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Conservation Law Foundation Appeals Stage VI, Phase II Landfill Expansion

DES Tells Casella Build At Your Own Risk

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The Conservation Law Foundation has filed another appeal against a recently approved phase of expansion at the Casella Waste Systems/North Country Environmental Services landfill in Bethlehem. (File photo by Robert Blechl)

Arguing it would be operating during a time without capacity need in New Hampshire, the Conservation Law Foundation has appealed another expansion phase at Casella Waste Systems/North Country Environmental Services landfill in Bethlehem.

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On April 17, the New Hampshire Department of Environmental Services informed Casella that it has approved the company's application to begin construction on Stage VI, Phase II, which is expected to be the final phase before the landfill reaches capacity after 2026.

But DES notes that its approval of Stage VI in October 2020 remains under appeal with the New Hampshire Waste Management Council and New Hampshire Supreme Court, Jaime Colby, an engineer with DES's Solid Waste Permitting and Review Section, wrote to Casella engineer John Gay.

"Accordingly, the Stage VI decision is subject to remand or other decision and all related construction and operating approvals may be subject to subsequent NHDES action," said Colby. "As such, any and all construction performed by NCES pursuant to this approval is done so at NCES' sole risk."

On May 11, CLF, which filed the 2020 appeal, filed with the Waste Management Council the notice of appeal for Stage VI, Phase VI, arguing that the expansion and Type II permit modification is not permissible because the council previously determined that DES acted unlawfully when it issued the underlying permit.

In May 2022, the council determined that DES acted unlawfully and unreasonably when the department concluded that the Stage VI expansion that DES approved in 2020 would provide "a substantial public benefit," as required under New Hampshire RSA 149-M:11, III(a), the solid waste management statute.

Citing the council, CLF attorneys Thomas Irwin and Heidi Trimarco argue that no such benefit exists because the landfill would only be operating for one year during a time of capacity shortfall and would operate for five years during a period of excess landfill capacity in New Hampshire.

"Relying on the plain meaning the statute, the council determined that the state 'requires a proposed facility to operate during a period of capacity need ...,'" they said.

The council remanded the finding back to DES, which, with Casella, appealed the council's finding to the Supreme Court.

The two appeals have been consolidated into one matter that is pending before the Supreme Court, said Irwin and Trimarco.

“Upon information and belief, NCES has continued to operate Stage VI, despite the council’s determination that the Stage VI permit was issued unlawfully,” they said.

Meanwhile, CLF is seeking to become an intervenor in the lawsuit that Casella filed against DES commissioner Robert Scott at Merrimack Superior Court in September.

Casella’s three-count petition for summary judgment alleges that DES’s “recent departure from its decades-long construction of RSA 149-M:11 together with [the council’s] inconsistent construction of the same statute have clouded the statute’s meaning and created uncertainty about the requirements for obtaining a permit for solid waste disposal facilities in New Hampshire, including facilities owned or proposed by [Casella].”

Both the department’s new construction and the council’s interpretation of RSA 149-M:11 violate the “dormant Commerce Clause” of the United States Constitution, they argue.

In filings, Casella attorneys have cited the dormant Commerce Clause, which refers to a prohibition implicit in the U.S. Constitution against states adopting laws that discriminate against interstate commerce, which includes solid waste.

In their Merrimack Superior Court lawsuit, Casella attorneys ask the court to declare that 149-M:11 “has the meaning NHDES has given it since adoption of the statute in 1991 and until 2019 or, in the alternative, that RSA 149:M-11 is unconstitutional.”

In January, Casella filed a motion objecting to CLF becoming an intervenor in the superior court litigation.

On May 11, the motion to intervene by CLF, which is raising the same arguments at Merrimack Superior Court that it has raised before the Waste Management Council, went to a court hearing.

As of Monday, the judge had not issued an order.

According to the case summary, the lawsuit is scheduled to go to a bench trial in November.

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