

NEW HAMPSHIRE SUPREME COURT
NOTICE OF APPEAL

Preliminary Disclosures:

- **Contemporaneously with the November 3, 2022, rulings on rehearing that are the subject of this notice of appeal, the hearing officer below also ruled on two other post-hearing motions. Appellant, North Country Environmental Services, Inc. (“NCES”), has sought rehearing of the hearing officer’s rulings on the latter two motions in accordance with RSA 541:3 and :4. If the hearing officer denies the pending motion for rehearing, appellant anticipates filing a separate notice of appeal from that decision. Accordingly, NCES has omitted from the appendix to this notice of appeal the parties’ papers and the hearing officer’s rulings on these two post-decision motions.**
- **In his order on rehearing of November 3, 2022, the hearing officer disclosed in a footnote that the waste management council had assented in some fashion to his order before he issued it. Because NCES knew that there had not been a public meeting at which the council took such action, it requested documentation of the council’s assent pursuant to RSA ch. 91-A. On the afternoon of December 2, 2022, the waste management council produced documents establishing that there had been email exchanges with some members of the council but there had been no public meeting in which the council deliberated over and decided whether to assent to the order. Although it is doubtful that the hearing officer’s disclosure of non-public consultation with the council in the order on rehearing is a ruling, to ensure protection of its right to appeal NCES will also be seeking rehearing on December 5, 2022, of the order on rehearing based on the violation of RSA ch. 91-A. The hearing officer’s ruling on this portion of the December 5 motion for rehearing could moot this appeal if he sets aside his May 11, 2022, order on the merits. NCES will also be filing an action in superior court the**

week of December 4, 2022, seeking to set aside the order on the merits as having been adopted in violation of RSA ch. 91-A.

- **There is now pending in the Merrimack Superior Court a declaratory relief action brought by North Country Environmental Services, Inc., and its affiliate, Granite State Landfill, LLC, against the New Hampshire Department of Environmental Services (Docket No. 217-2022-CV-00942) in which the superior court is being asked to declare the meaning of RSA 149-M:11. The relief sought in the declaratory relief action raises legal issues that are also raised by Issue 2 in section (c) of this notice of appeal.**

a) *Specify the names of the parties seeking review of the order, the names of all other parties of record, the names of all counsel, the addresses of all parties and counsel, and the New Hampshire Bar identification numbers of counsel for the parties seeking review of the order. (Rule 10(a))*

<p>Appellant North Country Environmental Services, Inc. (“NCES”)</p>	<p>Counsel Bryan K. Gould, Esq. (N.H. Bar #8165) Cooley A. Arroyo, Esq. (N.H. Bar #265810) Morgan G. Tanafon, Esq. (N.H. Bar #273632) Cleveland, Waters and Bass, P.A. Two Capital Plaza, 5th Floor P.O. Box 1137 Concord, NH 03302-1137</p>
<p>Appellee Conservation Law Foundation, Inc. (“CLF”)</p>	<p>Counsel Thomas F. Irwin, Esq. Heidi Trimarco, Esq. Conservation Law Foundation 27 North Main Street Concord, NH 03301</p>

<p>Department New Hampshire Department of Environmental Services (“NHDES”)</p>	<p>Counsel Joshua C. Harrison, Esq. Assistant Attorney General Office of the Attorney General Environmental Protection Bureau 33 Capitol Street Concord, NH 03301</p>
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b) *Contain, or have annexed or appended to it, a copy of the administrative agency's findings and rulings, a copy of the order sought to be reviewed, a copy of the motion for rehearing and all objections thereto, and a copy of the order on the motion for rehearing. The appeal or petition, and any appendix that may be filed, shall contain a table of contents. (Rule 10(b))*

This is an appeal from a decision of a hearing officer for the New Hampshire Waste Management Council. Appended to this notice of appeal are the following papers from the record of the waste management council proceeding:

(Please note that the parties’ papers and memoranda on the procedurally pertinent interlocutory orders listed below are omitted from this notice. NCES’s motion for rehearing and the papers in support of and opposition to that motion address the interlocutory orders as a prerequisite to appeal as contemplated by RSA ch. 541.)

