

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

Case No. 2022-\_\_\_\_\_

In re: Conservation Law Foundation, Inc. Appeal

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**RULE 10 APPEAL FROM ADMINISTRATIVE AGENCY  
(NEW HAMPSHIRE WASTE MANAGEMENT COUNCIL)**

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STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL SERVICES

By its Attorneys,

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2022 Term

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In re: Conservation Law Foundation, Inc. Appeal

**PETITION FOR APPEAL PURSUANT TO RULE 10 FROM THE NEW HAMPSHIRE  
WASTE MANAGEMENT COUNCIL**

NOW COMES the State of New Hampshire Department of Environmental Services by its attorneys the New Hampshire Office of the Attorney General and respectfully petitions this Honorable Court to grant an appeal, pursuant to RSA 541 and N.H. Supreme Court Rule 10, to review the decisions of the New Hampshire Waste Management Council (“Waste Council”) in the above captioned matter.

**I. PARTIES**

Appellant: The New Hampshire Department of Environmental Services  
 (“Department”)  
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 Concord, New Hampshire 03301  
 P.O. Box 95, Concord, New Hampshire 03302-0095

Represented by: K. Allen Brooks  
 Senior Assistant Attorney General. N.H. Bar #16424  
 Joshua C. Harrison  
 Assistant Attorney General. N.H. Bar #269564  
 33 Capitol Street, Concord, New Hampshire 03301

Appellee: Conservation Law Foundation, Inc. (“CLF”)  
 27 North Main Street  
 Concord, New Hampshire 03301

Represented by: Thomas F. Irwin, Esq., N.H. Bar #11302  
 Heidi Trimarco, Esq., N.H. Bar #266813

Other Party: North Country Environmental Services, Inc. (“NCES”)<sup>1</sup>

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<sup>1</sup> The Department anticipates that NCES will also file a request for appeal.

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Bethlehem, New Hampshire 03574 (Facility Address)

Represented by: Bryan K. Gould, Esq., N.H. Bar #8165  
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## **II. DECISIONS BEING APPEALED**

1. State of N.H. Waste Management Council “Final Order on Appeal,” in Docket No. 20-14 WMC, dated May 11, 2022.
2. State of N.H. Waste Management Council “Order on State of New Hampshire Department of Environmental Services’ Motion for Reconsideration,” in Docket No. 20-14 WMC, dated November 3, 2022.

## **III. QUESTIONS PRESENTED**

1. Whether the Hearing Officer erred when he decided whether the permit properly addressed “need” as a matter of law because the determination of whether a proposed facility satisfies a “need” is a factual one.
2. Whether the Hearing Officer erred when he determined that RSA 149-M:11, III(a) and V preclude NHDES from finding that a proposed facility satisfies a “need” unless the proposed facility will only operate during a period of capacity shortfall.

## **IV. PROVISIONS OF RELEVANT STATUTES AND OTHER DOCUMENTS RELATED TO THE QUESTIONS PRESENTED**

### **Statutes**

N.H. RSA 21-M:3	(Appendix Pages 624-626)
N.H. RSA 21-O:9	(Appendix Pages 627-628)
N.H. RSA 21-O:14	(Appendix Pages 629-631)
N.H. RSA 149-M:11	(Appendix Pages 632-633)

## **Other Documents**

CLF's Petition for Appeal dated November 9, 2020 (Appendix Pages 3-19);

Waste Council Final Order on Appeal dated May 11, 2022 (Appendix Pages 20-39);

Department's Motion for Reconsideration dated May 31, 2022 (Appendix Pages 40-46);

Waste Council Order on State's Motion for Reconsideration dated November 3, 2022 (Appendix Pages 57-69).

Waste Council Transcript from February 18 and 22, 2022 Hearing (Appendix Pages 70-623).<sup>2</sup>

### **V. PROVISIONS OF INSURANCE POLICIES, CONTRACTS, OR OTHER DOCUMENTS**

Not applicable to this appeal.

### **VI. STATEMENT OF THE CASE**

The Department brings this appeal to determine whether the Waste Council, through its Hearing Officer, erred in determining as a matter of statutory interpretation that RSA 149-M:11, III(a) and V prohibit the Department from granting a solid waste facility permit to a facility that proposes to operate prior to a projected shortfall in capacity despite the Waste Council finding as a factual matter that the Department acted reasonably in granting the Permit with respect to the capacity need requirements of RSA 149-M:11, III(a) and V.

