

# Bethlehem grapples with landfill image

## Court gives win to local power over state rules

■ Ruling in Bethlehem dump case has statewide implications in local-vs.-state control.

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Sunday News Staff

A town once renowned for the purity of its mountain air is rejoicing because a judge has recognized its authority to regulate a private landfill that has become the repository for the North Country's trash.

Before the air conditioner tempered heat and humidity, city dwellers summured in Bethlehem and doctors recommended asthmatics vacation in the town.

But that was long before Harold Brown got a zoning variance in 1976 to operate a four-acre landfill in an old gravel pit. The dump — operated since 1989 by North Country Environmental Services, a division of Casella Waste Systems of Rutland, Vt. — now covers 51 acres. That site is expected to reach capacity within two years and, in March, the state gave NCES preliminary approval to extend its operation to another 11 acres.

That expansion is on hold now because Grafton County Superior Court Judge Jean K. Burling ruled there are "interstices" — that is, cracks — in the law under which the state Department of Environmental Services regulates the operation of landfills. The law's flexibility allows local officials to exercise some zoning, building and site planning authority.

"The rules of operation leave somewhat larger interstices between defined state monitoring procedures in which the town may exert some measures of local control that do not interfere with the state regulatory scheme," Burling wrote.

The judge's decision, in a lawsuit filed by NCES a year ago, has statewide implications. It addresses the delicate balance be-

tween state regulation of how landfills operate and local control over where they are situated, and it touches on the indelicate issue of how each community meets the statutory requirement to dispose of the trash it generates.

"It is contrary to the legislative scheme that any one town should be burdened by the uncontrolled growth of a landfill," Burling said in her 28-page decision dated April 24.

"This is a very significant court decision to the town of Bethlehem and other towns in the state who could become victims of a 'runaway train,' like Bethlehem has been," said town counsel Edmund J. Boutin.

The judge, Boutin said, didn't do what NCES had hoped she would.

"They wanted to have the court say, 'The town is out of the picture. What we do is just between us and the DES and we can go

anywhere we damn well please,'" Boutin said.

"Today, we are the only town in this position, but this is really a fight for every town's local control," said Bethlehem Selectman Lon Weston, who cautioned that this was one round in a costly multi-round legal battle that is expected to move now to the state Supreme Court.

"We're thrilled by it," Selectman George Manupelli said of Burling's decision. "We now have the court on our side, which we had not had before. It's a different legal future. We've got a resolute board and a strong attorney and a reasonably healthy legal budget and the support of the town."

Neither Bryan K. Gould, the Concord lawyer who represented NCES, nor Casella's vice president, Joseph Fusco, responded to the Sunday News' telephone messages seeking comment. Fusco was quoted in the Littleton Courier as saying that the company viewed Burling's ruling as "another step in the process of reaching a definitive interpretation of all the issues surrounding this facility and the application of state solid waste policy generally."

Maureen Smith, the senior assistant attorney general who has been monitoring the case for the DES, said she expects Gould will ask the Supreme Court to review Burling's decision.

"There are very few cases on the preemption issue, with regard to solid waste facilities," Smith said of the law that governs the way the state regulates landfills.

Lawmakers amended that law in 1996. Prior to that date, a landfill application seeking state design and construction approval had to be accompanied by evidence that town officials sanctioned the plan. Now, the DES doesn't care whether the applicant has his local ducks in order.

"If there is a dispute between the landfill owner and the town, that has to go to the court," Smith said.

Which is why NCES took its complaint to Burling's court.

The landfill operator had won a first round when the Supreme Court, in May 2001, affirmed a lower court ruling that rejected the town's arguments with regard to the 51-acre site. The courts found that a zoning variance and other permits obtained from the town in the 1980s covered the state-approved landfill operating on those 51 acres.

The high court did not address the issue of state preemption, but Burling has. She examined the Solid Waste Management statute to determine what the town may regulate within the existing 51-acre NCES site and whether the town could prohibit further development of the landfill.

Burling ruled:

- "That the Legislature in-

tended to require landfill operators to get permission from local authorities to site or locate landfills within their boundaries, so long as such local control is made in good faith and does not violate the overall state plan for solid waste."

- "NCES's claim for a declaration from the court that it may proceed with development of the landfill subject only to applicable state regulation, but without interference from the town, is denied."

- "The town's height ordinance is valid to control the vertical growth of the landfill within the 51 acres." The town wants to impose a height restriction of 95 feet.

- "NCES is required to get a building permit for the (landfill gas utilization facility) subject to the understanding of the town that the LGUF is not an incinerator and that the allowable particulate matter released into the air is a preempted issue. NCES is also required to get a building permit for any other specific structure."

The LGUF is a 40-foot high apparatus that evaporates leachate by burning it at high pressure in methane gas generated by the decomposing trash in the landfill. It has operated for three years despite the town's never having issued either site plan approval or a building permit.

Last week, Boutin filed a request asking the court to clarify its definition of the LGUF.

Burling ruled the fuel-combustion device did not meet the state's definition of an incinerator because it burns about 25 pounds of waste material per hour. The state does not issue incinerator permits for any device that destroys less than 200 pounds of waste per hour.

"That's the cut-off below which they don't regulate. It doesn't mean it isn't an incinerator, merely not a state-regulated incinerator," Boutin said.

He noted the town would like to enforce the ordinance it has that bans all incinerators.

The town's lawyer emphasized the incinerator definition was a minor point and that, from his perspective, "the judge was right on almost everything."

He said the decision was carefully written and rooted in the belief that state lawmakers intended that the state and its communities "operate side-by-side" when it comes to regulating landfills.

"They are supposed to complement each other. . . . The towns retain the right to determine by

zoning where and when these facilities can go," Boutin said.

Rep. Ned Densmore, D-Franconia, tried unsuccessfully earlier this year to convince his legislative colleagues that it was wrong for the DES to ignore a community's objections to a proposed landfill. He introduced a bill that would have required proof of local approval before the state agency could issue its permits.

"The report on that bill was that the DES didn't want to be faced with the horrible duty of determining which approvals were applicable," Densmore said.

Also contributing to the defeat of the measure, Densmore said, was the opposition expressed by some of the 50 or so towns that truck to the Bethlehem landfill and don't know where else they are going to put their trash. (The only other private landfill in the state is Waste Management's Turnkey disposal facility in Rochester.)

But both Densmore and Lon Weston, the Bethlehem selectman, pointed to the new dump on the North Country's horizon. It is a 1,000-acre facility at Mount Carberry in Success, where the region's paper mills have carted their sludge since the mid 1980s.

The Carberry landfill — a state-of-the-art facility sitting on 220 feet of impermeable silt — is now run by the newly formed Androscoggin Valley Regional Refuse Disposal District. It is licensed to take up to 120,000 tons of municipal solid waste a year and it's looking for customers.

Weston said Bethlehem could dump a ton of municipal trash at Carberry for \$53, compared to the current tipping fee of \$77 at the NCES landfill.

Meanwhile, Bethlehem must deal with its tarnished image.

"Doctors used to have patients come to Bethlehem to cure respiratory illnesses. It was scientifically proven that we had the cleanest air in the country," Weston said.

"Now, not only are we not getting anything from the responsibility of storing 51 acres of municipal waste for eternity, but it is costing us the biggest asset this town had. It's hurting our identity. People say Bethlehem is 'the dump town,'" he said of the NCES landfill.

"We pay an enormous price to have this facility here and its cost this community dearly. We're hoping Judge Burling's decision is going to remain intact, but from what I understand they (the landfill operators) intend to continue to fight us every step of the way," he said.

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