- Council hearing officer’s order on CLF’s standing (Conley, H.O.) (March 17, 2021)
- Council hearing officer’s order on NCES’s motion for reconsideration on CLF’s standing (Conley, H.O.) (May 11, 2021)
- Council hearing officer’s order on NCES’s motion to dismiss (Conley, H.O.) (9/3/21)
- Council hearing officer’s order on CLF’s motion for reconsideration of order of partial dismissal (Towle, H.O.) (11/19/21)
- Excerpt from transcript of council deliberations on February 22, 2022

(Please note that the record of the hearing and deliberations on the merits is the audio recording of the proceedings (N.H. Code Admin. R. Env-WMC 205.05(b)) which will be provided by the waste management council upon receipt of a certified record order from the court. NCES has obtained both a copy of the audio recording and a transcription of the audio recording by a certified shorthand reporter as contemplated by Env-WMC 205.05(b), but the transcript itself is not part of the record below. RSA 541-A:31, VI(g) (transcript of recording must be “considered before final disposition” to be part of the record; NCES did not yet have either the recording or the transcript at the time it filed its motion for rehearing of the order on the merits so it did not submit it to the council). For the convenience of the court, NCES has attached an excerpt of the transcript containing the council’s deliberations as an exhibit. Appendix (“Appx.”) at 373. Upon order of the court, NCES can provide the court with a copy of the recording for screening purposes to verify the transcript.)

- Council hearing officer’s May 11, 2022, order on the merits
- NCES’s motion for rehearing (June 10, 2022)
- NHDES’s motion for reconsideration¹ (May 31, 2022)
- CLF’s objection to NCES’s motion for rehearing (June 24, 2022)
- NHDES’s objection to NCES’s motion for rehearing (June 24, 2022)
- NCES’s reply to CLF’s objection to NCES’s motion for rehearing (July 6, 2022)

¹ Although N.H. Code Admin. R. Env-WMC 205.16 refers to the motion for rehearing required by RSA 541:3 and :4 as a “motion for rehearing” it also states that there will be no distinction drawn between motions for “rehearing” and motions for “reconsideration.” Enc-WMC 205.16(a). Presumably in reliance upon this equivalency under the rule, NHDES and the council’s hearing officer labelled the post-decision motions as seeking “reconsideration,” but NCES uses the statutory terminology of “rehearing” in this notice to avoid confusion with the entirely different standard governing reconsideration in New Hampshire’s courts. NCES has provided NHDES’s motion and the hearing officer’s ruling on that motion for procedural context only. If NHDES appeals the hearing officer’s ruling on its motion for rehearing, it can present the court with the full briefing on its motion with its notice of appeal.

- NCES’s reply to NHDES’s objection to NCES’s motion for rehearing (July 6, 2022)
- CLF’s surreply to NCES’s motion for rehearing (July 18, 2022)
- Order on NHDES’s motion for reconsideration (November 3, 2022)
- Order on NCES’s motion for rehearing (November 3, 2022)

The waste management council did not make separate written findings and rulings.

c) Specify the questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court. (Rule 10(c))

1. Did the hearing officer for the waste management council err (a) in determining that CLF had standing to pursue an appeal before the council based on the alleged future impacts of the challenged NHDES permitting decision on just two of its members, (b) in denying NCES’s request for an evidentiary hearing on CLF’s claimed basis for standing, and (c) in determining CLF’s standing without obtaining rulings from the council on the factual issues underlying CLF’s claim of standing as required by RSA 21-M:3, IX(c)-(e)?
2. Did the hearing officer for the waste management council err in (a) ruling that NHDES cannot find the existence of “capacity need” as required by RSA 149-M:11, III(a) and V to support issuance of a permit for new waste disposal capacity unless all of the new capacity will be used only

after there is a projected shortfall of capacity for New Hampshire-generated waste²;

