pursuant to an appeal under [RSA 677:2](#) (Suppl. 2001)." (*See* Order at 6).

The petitioners argue the court improperly followed the New Hampshire Supreme Court's analysis in [Pelletier v. City of Manchester](#), 150 N.H. 687, 689 (2004), because, subsequent to the release of the *Pelletier* decision, the New Hampshire Legislature (the "legislature") re-wrote [RSA 677:2](#) in order to clarify when a motion for rehearing is considered "timely." The petitioners accordingly urge the court to apply the 2004 version of [RSA 677:2](#) to the facts of this case instead of the law that was actually in effect at the time the petitioners' motion for rehearing was due.

The court will grant a motion to reconsider when it has overlooked or misapprehended points of law or fact. [Super. Ct. R. 59-A](#). In its October 31, 2005 order, the court denied the petitioners' ZBA appeal and held: "[T]he thirty-day time period begins to run on the date of the decision." [Pelletier v. City of Manchester](#), 150 N.H. 687, 689 (2004). "A timely motion for rehearing 'is a necessary prerequisite to maintenance of an appeal, and to the jurisdiction of the superior court on an appeal.'" *Id.* (quoting [Keene v. Zoning Bd. of Adjust.](#), 114 N.H. 744, 746 (1974)). Even the board hearing the petition cannot waive compliance with these mandatory time limits. *See Keene*, 114 N.H. at 746; *see also Daniel v. B & J Realty*, 134 N.H. 174, 176 (1991).

In this case, the ZBA made its decision to grant Equivise's application during its public hearing on March 3, 2005. (*See* Certified Record (hereinafter "CR") at 35-36). The petitioners filed their motion for rehearing with the ZBA on April 4, 2005. (CR at 39). Pursuant to *Pelletier*, the 30-day mandatory time period for filing a motion for rehearing includes the date of the ZBA decision, which is March 3, 2005 in this case. 150 N.H. at 689. Although the petitioners argue the facts of *Pelletier* are distinguishable from the facts of the case at bar, this court does not agree. *Pelletier* and this case both involve a ZBA appeal following an untimely filed motion for rehearing. *See id.* at 688. Thus, *Pelletier's* findings are applicable here and the petitioners' motion for rehearing was due on April 1, 2005. *See id.* at 689. Thus, the petitioners' motion for rehearing was untimely because the petitioners filed their motion for rehearing 3 days after the motion was due. Further, this court finds the petitioners have not demonstrated "the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 144 hours of the vote pursuant to [RSA 676:2, II.](#)" *See RSA 677:2*. Consequently, this court does not have jurisdiction to hear the case and declines to address the respondent's standing argument.

(Order at 3).

The version of [RSA 677:2](#) that was in effect at all times relevant to the facts of this case provides:

Within 30 days after any order or decision of the zoning board of adjustment, ..., any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefore; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion. This 30-day time period shall be counted in calendar days *beginning with the date upon which the board voted to approve or disapprove the application*; ...

(Suppl. 2001) (emphasis added).

In reference to the 30-day time period articulated in [RSA 677:2](#), the *Pelletier* Court specifically held that [RSA 677:2](#) was unambiguous and “the day of the ZBA’s vote is included in computing the thirty-day time period.” *Ireland v. Town of Candia*, 151 N.H. 69, 70 (2004)(citing *Pelletier*, 150 N.H. at 689). In accordance with the doctrine of *stare decisis*, this Court chooses to follow *Pelletier’s* interpretation of this statute, which was the law that was in effect at the time the petitioners’ motion for rehearing was due. *Jacobs v. Dir., N.H. DMV*, 149 N.H. 502, 504 (2003).

In 2005, the legislature amended the second sentence of [RSA 677:2](#) to state, “This 30-day time period shall be counted in calendar days *beginning with the date following the date* upon which the board voted to approve or disapprove the application *in accordance with RSA 21:35*; ...” (Suppl. 2005) (emphasis added highlighting amended portion). The legislature passed this amendment on June 15, 2005, and expressly made it effective 60 days after its passage on August 14, 2005. 2005 N.H. Legis. Serv. Ch. 105, § 1. The petitioners’ motion for rehearing was due on April 1, 2005. Thus, when the petitioners’ motion was due, the legislature had neither passed nor effectuated the amendment to [RSA 677:2](#).

In their motion to reconsider, the petitioners acknowledge the new amendment to [RSA 677:2](#) was not effective during April 2005. Despite this acknowledgement, the petitioners urge the court to apply the 2005 amendment to the facts of this case because “the amendment is intended to rectify an ambiguous and erroneous interpretation of the statute ...” (*See Pet’rs’ Resp. Interv. Obj. Mot. Reconsid.* at 1). However, the legislature was not ambiguous as to when it intended the amendment to be effective. Thus, this court will not apply the amended statute to this case because the petitioners’ motion for rehearing was due four months prior to the date upon which the legislature explicitly intended the amendment to [RSA 677:2](#) to be effective.

Further, when [RSA 677:2](#) was amended and made effective, this case had “gone beyond the procedural stage to which the statute pertains” *See In re Beaugard*, 151 N.H. 445, 448 (2004), *Workplace Sys. Inc. v. Cigna Prop. & Cas. Ins. Co.*, 143 N.H. 322, 324 (1999). Specifically, [RSA 677:2](#) is a “procedural statute” because it addresses the process and timeframe for filing a motion for rehearing with a ZBA. The petitioners contend the court’s conclusion the amended version of [RSA 677:2](#) does not apply to this case “is inconsistent with the stated principles of the *Beaugard* line of cases and the procedural posture of this case.” (*See Pet’rs’ Mot. Reconsid.* at 4). The court does not agree.

The petitioners’ motion for rehearing was due April 1, 2005, but the amendment to [RSA 677:2](#) was not enacted until June 15, 2005, or made effective until August 14, 2005. Thus, contrary to the petitioners’ contention, when the legislature acted to amend the [RSA 677:2](#), the time period for the petitioners to file a timely motion for rehearing had already passed.

The petitioners also argue the court improperly precluded consideration of their declaratory judgment action, failing to evaluate this claim on its merits. In its prior order on the matter, the court wrote:

This court recognizes that a petition for declaratory judgment is an appropriate means of challenging certain actions by the local ZBA or “other duly authorized local legislative body” when the challenged actions lay outside the scope of “zoning related

matters.” See *City of Portsmouth v. Schlesinger*, 140 N.H. 733, 735 (1996) (declaratory judgment action appropriate when developers agree with zoning arrangement but contend City lacked authority to impose payment condition); see also *Blue Jay Realty Trust v. City of Franklin*, 132 N.H. 502, 509-510 (1989) (declaratory judgment petition may be used for direct review of validity of zoning decisions), and *Morgenstern v. Town of Rye*, 147 N.H. 558, 561 (2002) (declaratory judgment petition may be used to challenge constitutionality of zoning ordinance on its face or as applied to particular property). Specifically, a petitioner may bring a declaratory judgment action to attack a ZBA's decision collaterally when the collateral attack “raises questions of law suited to judicial rather than administrative treatment.” *Morgenstern*, 147 N.H. at 561-562 (citing *Blue Jay Realty Trust*, 132 N.H. at 509-110).