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<sup>2</sup> Supreme Court Rule 10 requires that if the moving party in an appeal seeks that a transcript "be prepared and include[d] [in] the record of appeal, the moving party should consult the administrative agency's regulations and/or RSA 541-A:31." N.H. Sup. Ct. R. 10. RSA 541-A:31 provides that "[u]pon the request of any party or upon the agency's own initiative, such [hearing] record shall be transcribed by the agency if the requesting party or agency shall pay all reasonable costs of such transcription." RSA 541-A:31, VII. With respect to transcripts, the Waste Council rules provide that "[t]he council, upon request of a party, shall provide, at cost, a duplicate tape of the hearing. Any person desiring a transcript of the hearing prepared by a qualified stenographer shall provide the stenographer and shall bear all expenses associated with the preparation of the transcript. Any transcript so prepared shall be made available to the council for copying at the council's expense." N.H. Admin. R. Env-WMC 205.05(b). The transcript included with this petition for appeal was produced following the Waste Council's Final Order on Appeal using a qualified stenographer at Department expense and will be shared with the Waste Council.

On March 24, 2020, the Department received an application for a Type I-A Modification to a Solid Waste Management Facility Permit from NCES to expand their solid waste facility in Bethlehem, New Hampshire and operate for approximately six years, through December 2026. Following a robust review of the application, which included a public hearing and comment period, the Department granted NCES its Type I-A Permit Modification on October 9, 2020, Permit No. DES-SW-SP-03-002 (“Permit”). The Permit authorized NCES to expand its existing facility by 1.24 million cubic yards of airspace and conditioned the Permit on NCES operating the facility until December 31, 2026. The expansion is known as Stage VI. As part of its review and its permit issuance, the Department created a 48-page Application Review Summary, which detailed the Department’s review of the permit application.

On November 9, 2020, CLF appealed the Permit to the Waste Council arguing, among other things, that the Department’s issuance of the Permit was unlawful and unreasonable because it does not satisfy the substantial public benefit criteria in RSA 149-M:11, III(a). CLF Notice of Appeal, A3-19. Following many prehearing pleadings and orders, the Waste Council held a two-day hearing on February 18 and 22, 2022. The Waste Council heard testimony from a witness for CLF and then from a panel of Department witnesses from the Waste Management Division who testified about their role and their capacity need analysis performed under RSA 149-M:11, III(a) and V. These provisions of RSA 149-M:11 require the Department to assess many factors and determine what the total projected New Hampshire generated waste will be over a 20-year planning period and then to determine the total amount of remaining capacity at existing and permitted landfills to identify whether a shortfall in capacity occurs over the 20-year planning period. Specifically, RSA 149-M:11, III and V read as follows, in relevant part:

- III. The department shall determine whether a proposed solid waste facility provides a substantial public benefit based upon the following criteria:

- (a) The short- and long-term need for a solid waste facility of the proposed type, size, and location to provide capacity to accommodate solid waste generated within the borders of New Hampshire, which capacity need shall be identified as provided in paragraph V.

...

V. In order to determine the state's solid waste capacity need, the department shall:

- (a) Project, as necessary, the amount of solid waste which will be generated within the borders of New Hampshire for a 20-year planning period. In making these projections the department shall assume that all unlined landfill capacity within the state is no longer available to receive solid waste.

...