- (b) setting aside the council's determination on February 22, 2022, that NHDES acted reasonably and lawfully in finding that there was a need for NCES's Stage VI capacity as required by RSA 149-M:11, III(a) and V; and
- (c) refusing to apply the decades-old administrative gloss NHDES has given RSA 149-M:11 since its adoption?

d) Specify the provisions of the constitutions, statutes, ordinances, rules, or regulations involved in the case, setting them out verbatim, and giving their citation. If the provisions to be set out verbatim are lengthy, their citation alone will suffice at that point and their pertinent text shall be annexed or appended to the petition. If the provisions aggregate more than 5 pages, their text may be filed as a separate appendix, including a table of contents referring to numbered pages. (Rule 10(d))

In its motion for rehearing, NCES cited the then-current RSA 149-M:6 (Supp. 2009). The legislature repealed the pertinent portion of the statute and this new version of the statute became effective in 2022. RSA 149-M:6 (Supp. 2022). Since the 2022 revision of the statute does not reflect the relevant provision that NCES cited to in its motion, NCES provides the 2009 version of the statute for the court's reference.

- RSA 21-M:3
- RSA 21-O:3
- RSA 21-O:9

² Included in this issue is the subsidiary question of whether the hearing officer's construction of the statute is unlawful because it would render it unconstitutional under the federal dormant commerce clause.

- RSA 21-O:14
- RSA 149-M:2
- RSA 149-M:3
- RSA 149-M:6 (Supp. 2009)
- RSA 149-M:9
- RSA 149-M:11
- RSA 149-M:12
- RSA 149-M:14
- RSA 541:3
- RSA 541:4
- RSA 541:6
- RSA 541-A:3
- RSA 541-A:11
- RSA 541-A:29
- U.S. Const. Art. 1, Sec. 8, Clause 3
- N.H. Code Admin. R. Env-WMC 205.16
- NH Session Laws 1993-133
- NH Session Laws 1996-251

e) *Specify the provisions of insurance policies, contracts, or other documents involved in the case, setting them out verbatim. If the provisions to be set out verbatim are lengthy, their pertinent text shall be annexed or appended to the petition. If the provisions aggregate more than 5 pages, their text may be filed as a separate appendix, including a table of contents referring to numbered pages. (Rule 10(e))*

There are no such controlling documents involved in the case. There are exhibits and other documents submitted to the waste management council below, but NCES does not understand such documents to be responsive to this requirement.

f) Set forth a concise statement of the case containing the facts material to the consideration of the questions presented, with appropriate references to the transcript, if any. (Rule 10(f))

This notice of appeal raises three issues of first impression³ in New Hampshire. The first issue is whether the New Hampshire Constitution recognizes standing for an organization where only a token number of the organization's members is allegedly affected by the challenged decision. The second issue is the proper construction of RSA 149-M:11, III(a) and V, resolution of which has profound implications for the validity of existing permits for currently operating landfills and the availability of waste disposal capacity in the state in the future. The third issue is whether RSA 149-M:11 as construed by the hearing officer and as considered in light of the statute as a whole is facially invalid under the dormant commerce clause of the United States Constitution.⁴

Permitting of waste disposal facilities in New Hampshire is carried out pursuant to rigorous, comprehensive statutory and regulatory provisions. *See generally* RSA ch. 149; *North Country Environmental Services, Inc. v. Town of Bethlehem*, 150 N.H. 606, 615 (2004) (RSA ch. 149-M “constitutes a comprehensive and detailed regulatory scheme . . .”); N.H. Code Admin R. Env-Sw 300 (permitting rules), 800 (landfill-specific rules), 1000 (requirements applicable to all facilities), and 1100 (additional facility requirements). One aspect of this regulatory scheme is the requirement that NHDES determine that a proposed facility provides a “substantial public benefit.” *North*

³ This summation of the issues of first impression is not intended to waive or modify in any way the issues set forth in section (c) of this notice of appeal.