In this case, however, the petitioners challenge the process by which the ZBA made its decision to grant Equivise's application. Particularly, the petitioners contend the ZBA's decision was unlawful and unreasonable because the ZBA did not follow the decision-making process established by the Ordinance. The petitioners do not dispute the constitutionality of the zoning ordinance on its face or as applied to a particular piece of property. Instead, the petitioners base their petition for declaratory judgment on questions of administrative treatment, which may only be addressed by this court pursuant to an appeal under RSA 677:2 (Suppl. 2001). See *Morgenstern*, 147 N.H. at 561-562; see also *City of Portsmouth*, 140 N.H. at 735 (questions of administrative action are assessed under RSA 677:2).

This court has already determined that the petitioners' motion for rehearing was untimely. Thus, this court does not have jurisdiction to hear the petitioners appeal on grounds asserted in their petition for declaratory judgment. Although this court may consider evidence not previously presented to the ZBA when evaluating a petition for ZBA appeal, see *Lake Sunapee Protective Ass'n v. N.H. Wetlands Bd.*, 133 N.H. 98 106 (1990), the court declines to do so considering the posture of this case.

(Order at 5-6).

The petitioners now argue:

[T]he Court's recognition of the Petitioners' specific allegations in their claims for declaratory relief based upon statutes distinct from the powers and jurisdiction accorded to zoning boards, coupled with the Court's recognition of petitions for declaratory judgment as the appropriate means of challenging certain actions by the local ZBA which raise “questions of law suited to judicial rather than administrative treatment,” inconsistently deprives Petitioners of any meaningful judicial review of the actions of Selectmen, building officials and Board members in disregard for their statutory obligations and procedural mandates of their own Zoning Ordinance.

(Pet'rs' Mot. Reconsid at 6) (emphasis added).

The petitioners are correct in their contention that a declaratory judgment process is meant to serve broad remedial purposes, *Blue Jay Realty Trust*, 132 N.H. at 511, and New Hampshire's rule regarding the exhaustion of administrative remedies is “flexible and recognizes that exhaustion is not required under some circumstances.” *Bedford Residents Group v. Town of Bedford*, 130 N.H. 632, 639 (1988)(citing *Metzer v. Brentwood*, 115 N.H. 287, 290 (1975)). In New Hampshire, a petitioner may bring a declaratory judgment action and bypass the exhaustion of administrative remedies if he seeks to challenge an action that raises a “question of law.” *Id.* (citing *Bougeois v. Town of Bedford*, 120 N.H. 145, 149 (1980)). See *Pheasant Lane Realty Trust v. City of Nashua*, 143 N.H. 140, 142 (1998) (no need to exhaust administrative remedies when question of law is whether city had authority to impose supplemental assessment); *City of Portsmouth v. Schlesinger*, 140 N.H. 733, 735 (1996) (petitioner may bring declaratory judgment action to superior court because ordinance's legality and the binding effect of the promissory note are not questions of administrative action); *Delude v. Town of Amherst*, 137 N.H. 361, 137 (1993) (declaratory judgment action appropriate to test legality of zoning restriction allegedly in excess of jurisdictional authority of zoning power); *Blue Jay Realty Trust*, 132 N.H. at 506 (no need to pursue administrative remedies under RSA 677:2 and :4 when challenges focus

on determinations of statutory and constitutional law); and *e.g.* *Taylor v. Town of Plaistow*, 152 N.H. 142, 144 (2005) (court substantively addresses declaratory judgment on constitutionality of zoning ordinance).

However, in this case, most of the petitioners' claims are "question[s] of the exercise of administrative discretion," which the petitioners must first pursue through the process set forth in [RSA 677:2](#) and [:4](#). *Blue Jay Realty Trust*, 132 N.H. at 509. Specifically, most of the claims contained in the petition for declaratory judgment allege the ZBA misapplied or misinterpreted the applicable zoning ordinances, *see* Pet. Decl. J. at 10-11, or failed to follow the appropriate legislative process set forth by these zoning ordinances. *See id.* at 10-12.

As the court has previously stated, unless administrative remedies are properly exhausted, this court does not have jurisdiction over any questions of "administrative action" raised by the petitioners.. Accordingly, because this court has already determined the petitioners did not adhere to the strict procedural requirements set forth in [RSA 677:2](#) and [:4](#), the petitioners' claims challenging the ZBA's administrative actions must be dismissed.

Upon review, however, the court finds the petitioners make one allegation in their petition for declaratory judgment that is deemed a "question of law" in New Hampshire. On the second to last page of their petition, in pertinent part, the petitioners allege None of the Minutes or Notices of Decision of the Board's meetings or votes taken on February 3, February 12, March 3, or April 7, 2005, in this matter have been maintained or placed on file in records available to public inspection within 144 hours of the said meetings or votes taken by the Board in accordance with [RSA 673:17](#), [RSA 676:3, II](#), or [RSA 91-A:2](#)

(*Id.* at 13).

In New Hampshire, whether or not a public body has properly adhered to the applicable statutory notice requirements is "a question of law." *See Bedford Residents Group*. 130 N.H. at 639 (petitioner may pursue declaratory judgment action when issue is whether notice furnished by Bedford Planning Board satisfies statutory requirements); *Bradley v. City of Manchester*, 141 N.H. 329, 332 (1996) (Without deciding, Court assumes petitioners' claim regarding defective notice process falls within "the exception to the requirement that administrative remedies be exhausted"); and *Cf. Bourgeois*, 120 N.H. at 149 (petitioner may pursue declaratory judgment action when issue is whether substantial compliance with statutory filing requirements relating to protest petitions is sufficient to require a two-thirds affirmative vote for adoption of proposed amendment). Therefore, the petitioners' declaratory judgment action on the question of whether the ZBA complied with the statutory notice requirements set forth in [RSA 673:17](#), [RSA 676:3, II](#), or [RSA 91-A:2](#) is a proper collateral challenge to the ZBA's actions and is not dismissed.

Accordingly, the petitioners' motion to reconsider is *DENIED*, in part, and *GRANTED*, in part, consistent with the terms of this order..

So Ordered.