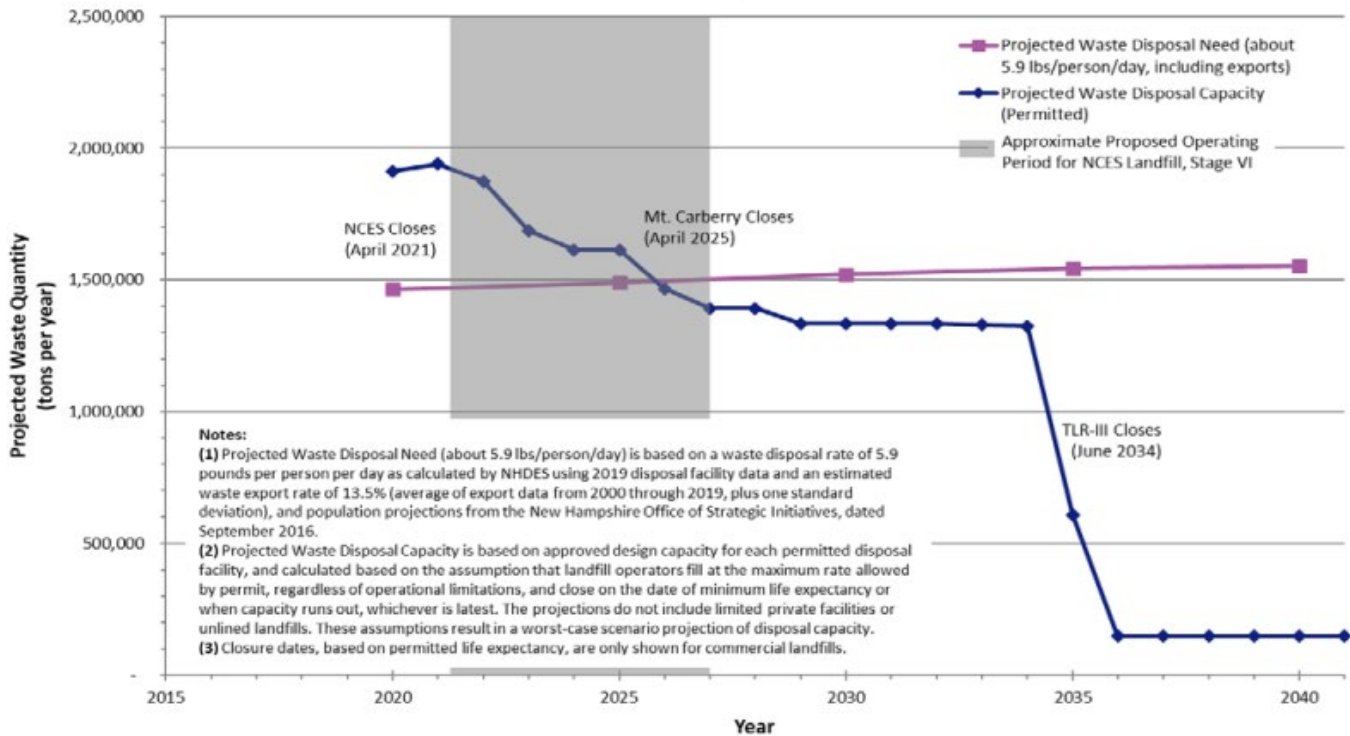
- (d) Identify any shortfall in the capacity of existing facilities to accommodate the type of solid waste to be received at the proposed facility for 20 years from the date a determination is made under this section. If such a shortfall is identified, a capacity need for the proposed type of facility shall be deemed to exist to the extent that the proposed facility satisfies that need.

RSA 149-M:11, III(a) and V. The Department is able to produce the results of this analysis on a chart that demonstrates the amount of landfill capacity over the 20-year planning period compared against the projected total New Hampshire generated waste over that time. The Department also positions the proposed facility's operating life onto the chart to further evaluate short- and long-term need and capacity need consistent with RSA 149-M:11, III(a) and V. The Department's evaluation of these results regarding when and by how much a shortfall occurs is a consideration in the RSA 149-M:11 public benefit determination and the focus of this appeal.<sup>3</sup> Below is the chart produced by the Department for the review of the subject permit application for the proposed expansion of NCEC Stage VI.

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<sup>3</sup> RSA 149-M:11 requires the Department to take into account multiple other competing factors such as location, size, and type of proposed facility as well as the concerns of the public and the host community. See RSA 149-M:11, III and RSA 149-M:11, IV.

## Projected Waste Disposal Need & Capacity for New Hampshire



During the hearing, the Department referred to its Application Review Summary, which contained its capacity shortfall projections and this chart, and testified that when reviewing the application and completing the RSA 149-M:11, V capacity shortfall projection analysis, the Department determined that a shortfall would occur in approximately 2025. As the Waste Council found and the chart demonstrates, NCES Stage VI would begin operating around 2021 and operate through the end of 2026. The Waste Council heard testimony, rationale, and argument regarding the NCES Stage VI proposal and the reasonableness of the Department’s capacity need determinations.

During deliberations, the Hearing Officer posed multiple questions to the Waste Council consisting of both narrow questions of fact the Hearing Officer needed to make rulings of law



and then more general questions regarding the reasonableness of the Department's decision. Waste Council Hearing Transcript, A428-554.