⁴ The court's resolution of the second issue may moot the third.

Country, 150 N. H. at 612, *quoting* RSA 149-M:11, III (Supp. 2003). As part of this public benefit determination, NHDES must “consider, among other things, “[t]he . . . need for a facility of the proposed type, size and location to provide capacity to accommodate solid waste generated within the borders”” of New Hampshire. *Id.*, *quoting* RSA 149-M:11, III(a) (Supp. 2003). This “capacity need” is to be “identified as provided in paragraph V” of RSA 149-M:11. *Id.* Paragraph V of RSA 149-M:11 sets forth a methodology for determining capacity need over a projected twenty-year planning period, RSA 149-M:11, V(a), and provides that if a “shortfall” in disposal capacity is found after employing the methodology, “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). It is the meaning of this language that is one of the principal substantive issues on this appeal.

The appeal before the waste management council below arose from NHDES’s approval of the Stage VI cell at NCES’s landfill in Bethlehem. At the time NHDES issued the Stage VI permit, it estimated that approximately 40,444,900 tons of waste would be generated within the state’s borders over the statutory twenty-year planning period. NHDES also projected that existing facilities could provide only 22,752,200 tons of capacity to accommodate that waste over that same period. Over the planning period, then, there was a projected shortfall of 17,692,700 tons of disposal capacity. The total capacity of Stage VI is approximately 943,160 tons, far less than the 17,692,700-ton shortfall. As addressed in more detail in NCES’s motion for rehearing, Appx. at 59-63, historically NHDES has found a capacity need as prescribed by RSA 149-M:11, V, when the applicant proposes to provide capacity during the twenty-year period that is less than the amount of the projected shortfall. NCES refers to this historical practice as the “aggregate capacity need” approach. NCES’s original Stage VI application employed the aggregate capacity need approach to satisfy the public benefit requirement. Appx. at 64.

Late in its consideration of NCES’s original Stage VI application, NHDES notified NCES that it would be using what it called a “function of time” factor in determining capacity need. In subsequent communications with NHDES, NCES learned

that for the first time in the permitting of waste disposal facilities NHDES would be considering *when* during the planning period a “crossover” would occur. Included in the appendix to this notice of appeal are three charts to which the court can refer for an illustration of the crossover concept.⁵ Appx. at 487-489. The crossover occurs at the point in the twenty-year planning period at which NHDES projects that the amount of permitted disposal capacity in the state will drop below the projected amount of waste generated in the state. *Id.* According to NHDES at the time of these communications, while a facility could receive approval if it proposed providing disposal capacity for some period before the crossover, the facility would also have to provide some disposal capacity *after* the crossover point to satisfy the capacity need requirement. As originally proposed, Stage VI would have exhausted all of its capacity before the projected crossover, so NHDES informed NCES that it would deny the pending application if it were not withdrawn. NCES objected to NHDES’s introduction of the crossover concept and its institution of the “function of time” element without a statutory or rule change but withdrew its application to avoid a denial. Based on guidance from NHDES that it could find a capacity need if Stage VI provided capacity for a year after the crossover point, NCES filed a new Stage VI application proposing just that. NHDES eventually granted the second Stage VI application, allowing Stage VI to begin operations in 2021 but requiring it to continue to operate through the end of 2026. NCES refers to this construction of RSA 149-M:11, V, as the “partial function of time” approach. The chart at page 488 of the appendix illustrates how NHDES used the partial function of time approach in approving Stage VI.

CLF, an environmental activist organization, appealed the approval of the Stage VI permit to the waste management council pursuant to RSA 21-O:14. Among the claims it asserted was that it had standing because it had an unspecified number of

⁵ These charts are based on similar charts introduced into evidence below but have been modified and included in the appendix by NCES solely for illustrative purposes so the court can more readily understand the competing constructions of RSA 149-M:11, V, at issue on this appeal.