Date 12-15-05

<<signature>>

Peter H. Fauver

Presiding Justice

Colby, Jaime

From: Joe Gay <John.Gay@casella.com>
Sent: Friday, May 7, 2021 4:36 PM
To: Colby, Jaime
Cc: Kevin Roy; Russell Anderson; Samuel Nicolai; Brian Oliver
Subject: NCES May 3 Incident Report
Attachments: Table.pdf; May 3 2021 NHDES Incident Report.pdf; 665-Incident Report-210501-1.pdf; May 7 2021 Incident Report Cover Letter.pdf

EXTERNAL: Do not open attachments or click on links unless you recognize and trust the sender.

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May 7, 2021

Ms. Jamie M. Colby, PE
NH Department of Environmental Services
Solid Waste Management Bureau
P.O. Box 95, 29 Hazen Drive
Concord, New Hampshire 03301

**RE: North Country Environmental Services, Inc.
Landfill Facility - Bethlehem, NH
Incident Report
Permit # DES-SW-SP-03-002**

Dear Ms. Colby,

Please find enclosed an Incident Report and related documents that provides the required information pursuant to Env-SW 1005.09 that details the incident reported on Monday May 3, 2021 via phone.

Should you have any questions please do not hesitate to contact me at 802-236-5973.

Sincerely,

NORTH COUNTRY ENVIRONMENTAL SERVICES, INC.

/s/ John Gay

John Gay, E.I.
Permits, Compliance & Engineering

Enclosure: Incident Report & Attachments

c. Kevin Roy, NCES
Russell Anderson, NCES
Samuel Nicolai, NCES
Brian Oliver, NCES

**INCIDENT REPORT PURSUANT TO ENV-SW 1005.09
MAY 7, 2021**

Facility Name: North Country Environmental Services, Inc. Landfill (NCES)

Facility Permit: DES-SW-SP-03-002

Location: 581 Trudeau Road, Bethlehem, New Hampshire, 03574

Accessed Via: Trudeau Road via Route 3/Route 302

Facility Owner: North Country Environmental Services, Inc.

Owner Contact: John Gay, E.I.
North Country Environmental Services, Inc.
1855 Vermont Route 100, Hyde Park, VT 05655

Date of Incident: May 1 to 3, 2021

Persons Involved: Kevin Roy, Division Manager, NCES
Bruce Grover, Operations Manager, NCES
Scott Wynott, Driver, Mr. Bults, Inc.

**Incident Description
& Waste Material
Quantity:**

Based on system control and tank level information, beginning at approximately 9:30 a.m. on May 1 and continuing intermittently until approximately 6:40 a.m. on May 3, the Stage IV Phase II sump pumped leachate to the on-site storage tank "A" (see attached figure) while Tank A was at capacity. The Stage IV Phase II pump did not receive an "inhibit" signal from the system control and resulted in intermittent pumping after tank storage were full. The continued pumping from Stage IV Phase II resulted in leachate flowing to a former valve box "401" that is no longer in service. Over this period and intermittently, valve box 401 filled with leachate and overtopped. Leachate flowed over the ground surface into the forebay of Detention Pond No. 4, located north of Valve Box 401.

Immediately, upon discovery, landfill personnel contacted the NCES compliance staff at 6:37 am who in turn notified the NH Spill response coordinator (via after hours contacting), Mr. Andrew Madison and also contacted Ms. Jaime Colby of the New Hampshire Department of Environmental Services, Waste Management Division (Division).

The total volume of leachate pumped from Stage IV Phase II after

the tanks were full is estimated to be up to 154,000 gallons based on totalizing flow meter readings. The amount of release from 404 valve box to the forebay of Detention Pond No. 4 cannot be determined precisely, however it is likely significantly less than the flow meter totalizer quantity due to residual capacity within the leachate storage, tanks, pipes and structures connected to the valve box structure.

Cause

There is a master supervisory control and data acquisition system electronic control unit (SCADA) that collects and transmits electrical signal to various electronic control units around the site at NCES. This master SCADA control unit is located near the 162,000 gallon above ground storage tank.

Radio communication from the master SCADA control unit and the subordinate Stage IV Phase II control unit was under repair because the control signal had been lost. There was discussion between our SCADA controls vendor and our electrician on the necessary repairs, components were ordered, and a replacement of parts occurred on Tuesday April 27, 2021. After the parts were replaced, it was determined that the new parts had not resolved the communication error and therefore the issue was not resolved. The electrician inadvertently left the controls system in "automatic" mode and left the site. NCES site was not aware of this situation. On the morning of May 1 when the incident began, the Stage IV Phase II control unit was not able to receive a pump inhibit signal.

Assessment of Hazards:

Due to design of the pond having an earthen berm separating the forebay of the pond with the aft bay, the size (large) of the forebay, the low permeable nature of the soils utilized to construct the pond, the volume of water in the large forebay we are confident there was no risk to human health or safety or impact off property. Surface water and soil were impacted, on property.

Measures Taken:

The visually impacted stormwater was contained to the forebay of pond #4 and was immediately pumped from Detention Pond No. 4 to the leachate containment system on May 3 shortly after discovery of the release. Tank capacity was made available from the routine arrival of a leachate hauler first thing Monday.

Additionally, as soon as the stormwater pond water elevation was lowered, the sediment underlying the area of the forebay where

visual impacts were observed was excavated throughout the day on May 3 to a varied depth from 1 foot to approximately 4 feet in depth. The excavation was downward to a level that represented the natural subsurface soil. The total volume of sediment excavated from Detention Pond No. 4 is estimated to be 3,000 cubic yards. In addition, valve box 401 and associated piping was removed along with olfactory observed impacted soil immediately adjacent to the structure or around piping and was taken to the landfill and staged. We estimate that approximately 320 cubic yards of soil were removed from around Valve Box 401.

All stormwater from the forebay of Detention Pond No. 4 will be managed as wastewater and taken to a municipal wastewater treatment facility. The sediment underlying the western area of the pond was completely removed by the end of the day on May 3.

The additional following measures have been taken:

- Stormwater was steadily pumped from the forebay of Detention Pond No. 4 throughout the week and hauled to a municipal wastewater treatment facility.
- On May 3, approximately 3,000 cubic yards of sediment were excavated from Detention Pond No. 4, and approximately 320 cubic yards of soil was excavated from area surrounding valve box 401 where soils may have been impacted.
- A portion of stormwater discharging to Detention Pond No. 4 was diverted on May 3 to reduce addition of water to the pond.
- Water quality samples were also collected from the forebay and main bay of Detention Pond No. 4 along with the pond discharge area (refer to attached water quality report).
- On May 5, the following activities were performed:
 - Valve box 401 along with some associated piping and conduit was removed and as mentioned above approximately 320 cubic yards of backfill soil removed.
 - Valve box C and Valve Box 403 were inspected and no issues observed.
- On May 6, the following activities were performed:
 - Sediment samples were collected by Sanborn, Head & Associates, Inc. – the results will be provided to the Department.
 - The Stage IV Phase II primary flow meter was bench tested by a third-party vendor to confirm flow volume accuracy.
 - Stormwater from the forebay continued to be removed by pump systems and loaded into tankers or on site storage tanks for eventual off-site treatment.
- On May 7, the following activities were performed:

- Stormwater from the forebay continued to be removed by pump systems and loaded into tankers or on site storage tanks.
- Electrofusion capped the Stage III forcemain and leachate evaporation forcemain previously connected to valve box 401.