The Waste Council, with respect to RSA 149-M:11, III(a) and V, deliberated and made the following unanimous decisions on the issues before them that are relevant to this Rule 10 Petition for Appeal:

- (1) "DES did measure the short and long-term capacity requirements of the [State.]" *Id.* at Day 2 Page 87 Lines 13-23; Page 88, Lines 1-7, A514-515.
- (2) "DES acted reasonably [in its] measurement of the short and long-term capacity needs required by [RSA 149-M:11, III(a)] in issuing the permit." *Id.* at Day 2 Page 92 Lines 10-23, A519.
- (3) "DES was lawful in finding the capacity need during the life [of the permit.]" *Id.* at Day 2 Page 99 Lines 9-20, A526.
- (4) "DES acted reasonably in issuing [the] permit to help address the capacity needs during the life of the permit." *Id.* at Day 2 Page 109 Lines 14-23, A536.

As such, the Waste Council determined that the Department acted reasonably with respect to RSA 149-M:11, III(a) and V analysis and public benefit determination. The Waste Council upheld the Permit with respect to CLF's other remaining challenges as well. *See* Final Order on Appeal, A20-39.

On May 11, 2022, the Hearing Officer issued the Waste Council's Final Order on Appeal, which accepted the Waste Council's votes and decisions. However, without overturning the Waste Council's determinations on the reasonableness of the Department's capacity need determinations, the Hearing Officer decided as a matter of law that the Department acted *unlawfully* with respect to its determination that the proposed Stage VI facility satisfied a capacity need because the Permit authorized operation of the facility prior to the identified shortfall in capacity point. The Hearing Officer determined, relying on the term "satisfies" in RSA 149-M:11, V(d), that "[i]t is impossible for a proposed facility to satisfy a capacity need

beyond the scope of said facility’s lifespan because said facility cannot accommodate capacity need during a period when it is not operating.” Final Order on Appeal, page 11, A30. Further, the Hearing Officer stated that “[a]s the only way a proposed facility can satisfy a need is by operating, a proposed facility can only provide for a capacity need during the breadth of its lifetime.” *Id.* at 11-12, A30-31. Ultimately, the Hearing Officer concluded that:

if a proposed facility operates for a period without any shortfall, then [the Department] cannot lawfully find there to be a capacity need thereby meeting the requirement of the (a) criteria when determining substantial public benefit...The record reflects that the NCES Facility would operate for a period without capacity need, and capacity need is a requisite element for finding substantial public benefit under the (a) criteria. Accordingly, NHDES acted unlawfully when it determined that the NCES Facility would provide a substantial public benefit based on the capacity need of the state and the NCES Facility’s ability to accommodate waste generated in New Hampshire.

*Id.* at 14-15, A33-34. To support his interpretation, the Hearing Officer relied upon the present-tense form of the verb “satisfies” in RSA 149-M:11, V(d). The Hearing Officer provided the following rationale:

The word ‘satisfies’ is a present-tense verb, through which ‘the proposed facility’ (the subject) acts upon ‘that need’ (the object): this language imposes a present-action relationship between the proposed facility and the capacity need. The use of the word ‘satisfies’ in this context results in two implications: first, a proposed facility must have a present effect on capacity need, and second, it is not enough for a proposed facility to just affect capacity need—the proposed facility must ‘satisfy’ it to some degree.

Final Order on Appeal, at 10, A29. Essentially, the Hearing Officer’s Final Order on Appeal required a strict 1:1 temporal relationship between facility operation and capacity shortfall that the statute does not contemplate or require.

The Department filed a Motion for Reconsideration on May 31, 2022 that was limited to the Hearing Officer’s determination that the Department had acted unlawfully with respect to the capacity need analysis. Department’s Motion for Reconsideration, A40-46. CLF objected to the Department’s Motion for Reconsideration. CLF Objection to Department’s Motion for

Reconsideration, A47-56. In the Department’s Motion for Reconsideration, the Department recognized that much of the Hearing Officer’s Final Order on Appeal is not without merit and is well-taken but argued against the Hearing Officer’s interpretation of the word “satisfies” to imply a strict temporal relationship between operation and capacity shortfall and the resulting conclusions that followed. *Id.* The Department argued that the statute does not contemplate or require such a strict relationship and that much of the statute involves language that requires looking into the future and beyond the present impact to determine substantial public benefit and that the Hearing Officer’s interpretation would render the other requirements and necessary considerations of RSA 149-M:11, III meaningless. The Department further argued that the question of whether a proposed facility providing capacity at a certain point in time can satisfy a capacity shortfall elsewhere in the 20-year planning period, is a question of fact not law. As identified above, the Waste Council had considered this factual question and determined the Department acted reasonably in issuing the Permit.