“members” living in Bethlehem who would allegedly be adversely affected by the operation of Stage VI. It also asserted that NHDES could not find a capacity need sufficient to support a determination of public benefit where only one year of capacity would be provided after the crossover point. CLF contended in its notice of appeal that NHDES could not have found that Stage VI met the capacity need requirement because Stage VI would begin operating in 2021, before the projected crossover point.

NCES sought to dismiss the appeal based on CLF’s lack of standing. CLF objected and included affidavits from two of its members alleging that they anticipated being adversely affected by the operation of Stage VI. NCES challenged the sufficiency of the affidavits and requested an evidentiary hearing on the motion. The hearing officer denied NCES’s motion on March 17, 2021, denying NCES’s request for an evidentiary hearing and holding among other things that the allegations of the two affiants were sufficient to establish standing on the part of CLF to challenge the Stage VI permit. Appx. at 5. NCES sought reconsideration, renewing its request for an evidentiary hearing and contesting the hearing officer’s conclusion that an allegation of future harm to two members of a regional organization is adequate to support the organization’s standing. NCES also challenged the hearing officer’s reliance on rules promulgated by the other environmental councils to justify his conclusion. The hearing officer denied that motion for reconsideration. Appx. at 10.

NCES then sought dismissal of CLF’s notice of appeal for failure to state a claim. The hearing officer granted that motion in one respect, dismissing CLF’s capacity need claim on the ground that RSA 149-M:11, V does not “provide for a further temporal or other inquiry into whether a given proposal is ‘substantial’ or not.” Appx. at 17. CLF sought reconsideration of the dismissal of that claim, arguing among other things that the capacity need element of the appeal raises questions of fact that could not be resolved by the hearing officer on a motion to dismiss. The presiding hearing officer then retired, and the newly appointed hearing officer granted CLF’s motion for reconsideration. Appx. at 29.

The council held a two-day evidentiary hearing on the merits of the appeal on February 18 and 22, 2022. Appx. at 68. At the conclusion of the hearing on February 22, 2022, the council deliberated publicly with the hearing officer and ruled against CLF on each of the grounds on which it had appealed, finding, among other things, that:

1. NHDES did measure, and acted reasonably in measuring, the short- and long-term need for Stage VI; and
2. NHDES acted lawfully and reasonably in determining that there existed a capacity need for Stage VI.

Appx. at 407-08, 414.

Approximately two and a half months later the council's hearing officer issued a written order that was consistent with all of the determinations made in the council's February 22, 2022, public deliberations with one exception. Instead of ruling, as the council had, that NHDES had acted lawfully and reasonably in finding a capacity need for Stage VI, the hearing officer held that the Stage VI approval was unlawful because, in his view, RSA 149-M:11, V, requires that the capacity an applicant proposes to provide must be consumed *entirely* after the projected crossover point. Appx. at 35-44. NCES refers to this as the "pure function of time" approach. At page 489 of the appendix is a chart that illustrates how the pure function of time approach would apply to the Stage VI application. Because the NCES Stage VI facility would operate for a period of time before the projected crossover in 2025, the hearing officer concluded that NHDES acted unlawfully in approving that permit and remanded it to NHDES for further action. Appx. at 49.

The hearing officer's order transformed NCES from a real party in interest defending a permitting decision in its favor to a "[p]erson[] aggrieved by the disposition" of CLF's appeal within the meaning of RSA 21-O:14, III. Unlike CLF, which appealed the Stage VI approval to the council under RSA 21-O:14, I-a, and had the advantage of all of the procedural protections afforded an appellant by statute and the council's rules, the only remedy NCES had for a hearing officer decision that purported to hold its operating permit invalid was to seek rehearing under RSA 21-O:14, III.