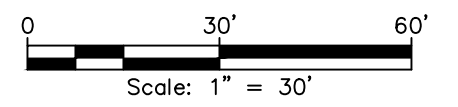
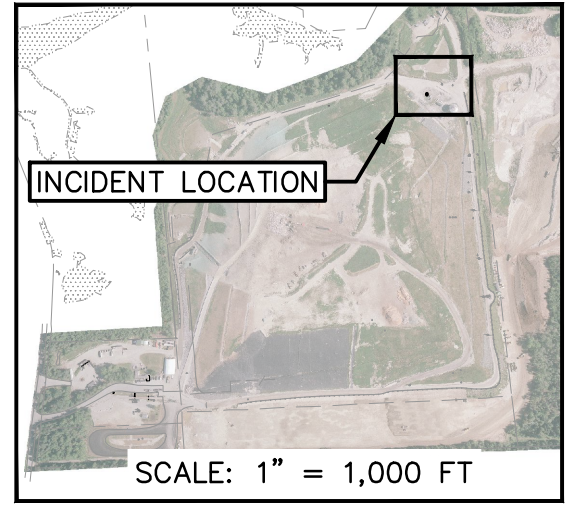
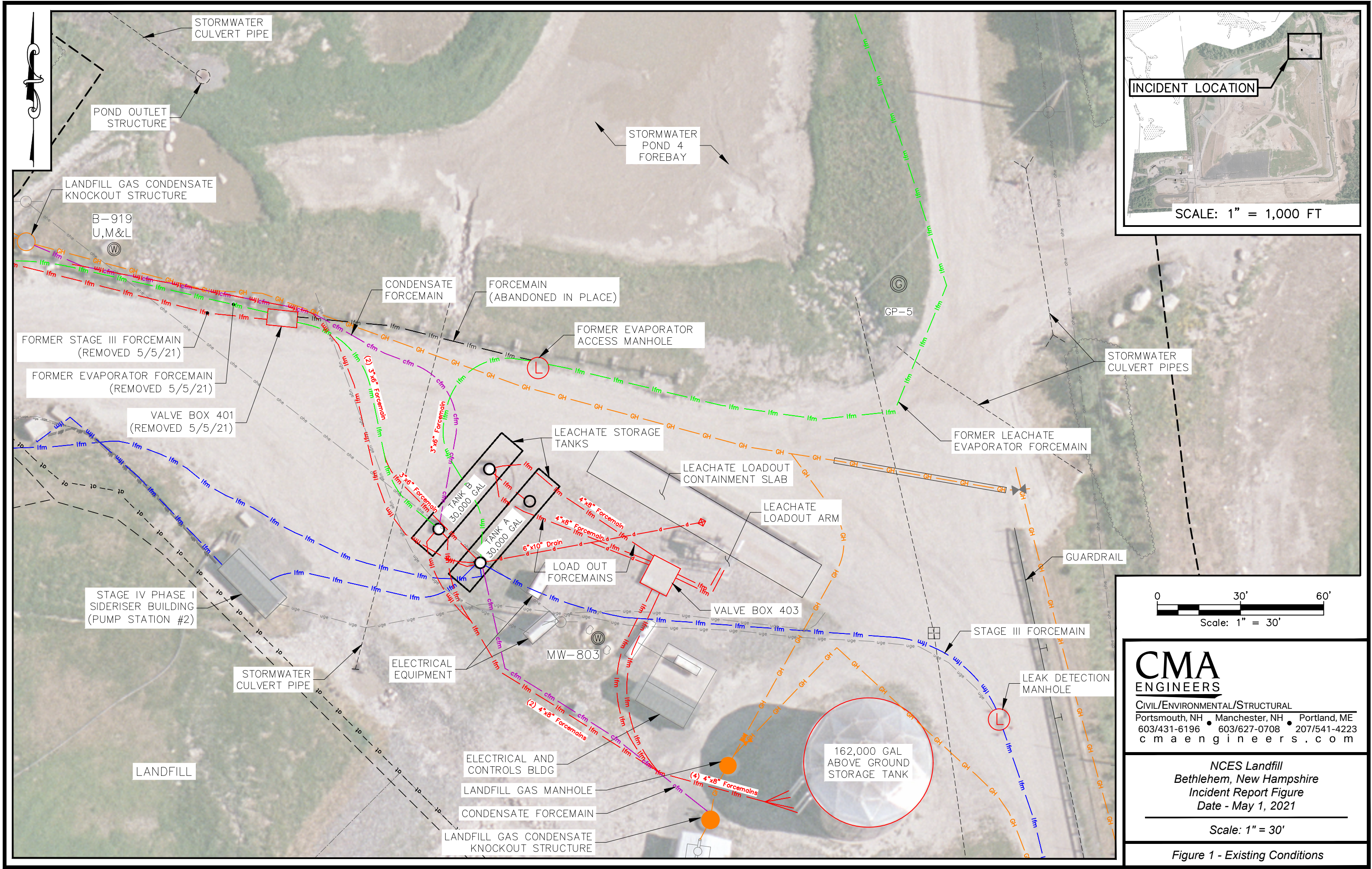
The following measures will be taken to reduce, eliminate and prevent reoccurrence:

- A full system on- site audit of the sites supervisory control and data acquisition system will be performed by June 1, 2021.
- We have collected pond sediment samples and will report the results to the Division.
- NCES will continue to remove forebay stormwater until the forebay is empty. The top 6" of soil from the pond will be dredged and taken into the landfill and used as daily cover. Native soil samples from below the sediment level in the forebay will be collected and analyzed.
- NCES staff will ensure that after any vendor has performed site maintenance that they check in with landfill staff before they leave the site.