On November 3, 2022, the Hearing Officer denied the Department’s Motion for Reconsideration reaffirming his initial Final Order on Appeal. Order on State’s Motion for Reconsideration, A57-69.

## **VII. JURISDICTIONAL BASIS OF APPEAL**

This appeal is filed pursuant to RSA 21-O:14, III and RSA 541. Specifically, RSA 21-O:14, III provides that “[a]ny party aggrieved by the disposition of an administrative appeal before any council established by this chapter may appeal such results in accordance with RSA 541.” RSA 21-O:14, III. RSA 541:3 provides that

Within thirty days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, 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 all grounds for rehearing, and the commission may grant

such rehearing if in its opinion good reason for the rehearing is stated in the motion.

RSA 541:3. In turn, RSA 541:6 provides that “[w]ithin thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.” RSA 541:6. As provided herein, the Department received the Waste Council’s Final Order on Appeal on May 11, 2022 and timely filed a motion for reconsideration. On November 3, 2022, the Waste Council issued its order denying the Department’s motion for reconsideration.

### **VIII. REASONS FOR ACCEPTANCE**

This appeal raises issues fundamental to the permitting of landfills in the State of New Hampshire pursuant to RSA 149-M. The three parties to the appeal all arrived at different conclusions with respect to implementation of the relevant statutory sections. In fact, the Waste Council members and the Hearing Officer also seemed to have reached different conclusions with respect to the statute’s application. The issues in the case implicate both significant environmental impacts of statewide importance and, potentially, a very significant cost on the regulated community.

The Hearing Officer’s interpretation of RSA 149-M:11, III(a) and V introduces a strict temporal relationship that is not contemplated by statute and is based upon factual determinations that the Waste Council rather than the Hearing Officer is obligated to make. The result of the Hearing Officer’s strict interpretation removes necessary Department discretion and evaluation of a permit application.

The Supreme Court’s acceptance of this appeal is necessary to determine whether RSA 149-M:11, III(a) and V requires the strict temporal relationship the Hearing Officer concludes, which negates the valuable Department discretion involved in these complex issues, or whether the Department may reasonably utilize its discretion, as the Waste Council found, to determine

that an applicant's proposed capacity may satisfy a capacity need even though an applicant may propose to operate its facility during periods in which no shortfall is identified. Accordingly, the Department respectfully requests that the Supreme Court of New Hampshire accept this appeal.

**IX. STATEMENT THAT ISSUES HAVE BEEN RAISED AND PRESERVED**

The issues presented within this petition for appeal were timely presented to the Waste Council and have been properly preserved for appellate review by motions, objections, and motions for reconsideration.

WHEREFORE, the Department respectfully requests that this Honorable Court:

- A. Grant this Rule 10 Petition for Appeal;
- B. Reverse the decision of the Waste Management Council's May 11, 2022 Final Order and November 3, 2022 Order on Reconsideration to the extent they conclude that the Department acted unlawfully;
- C. Find that RSA 149-M:11, III(a) and V do not require the Department to restrict permitting of proposed solid waste facility's to only times during which a capacity shortfall is projected; and
- D. Grant such other and further relief as justice may require.

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL  
SERVICES

By its attorneys,

JOHN M. FORMELLA  
ATTORNEY GENERAL

ANTHONY M. GALDIERI  
SOLICITOR GENERAL

Date: December 5, 2022

/s/ Joshua C. Harrison  
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served via the court's electronic filing service and via e-mail, to Conservation Law Foundation, Inc., through its attorneys, Tom Irwin, Esq. and Heidi Trimarco, Esq., at 27 North Main Street, Concord, New Hampshire 03301, and to North Country Environmental Services, Inc., through its attorneys, Cleveland, Waters and Bass, P.A., Bryan Gould, Esq., Cooley Arroyo, Esq., and Morgan Tanafon, Esq., at 2 Capital Plaza, P.O. Box 1137, Concord, New Hampshire 03302-1137.

Date: December 5, 2022

/s/ Joshua C. Harrison  
Joshua C. Harrison