On June 10, 2022, NCES moved for rehearing, contending that RSA 149-M:11, V, was satisfied by the aggregate capacity need approach and that both the partial function of time and pure function of time approaches were contrary to the statute. Appx. at 72-85. NCES prepared and submitted as exhibits to its motion records it obtained from NHDES and analysis of those records establishing that the agency had applied the aggregate capacity need approach in permitting consistently for decades and had been making public benefit determinations for over a quarter of a century without considering the “function of time” element it first introduced in 2020. Appx. at 60-64, 102-141. NCES thereafter received a response from NHDES to a public records request under RSA ch. 91-A that established that NHDES had considered and rejected the function of time concept as part of the determination of capacity need over twenty years ago and moved to supplement the record on rehearing with these newly received documents.⁶ NCES’s motion for rehearing also challenged the hearing officer’s earlier interlocutory orders on CLF’s standing and argued that the hearing officer’s construction of RSA 149-M:11, V, effectuated the facially discriminatory intent of RSA ch. 149-M against waste originating outside of New Hampshire, thereby violating the dormant commerce clause of the United States Constitution. Appx. at 85-90. While the hearing officer lacks jurisdiction to declare the statute unconstitutional, NCES contended that interpreting the statute in a way that rendered it unconstitutional is contrary to established principles of statutory construction. Appx. at 87.

On November 3, 2022, the hearing officer denied NCES’s motion for rehearing and NHDES’s motion for “reconsideration,” Appx. at 272-73, 291. NCES now seeks supreme court review of the hearing officer’s denial of its motion for rehearing.

⁶ The hearing officer denied the motion to supplement and granted CLF’s motion to strike the exhibits accompanying NCES’s motion for rehearing in separate orders on the same day he denied NCES’s motion for rehearing. These rulings are the subject of a motion for rehearing filed in the council contemporaneously with this notice of appeal.

- g) State the jurisdictional basis for the appeal, citing the relevant statutes or cases. (Rule 10(g))*

The jurisdictional basis for this appeal is RSA 541:6 (appeals of administrative agency decisions on motions for rehearing are by petition to supreme court) and RSA 21-O:14, III (appeals from environmental council's dispositions of appeals to be made pursuant to RSA ch. 541).

- h) A direct and concise statement of the reasons why a substantial basis exists for a difference of opinion on the question and why the acceptance of the appeal would protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice. (Rule 10(h))*

With respect to the first issue raised by this notice of appeal (i.e. CLF's standing), while this court has recognized that an organization can have standing to represent its members, it has never held that an organization may establish standing under the state constitution through the expedient of identifying a token number of members who allegedly have been directly affected by the challenged decision. In all of its prior decisions on organizational standing, all or nearly all of the organization's members were affected by the decision. The council's hearing officer found that CLF has standing based on the affidavits of two of its members forecasting harm from the operation of Stage VI. The hearing officer based his decision on a *wetlands council* rule⁷ that purports to give standing to an organization if one of its members is aggrieved by the challenged NHDES decision and on federal law applying the same principle in "citizen suits" expressly authorized by federal environmental protection statutes for enforcement of their provisions.

⁷ There is no such rule in the waste management council's rules.

Because standing is an element of the inquiry regarding whether there is a controversy that is justiciable under the state constitution, neither a state administrative rule (particularly of another tribunal) nor federal precedent designed to further the statutory goal of private enforcement has any bearing on whether this court will recognize token-member organizational standing. The court's resolution of this issue is important to the administration of justice because if token-member organizational standing is found to be consistent with the constitution it will give routine access to the state courts to ideological interest groups.

If the court determines, however, that the hearing officer erred (1) by denying NCES an evidentiary hearing on its motion, (2) by concluding that the two members of CLF could establish their individual standing by relying on predictions of harm, or (3) by failing to deliberate with the council on the mixed questions of law and fact arising from NCES's challenge to CLF's standing as required by RSA 21-M:3, IX(d), it will not be necessary for the court to reach the constitutional sufficiency of CLF's standing on the merits.