Attachments

Figure 1

Table 1



CMA ENGINEERS
 CIVIL/ENVIRONMENTAL/STRUCTURAL
 Portsmouth, NH • Manchester, NH • Portland, ME
 603/431-6196 • 603/627-0708 • 207/541-4223
 cmaengineers.com

*NCES Landfill
 Bethlehem, New Hampshire
 Incident Report Figure
 Date - May 1, 2021*

Scale: 1" = 30'

Figure 1 - Existing Conditions

TABLE 1
Stormwater Detention Pond No.4 Summary of Field Parameters and Analytical Results
North Country Environmental Services, Inc.
Bethlehem, New Hampshire

Sample Location	Sample Date	Field Measure				Volatile Organic Compounds										
		s.u	µS/cm	°C	NTU	Concentrations in µg/L										
		pH	Specific Conductance	Temperature	Turbidity	Acetone	Butanone (2-) (MEK)	Diethyl Ether (Ethyl Ether)	Dioxane (1,4-)	Ethylbenzene	Methylene Chloride (Dichloromethane)	Tert Butyl Alcohol (TBA) (tert-Butanol)	Tetrahydrofuran	Toluene	Xylene (m,p-)	Xylene (o-)
Aquatic Life Fresh	Acute	NS	NS	NS	NS	NS	NS	NS	NS	32,000	11,000(e)	NS	NS	17,500	NS	NS
	Chronic	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS
Human Health	Water & Fish	NS	NS	NS	NS	NS	NS	NS	NS	530	20(c)	NS	NS	1,300(l)	NS	NS
	Fish Only	NS	NS	NS	NS	NS	NS	NS	NS	2,100	1,000(c)	NS	NS	15,000	NS	NS
	NHDES GW-1 (AGQS)	NS	NS	NS	NS	6,000	4,000	1,400	0.32	700	5	40	600	1,000	10,000	10,000
DP-4_LS	05/04/21	8.42	204	9.4	321	48	37	<2	0.34	<1	<1	<30	<10	<1	<1	<1
DP-4_Aft	05/04/21	7.63	224	9.4	415	47	36	<2	0.52	<1	<1	<30	<10	<1	<1	<1
DP-4_Fore	05/04/21	7.19	793	10.6	259	130	160	8.7	4.5	2.5	5.6	39	71	6	3.4	1.8

Notes:

1. Samples were collected by Sanborn Head personnel on the dates indicated and analyzed by Eastern Analytical, Inc. (EAI) of Concord, New Hampshire.
2. pH is presented in standard units (s.u.), specific conductance is presented in microSiemens per centimeter (µS/cm), temperature is presented in degrees Celsius (°C), and turbidity is presented in nephelometric turbidity units (NTU). VOC results are presented in micrograms per liter (µg/L) which is equivalent to parts per billion (ppb).
3. "<" indicates the analyte was not detected above the listed laboratory reporting limit.
4. "GW-1" refers to the New Hampshire GW-1 Groundwater Standards as defined in New Hampshire Department of Environmental Services (NHDES) Contaminated Sites Risk Characterization and Management Policy (RCMP) (January 1998, with 2000 through 2018 revisions/addenda). GW-1 Groundwater Standards are intended to be equivalent to the Ambient Groundwater Quality Standards (AGQSS) promulgated in Env-Or 600 (June 2015 with October 2016, September 2018, September 2019, May 2020, and December 2020 amendments). For analytes where GW-1 and AGQS values differ, the values presented in this table reflect the AGQSS in the latest Env-Or 600 update. The AGQS/GW-1 Groundwater Standards are intended to be protective of groundwater as a source of drinking water.

"Acquatic Life Fresh" and Human Health" refers to the New Hampshire Water Quality Criteria for Toxic Substances as defined in Env-Wq 1703.21 and contained in Table 1703.1 Water Quality Criteria for Toxic Substances (December 2016). Footnotes from Table 1703.1 which appear above:
(c) The letter "c" shall indicate that these criteria for the protection of human health are based on carcinogenicity using a risk factor of one in 1,000,000, while the human health criteria without this footnote are based on systemic toxicity. Other risk factors shall be allowed only as specified in Env-Wq 1703.20.
(e) The letter "e" shall indicate that the following classes of compounds have 2 or more isomers and the appropriate aquatic life criteria apply to the sum of the concentrations of each isomer.
(l) The letter "l" shall indicate that there is a more stringent drinking water maximum contaminant level (MCL) specified in Env-Dw 700, so if the surface water is a source for a public water system as defined in RSA 485:1-a, XV or is within 20 miles upstream of any active surface water intake for a public water system, the department shall use the MCL values shown in table 1703-2A for the water and fish ingestion human health criteria.
5. "NS" indicates there is no standard listed for the analyte.
6. **Bold** values exceed the GW-1 Groundwater (AGQS) Standard for that analyte.

Leachate Spill Under Investigation At Bethlehem Landfill Could Be Largest In N.H.

By ANNIE ROPEIK · MAY 20, 2021

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The Bethlehem landfill owned by Casella.

CREDIT CASELLA

The state is investigating what may be its largest-ever spill of leachate from a landfill –the North Country Environmental Services facility in Bethlehem, owned by Vermont waste company Casella.

The state Department of Environmental Services says the incident began late on May 1, a Friday, and lasted until the following Monday.

Operators arrived to find that a leachate tank had been overflowing all weekend, spilling as much as 154,000 gallons of what’s often called “garbage juice.”

The landfill does not accept trash on weekends and was not staffed while the overflow occurred, according to the state.

Leachate is a combination of rain and liquid garbage, contaminated with heavy metals and other chemicals, which percolates through solid waste at landfills. It’s usually pumped into holding tanks, then into trucks that haul it to wastewater treatment plants.

In this case, the state and Casella say they believe an automated signal failed to fire when a leachate holding tank were full – meaning the liquid kept trying to pump into the tank with nowhere to go.

The tank overflowed, and the leachate traveled through an obsolete pipe that the state says Casella should have decommissioned after a recent expansion.

According to the state, the leachate made it into, and then out of, a surface water detention pond surrounded by a grassy swale on the side of the facility nearest the Ammonoosuc River. Casella, for three years, has been fighting a federal lawsuit alleging they contaminated the river.

The state says this leachate spill was much larger than most they deal with on a routine basis. Those spills usually involve a leak from the 8,000-gallon leachate trucks that empty the landfill’s holding tanks and take the liquid offsite.

A DES official couldn’t recall another leachate spill this large. He called the incident “significant” and said the state is “concerned” about its causes and potential effects.

It's not clear exactly how much leachate made it out of the detention pond. The state is now sampling nearby soil and groundwater to try and figure that out. They're also considering potential compliance and enforcement actions against Casella.

Casella spokesman Jeff Weld told NHPR that they don't believe any leachate made it out of the pond, which he said has a 600,000 gallon capacity.

"We continue to work with NHDES on the root cause and evaluation of additional impacts, but it appears there were no offsite impacts due to the engineering design of the retention pond forebay," Weld said.

When the spill was discovered, the state says, the company pumped out the affected pond, excavated the soil inside it and began its own sampling for impacts.

Otherwise, the landfill remains open and operating. On Wednesday, the company broke ground on a new gas capture project there. Meanwhile, landfill opponents are appealing the state's recent approval of a small expansion for the facility.

This story was updated Friday to include a comment from Casella.

Michael Durfor
Overview of Offer of Proof¹
Apr. 9, 2021 Preliminary Injunction Hearing
***CLF v. NH Dept. of Env'tl Services*, No. 217-2021-CV-0092 (Merrimack Super. Ct.)**

Background:

2004 to 2008: Executive Director of the NH/VT Solid Waste District in Claremont. He managed the day-to-day waste needs of the district, consisting of municipalities in both New Hampshire and Vermont.

2009 to 2019: Executive Director of the Northeast Resource Recovery Association, a non-profit founded in 1981 which supports municipalities in managing their recycling programs. NRRA operates a recyclables market cooperative and has deep expertise in recycling and municipal waste markets. Mr. Durfor led NRRA's efforts on a broad range of issues, including tipping fees, recycling rates, waste diversion rates, waste characterization studies, and challenges to the recycling industry posed by China. He also engaged in negotiations on behalf of member towns with waste disposal companies.

Served for ten years on the NH Waste Management Council.

2019: recognized by the U.S. EPA with a lifetime achievement award.

Offer of proof:

The requirement of an updated solid waste plan, every six years, is a critically important element of DES's role in managing solid waste. Had DES engaged in the required plan updates, it could have addressed numerous challenges and issues, including the following:

1. It could have developed goals and objectives to address significant challenges arising within the recycling market, such as the advent of single-stream recycling and its unintended consequences, and the so-called China Sword policy, by which China stopped accepting recyclables containing more than 3 percent contamination. For example, ongoing planning could have led to the development of a single-stream recycling plant in New Hampshire, enabling New Hampshire to better control its destiny with respect to recycling, and the market for recyclable waste. It also could have led to substantial increases in composting.

¹ This document is being provided in response to a request by counsel for Intervener Androscoggin Valley Regional Refuse District and in the spirit of expeditiously advancing proceedings related to CLF's motion for preliminary injunction. It is not intended as an expert report pursuant to RSA 516:29-b, nor does CLF concede that such a report is required at this time. *See* RSA 516:29-b, III. CLF reserves the right to make a disclosure and provide an expert report of Mr. Durfor and/or any other expert witness in accordance with RSA 516:29-b, III. CLF further reserves the right to include in such report(s) opinions not part of the offer of proof made by CLF during the April 9, 2021 hearing.

2. It could have developed goals and objectives to address out-of-state waste, which is now consuming approximately half of NH's waste disposal capacity. Doing so could have led to goals and strategies, including the development of more publicly owned waste disposal facilities, to prevent out-of-state waste from consuming significant disposal capacity in New Hampshire.
3. It could have determined how to define and calculate waste diversion – a critical metric central to New Hampshire's waste reduction goal in RSA 149-M:2. According to the 2019 Legislative Committee report (CLF Exhibit 14), "DES does not know what our current diversion rate is and so the level of success in achieving the 40 percent diversion goal is unknown."
4. It could have developed goals and objectives related to landfill siting as well as emerging contaminants of concern, such as per- and polyfluorinated alkyl substances (PFAS).

In addition to addressing new and evolving issues, updating the state solid waste plan is important because it enables DES to assess how the solid waste plan is working within the context of ever-changing market conditions, and to address challenges within the market as they arise.

Many of the problems facing the state, in its management of solid waste, existed decades ago, as discussed in a 2001 Task Force Report led by DES. (CLF Exhibit 13). For example, that report identified significant concerns about out-of-state waste consuming New Hampshire disposal capacity.

Problems facing the state in its management of solid waste persist today, as discussed in the 2019 Legislative Committee Report (CLF Exhibit 14).

The state would be in a different and better position now, with respect to reducing waste and achieving the state's solid waste hierarchy, had DES engaged in planning since 2003 and updated its state waste plan every six years to address evolving challenges.

An updated plan is an important part of DES's permit-review process and its ability to consider permits within the context of a current, larger plan for the state. Because DES has not updated the plan over the years with new and updated goals, its permit review process is relying on incomplete information.

DES's permitting of new disposal facilities on the basis of an outdated plan, without the benefit of updated goals and objectives, will exacerbate and perpetuate the state's current problems, such as the significant amount of capacity being consumed by out-of-state waste, the state's failure to meet its waste reduction goal, and the state's failure to achieve its solid waste hierarchy.

These ongoing problems will contribute to the permitting of landfill capacity that is unnecessary for New Hampshire to meet its needs, resulting in unnecessary impacts to New Hampshire communities, the environment, the economy, and nearby property owners.

Michael Durfor
Basis of Testimony Provided By Offer of Proof / Qualifications
and Other Background Information¹
CLF v. NH Dept. of Env'tl Services, No. 217-2021-CV-0092 (Merrimack Super. Ct.)

Basis of Opinions; Supporting Facts, Data, and Exhibits:

In rendering opinions, Mr. Durfor relied on his ten years of experience as Executive Director of the Northeast Resource Recovery Association (NRRA), during which time he monitored waste markets on a daily basis and assisted member municipalities in contract negotiations for waste recycling and waste disposal. Mr. Durfor also relied on his experience as Executive Director of the New Hampshire/Vermont Solid Waste District, as well as his working knowledge of challenges to the recycling industry and disposal capacity, including the importation of waste from outside New Hampshire; New Hampshire's waste management statutes pertaining to planning, the solid waste hierarchy, and solid waste reduction goal; and efforts in New Hampshire to address waste issues, including but not limited to the 2001 Report of the Governor's Solid Waste Task Force.

Facts and data considered by Mr. Durfor include the outdated nature of the state's solid waste plan; trends related to the disposal out-of-state waste, including the closure of two landfill facilities in Massachusetts; challenges facing recycling, including policies adopted in China; and policy and planning considerations in the 2001 Report of the Governor's Solid Waste Task Force (CLF Exhibit 13) and the 2019 Report of the HB 617 Legislative Committee (CLF Exhibit 14).

Mr. Durfor's Qualifications:

See Mr. Durfor's Bio, attached.

As Executive Director of the NRRA, Mr. Durfor led NRRA's efforts on a range of issues, including tipping fees, recycling rates, waste diversion rates, waste characterization studies, and challenges to the recycling industry posed by evolving policies in China. He also engaged in negotiations on behalf of member towns with waste disposal companies. Mr. Durfor was a

¹ An expert disclosure and report pursuant to RSA 516:29-b is not required at this time in this case, as there has been no case structuring order or other deadlines established for expert witness disclosures and reports. See RSA 516:29-b, III. This document is not intended as an expert report pursuant to RSA 516:29-b, nor does CLF concede that such a report, or even this document, is required at this time. This document is provided in the spirit of expeditiously advancing proceedings related to CLF's motion for preliminary injunction. CLF reserves the right to make a disclosure and provide an expert report of Mr. Durfor and/or any other expert witness in accordance with RSA 516:29-b, III. CLF further reserves the right to include in such report(s) opinions not part of the offer of proof made by CLF during the April 9, 2021 hearing on CLF's motion for a preliminary injunction.