As for the second issue raised by this notice of appeal (i.e., the proper construction of RSA 149-M:11, V), it is evident from the statement of the case above that there is a substantial basis for disagreement over the statute's meaning. For over twenty-five years NHDES has found a capacity need as required by RSA 149-M:11, III(a) is established if there will be a shortfall of waste disposal capacity over the twenty-year planning period and the applicant is proposing to provide capacity less than the amount of the shortfall during the twenty-year period. Appx. at 487. Beginning with NCES's first Stage VI application, and without any change to RSA 149-M:11 or any rulemaking modifying the public benefit analysis, NHDES decided to introduce a "function of time" element – that is, a consideration of *when* in the planning period the proposed capacity would be provided – to that analysis and required NCES to satisfy a newly created partial function of time approach to demonstrate capacity need for Stage VI. Appx. at 59-65, 488. In its prehearing memorandum before the council and in its motion for rehearing below, NHDES proposed an approach to determining capacity need that called for the agency to

exercise its discretion as to whether to consider when in the twenty-year planning period the proposed capacity would be provided. Appx. at 51-55, 264. The hearing officer's ruling represents yet a fourth approach to assessing capacity need, requiring for the first time since the statute's adoption over thirty years ago that NHDES use the pure function of time approach. Appx. at 35-44, 266-72, 276-79, 489.

The court's acceptance of this appeal would avert substantial and irreparable injury to NCES and its customers by preventing the potential closure of Stage VI. Attached as an exhibit to this notice is a letter from CLF to the Office of the Attorney General demanding that NHDES revoke the Stage VI permit as a result of the hearing officer's order. Appx. at 485.⁸ NCES currently accepts waste from residents, businesses, and governmental entities in about one hundred and fifty New Hampshire municipalities. All of New Hampshire's commercial landfills are operating at permitted capacity, and NCES's competitors could not accept the waste now being disposed of at NCES without displacing their own customers. There are no facilities in Vermont that could accept that waste, and facilities in Maine and Massachusetts are facing capacity constraints, so NCES's current customers would very likely have to make arrangements to ship their waste much greater distances. Those customers would certainly pay substantially more than they now do for transportation of their waste, and the fee they would pay for disposal is a matter of speculation. If the court were to decline to accept this appeal and NHDES were to revoke the Stage VI permit, then, NCES would immediately lose its New Hampshire customers, and those customers would face imminent disruptions of their solid waste management arrangements, with no apparent alternative available, and the certainty of price shocks if they are able to find alternatives. Before such a chaotic outcome is permitted to occur, the court should carefully assess the soundness of the hearing officer's conclusions below.

Finally, even if the court were to uphold the hearing officer's construction of RSA 149-M:11, V, the statute's overt discrimination against importation of out-of-state waste

⁸ This letter is not part of the record but is provided as an exhibit solely for illustrative purposes so the court can more readily understand the repercussions of the hearing officer's order.

for disposal in privately-owned landfills is facially violative of the federal dormant commerce clause. In his order on rehearing, the hearing officer gave this argument short shrift, but there is abundant federal authority, including multiple United States Supreme Court opinions, invalidating such discrimination against out-of-state waste. Appx. at 85-90, 279-81, n.4. If necessary, this court should determine the constitutionality of the statute before review is sought in the federal system.

- i) *A statement that every issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading. (Rule 10(i))*

NCES raised each of the questions set forth in this notice of appeal before the Council in a motion for rehearing as required by RSA ch. 541, Accordingly, each question has been properly preserved for consideration by this court.

Certification / Statement of Compliance

Pursuant to Supreme Court Rules 5(1), 10(7), 26(2), and 26(7), I hereby certify that a copy of this Notice of Appeal has been forwarded by email transmission to the following parties and the agency from which the appeal is taken. I further certify that all parties and the agency have agreed to solely accept service electronically.

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