frequent speaker/presenter, including as a keynote speaker, on matters pertaining to waste management at conferences, including the NRRRA's first in the nation annual recycling conference, and he co-chaired the annual spring "Talking Trash" conference in New Hampshire with the Environmental Business Council, ecomaine, and Tighe and Bond Engineering for six years. He was the keynote speaker at a Hartford, Connecticut conference sponsored by the U.S. Environmental Protection Agency, presented at a nationwide conference on household hazardous waste in Los Angeles, and was a keynote speaker for Massrecycle as well. Mr. Durfor regularly led workshops and trainings for member municipalities and attendees of conferences and events, including monthly NRRRA members' meetings for which his trainings were certified by the Department of Environmental Services (DES) to count as training credit for transfer facility operators. He provided training to solid waste managers and facility operators, through NRRRA, under a contract with DES. He also provided a training to the Waste Management Council, on which he served for ten years. Mr. Durfor has not published articles or papers in the preceding ten years but has made multiple presentations using webinars and in-person PowerPoints in five of the six New England States, with a concentration in New Hampshire and Vermont. He also oversaw the successful bid for EWASTE in the State of Vermont and managed to record high numbers of electronic waste pounds appropriately recycled. The first year of that three-year effort saw Vermont establish a nationwide best record for e-waste recycling.

Compensation:

Mr. Durfor is not being compensated for his services.

Other Expert Testimony:

Mr. Durfor has not testified as an expert in another matter in the preceding four years.

Michael Durfor

Mike is a Graduate of Syracuse University with a B.A. in Political Science and holds an MBA from Plymouth State University.

Mike came to the Northeast Resource Recovery Association (NRRA) after serving as the Executive Director to the NHVT Solid Waste District in Claremont, NH, in December of 2008 and became the Executive Director in October of 2009. Since joining NRRA, Mike increased support for member services outreach and technical support programs, started the “Full of Scrap” bi-weekly newsletter, updated market pricing, and added single-stream recycling and municipal solid waste contracts as part of NRRA’s menu of material handling programs available to members.

Mike increased the visibility of the NRRA School Recycling Club programs and, as a result, NRRA received several USDA Grants for School Recycling and outreach programs.

Mike was recognized for his work to protect New England's environment by the US Environmental Protection Agency (EPA) Region 1 with a lifetime achievement award at the Environmental Merit Awards ceremony held in Boston, Massachusetts on September 10th, 2019.

Mike conducted numerous NHDES approved Continuing Ed Training for Transfer Station Operators to maintain their Certifications. In addition, NRRA has been twice awarded the contract to administer the Vermont State E-Cycles program which properly recycled over 4.8 million pounds of e-waste in its first year.

While at the association, Durfor faced a barrage of difficult issues. Tipping fees, recycling rates, diversion rates, reuse of mixed paper, processed glass aggregate reuse, waste characterization studies, contract negotiations, rural logistics, new technologies, and China’s Green Fence and China Sword were among challenges for which Mike became a regional leader. Along the way, partnerships expanded the scope and reach of the organization's mission, including the acquisition of the Association of Vermont Recyclers in 2009 and oversight of the best-in-the nation electronics recycling program.

Mike served diligently as a member of the NH Waste Management Council Member for 10 years while at NRRA, prior to retiring in September of 2019.

STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

SUPERIOR COURT
CASE NO. 217-2021-CV-0092

Conservation Law Foundation, Inc.
Plaintiff,

v.

Robert R. Scott, Commissioner, New Hampshire Department of Environmental Services,
Defendants.

AFFIDAVIT OF MICHAEL DURFOR

I, Michael Durfor, do hereby depose and state under oath as follows:

1. I have reviewed the Affidavit of Anthony P. Giunta, P.G., CPG, including Mr. Giunta's assertions about my testimony as provided by Conservation Law Foundation as an offer of proof at the April 9, 2021 hearing in this lawsuit.
2. Contrary to Mr. Giunta's statements downplaying the importance of the State Plan, it is difficult to *overstate* the importance of the Plan when so many functions in RSA 149-M – permitting, determinations of public benefit, town and district waste planning, and capacity issues for New Hampshire-generated waste – all look to the State Plan for guidance. The Legislature has made clear in RSA 149-M:12, I(b) and RSA 149-M:11, III, that the Department's permitting decisions are to rely on the Plan, including the Department's determination whether proposed waste facilities will provide a substantial public benefit. It also has made clear that the State Plan is to help guide planning at the municipal and waste district level, as RSA 149-M:24, IV requires that towns and waste districts "shall prepare and maintain an 'approvable' solid waste management plan which is consistent with the state plan"

3. The importance of planning is further evidenced by looking at RSA 149-M:29 as a whole. In addition to requiring that the State Plan be updated every six years, it also requires that “[a]t least every October 1 of every odd-numbered year, the department shall prepare a report on the level of achievement in reaching the 40 percent diversion goal established in RSA 149-M:2 and on proposed strategies for achieving the goal and any proposed changes to the goal. . . .” There is nothing in the statute that indicates that the preparation of State Plan updates and biennial reporting on progress is optional or dependent on specific funding by the Legislature.

4. Mr. Giunta states that “the NHDES waste management division routinely engages in comprehensive waste management planning and responds in one form or another to inquiries from legislative committees on the status of its planning in every session year.” [Giunta Affidavit at 3, ¶ 5] However, the Department has by its own admission maintained that it has been unable to engage in comprehensive waste management planning or the every-six-year State Plan updates or regular biennial reports (although it did, finally, submit a biennial report in 2019).

5. Mr. Giunta understates the importance of the Department’s role in the management of solid waste in New Hampshire, suggesting that the Department cannot establish goals and policy and that its hands have been tied by inaction from the Legislature in passing new solid waste laws. Under RSA 149-M:6, II, however, the Department has the responsibility and authority to “[e]stablish solid waste management policies and goals consistent with the provisions of RSA 149-M:1-3.” The 2003 State Plan contains Goals which, in turn, include a description of the basis of each Goal as well as Sub-goals and Objectives. A number of the 2003 State Plan’s Goals include Sub-goals and Objectives that

do not require specific legislative authority, and that the Department clearly considered to be within its responsibilities and authority to adopt and implement. For example, Goal 4 of the 2003 State Plan (“Assure disposal capacity for New Hampshire”) references concerns with the impacts of out-of-state waste on New Hampshire disposal capacity. The Goal includes Sub-goal 4.1 (“Obtain more thorough data regarding solid waste generation, diversion activities and disposal and assist in assuring solid waste disposal capacity at a reasonable cost to NH municipalities and businesses”) which includes Objective 4.1.3: “Report on the benefits of publicly owned solid waste disposal facilities, including one or more owned and/or operated by the State. (July, 2006).” This Sub-Goal and Objective, and many other Objectives in the 2003 State Plan (e.g., Objectives 1.1.1, 1.1.2, 1.1.3, and 1.2.2, to name a few) are examples of policies that the Department has clear authority to pursue, *without* further legislative action. An updated State Plan could include updated Goals, with new or refined Sub-goals and Objectives, that can be pursued by the Department without legislative action.

6. The 2003 State Plan also includes activities that *do* require legislative action. For example, Goal 1, Sub-goal 1.2, includes as Objective 1.2.1: “Pursue legislation to establish a state-wide tipping fee on the disposal of solid waste in New Hampshire as a disincentive to disposal and as a mechanism to raise funds to support diversion activities. (July, 2005).” The 2003 State Plan contains other Objectives specifically identifying legislation to be pursued to advance the Plan’s Goals, such as Objectives 1.2.1, 2.1.3, 2.2.2, and 3.2.6. By updating the State Plan, the Department could have provided ongoing guidance for legislation needed to achieve the state’s solid waste goals.

7. Whether to be pursued by the Department under its authority, or to be pursued through legislation, the Objectives in the 2003 State Plan include “target completion dates” – indicating Objectives to be achieved either by a certain date or indicating the “ongoing” nature of the Objective. Each of the specified dates has long since passed. Absent the required updates of the 2003 State Plan, there is no public accounting of whether the various Sub-goals and Objectives have been achieved, nor is there any assessment of whether or how, in light of changing conditions, the Goals, Sub-goals, and Objectives should be updated or refined. Without the required State Plan updates, there has been no affirmative identification by the Department of legislation that is necessary to advance the state’s waste goals. Accordingly, while Mr. Giunta emphasizes the Legislature’s failure to act in ways that advance the state’s waste policies, such failure rests in part with the Department’s failure to provide legislative guidance through updated State Plans. In light of this failure, it is not surprising that the HB 617 Legislative Committee – which found New Hampshire to be falling behind in long-range planning and assistance to the point of rendering it “incapable of adequately responding to the various challenges that have arisen” – explored solid waste management challenges which it characterized as having “seemingly lied dormant for many years, at least at the Legislature.” Report of the Committee to Study Recycling Streams and Solid Waste Management in New Hampshire (CLF Hearing Exh. 14) at 5, 13. In any event, whether the Legislature has or has not addressed issues does not cloud the fact that the mandatory planning and reporting by the Department has not been done, depriving the Legislature and the public of important guidance in advancing the state’s solid waste management policies, depriving the Department of updated Goals against which to consider permit applications for waste facilities and render properly informed decisions, and resulting

in daily, ongoing harm as New Hampshire landfill capacity is consumed by out-of-state waste and waste that could otherwise be reduced at the source or diverted to preferred management methods under the state's waste management hierarchy.

8. In my opinion, under its responsibilities and authority to establish solid waste management policies and goals consistent with RSA 149-M:1-3 – which includes protecting human health, preserving the natural environment and conserving dwindling natural resources, as well as achieving the state's waste reduction goal and solid waste management hierarchy – the Department has a duty, under its statutory planning requirements, to update and refine goals and policies to address new information and trends when solid waste management challenges come to the fore. CLF's offer of proof of my testimony identifies several such challenges which, had the Department been fulfilling its duty, would have been addressed in updating the State Plan's goals.

9. In my opinion, Mr. Giunta is incorrect in his assertion that the 2003 State Plan remains a valid tool for use in permitting, on the theory that the Goals of the plan remain valid today and an updated plan would be essentially the same as the 2003 State Plan. In addition to understating the Department's authority to develop policies and goals, and ignoring the role that State Plan updates would have served in informing the Legislature of needed legislation, Mr. Giunta ignores the detailed Sub-goals and Objectives of the 2003 State Plan's Goals, which should have been updated to reflect changing needs. He also ignores the fact that the 2003 State Plan itself, in its preface, explicitly acknowledges the "constantly evolving" nature of the State Plan. Moreover, in asserting that problems stemming from the China Sword policy would not have been addressed by the Department had it updated the State Plan in 2015 (Giunta Affidavit at 7, ¶ 17), Mr. Giunta also ignores

the fact that the China Sword policy was a culmination of several other restrictions by China on accepting contaminated recyclables, including its Green Fence initiative, which went into effect in February of 2013. He also ignores the Department's regulatory power, through permitting, to address waste management challenges. For example, as recognized in the 2001 Solid Waste Task Force Report, the Department, when faced with an imbalance of out-of-state waste as compared to New Hampshire-generated waste, demonstrated its regulatory authority in correcting the capacity imbalance at the Turnkey Landfill.

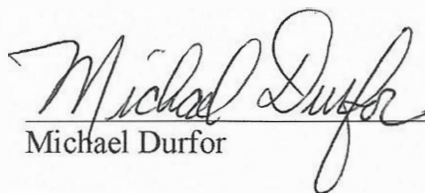
10. In paragraph 18 of his affidavit, Mr. Giunta states: "It is far more important that NHDES examine permit applications under current conditions than base decisions on outdated conditions that existed as many as six years earlier." I heartily concur with Mr. Giunta that the Department should be conducting its permit activities on the basis of current information. Such information, as the law makes clear, must include up-to-date *planning* in the form of updated State Plans and ongoing biennial reporting. It most certainly cannot include a State Plan that is nearly two decades old.

11. On the basis of my background and experience, I am well equipped to understand the value and importance of state waste planning, including the importance of the Department updating the State Plan and providing biennial reports as required by the state's solid waste management statute. My experience as Director of the New Hampshire / Vermont Solid Waste District included not only New Hampshire solid waste issues, including incineration and landfill options, but also Vermont solid waste issues. It also required oversight of the closed ash landfill in Newport, New Hampshire, including leachate removal. As Director of the Northeast Resource Recovery Association (NRRA) for ten years, I worked closely with numerous NRRA member municipalities, including negotiating numerous

NRRA member solid waste contracts which included the impact of recycling markets on solid waste pricing. I also co-chaired the Annual Talking Trash Event for six years to address the immediate issues of solid waste management in New England, with participation from industry leaders and state regulators, including presentations by the Department and its counterpart agencies across the region. My knowledge and experience in the solid waste industry was recognized by EPA Region I with a lifetime achievement award. My experience and knowledge of long-range solid waste management planning was affirmed by my initial appointment and subsequent reappointments to the Waste Management Council which, under RSA 21-O:9, IV, is to advise the Department on policies, programs, and goals, with “particular emphasis on long-range planning.”

FURTHER, AFFIANT SAYETH NAUGHT.

Dated: April 28, 2021


Michael Durfor

State of New Hampshire
County of Sullivan

At Sunapee, New Hampshire, this 28 day of April 2021, Michael Durfor personally appeared before me and made oath that the foregoing Affidavit is true and correct to the best of his knowledge and belief.



BETTY M. RAMSPOTT
Notary Public - New Hampshire
My Commission Expires May 18, 2021

