



September 10, 2021

Via Electronic Mail

Rene Pelletier, P.G.
Assistant Director, Water Division
N.H. Dept. of Environmental Services
P.O. Box 95, 29 Hazen Drive
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David Price
Wetlands Bureau Regional Supervisor
N.H. Dept. of Environmental Services
P.O. Box 95, 29 Hazen Drive
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Stefanie Giallongo
Wetlands Regional Permitting Specialist
N.H. Dept. of Environmental Services
P.O. Box 95, 29 Hazen Drive
Concord, N.H. 03302-0095

**RE: NHDES Wetlands File #2020-02239 Granite State Landfill, LLC.
Proposed Landfill Development – Dalton, New Hampshire.**

Dear Mr. Pelletier, Mr. Price, and Ms. Giallongo,

Conservation Law Foundation (“CLF”) writes in response to the New Hampshire Department of Environmental Services’ (“Department”) recent decision to suspend the review of the Standard Individual Wetland Permit Application submitted by Granite State Landfill, LLC. (“GSL”) in August 2020.

CLF seeks clarity on the impact the Department’s request for an amended application has on the current permitting process. Additionally, CLF writes to voice our strong opposition to the Department’s attempt to limit the scope of review to only one portion of the larger landfill development. Regardless of how the Department proceeds with its review of the application, the Department must consider all impacts associated with the entire proposed landfill development.

I. Background and Permitting Process

As you know, in August 2020, GSL submitted to the Department a Standard Wetland Permit Application (“2020 Wetland Application”), seeking approval to develop a new landfill in

Dalton, New Hampshire. As designed, the proposed project would result in permanent impacts to 17.04 acres of wetland, roughly a quarter mile of stream impacts, the complete destruction of five vernal pools and their 750-ft. buffer areas, and the clearcutting of over 160-acres of forested land immediately adjacent to the Alder Brook wetlands complex. The Department requested more information on two occasions before finally deeming the application administratively complete. The Department then held a public hearing on the 2020 Wetland Application on July 14, 2021. On August 26, 2021, a year after receiving GSL's permit application, the Department requested that GSL submit an amended application.¹ The Department requested that the amended application only focus on Phase One of the larger three-phase development. On August 27, 2021, GSL responded to the Department's request and agreed to submit a new revised application prior to December 15, 2021.²

II. Request for Clarity in the Permitting Process

Prior to this drastic change in the permitting process, CLF intended to submit substantive comments opposing the 2020 Wetland Application and urging the Department to deny the permit application. To be clear, CLF still strongly opposes the project and was ready to submit substantive comments addressing our numerous concerns. However, given the Department's recent shift in approach and GSL's representation that it will provide an amended application, it appears to us that the Department will not be considering the original application. Accordingly, CLF will not be submitting substantive comments on the original permit application. If our understanding of the situation is inaccurate, we ask that you clarify the procedural posture of this matter and provide CLF and other members of the public a reasonable extension of time for the submission of public comments.

III. The Department Must Consider the Impacts of the Proposed Project as a Whole

CLF strongly opposes the Department's attempt to narrow the scope of review to only Phase One of the development. GSL has articulated a clear intention to develop the project beyond Phase One. In fact, the 2020 Wetland Application repeatedly outlines a well-developed plan for the construction and operation a large landfill developed in three phases. When describing the full project in the 2020 Wetland Application, GSL states:

The facility will be developed in three phases. The initial phase will center on constructing the westernmost portion of the landfill, containment berm, perimeter road, necessary landfill infrastructure and stormwater management features. This phase will also include road improvements to Douglas Drive and Route 116. The infrastructure area and maintenance building will also be constructed.

¹ Letter from Rene Pelletier to John Gay, August 26, 2021. (Attachment 1)

² Letter from John Gay to Rene Pelletier, August 27, 2021. (Attachment 2)

The second phase will extend the landfill to the east while the third phase extends the facility to the northern limits of the project area.³

GSL has demonstrated an unmistakably clear intention to develop the site beyond Phase One. The Department's approach of dividing up and segmenting the full project review into smaller individual parts will ignore the true scope, scale, and severity of the proposed action. Therefore, the Department must consider the full scope of impacts from the entire project. This will ensure the Department (1) is not illegally segmenting the project in a manner that renders the review process inconsistent from that of federal agencies, and (2) is considering all cumulative impacts as required by Env-Wt. 302(a)(16). It also will protect the Department's credibility in its regulation and permitting of activities affecting wetlands; simply put, a segmented approach that fails to consider the true, foreseeable impacts of the project would create the very real impression that the Department is more interested in "getting to yes" with the applicant than providing important regulatory protections for the state's wetlands resources.

A. Failure to Fully Evaluate and Consider the Entirety of the Projects Impacts Would Constitute Unreasonable and Unlawful Segmentation

The Department's decision to ignore the scope and magnitude of the entire planned development and only focus on Phase One constitutes segmentation, which is prohibited at the federal level under the National Environmental Policy Act ("NEPA"). Therefore, this new approach of reviewing the project on a phase-specific basis will create a divide between the federal and state permitting processes. This is directly in contrast to one of the Department's primary reasons for requesting a new application in the first place.

As partial justification for its request for a revised application, the Department points to the "significant overlap" between the state wetland application and other required applications under the Department's Water Division review and related federal programs.⁴ Given this significant overlap, the Department argues that these permits should be reviewed "contemporaneously" to allow for a "holistic assessment of the impacts on water resources."⁵ Therefore, the Department requested that the revised wetlands application be submitted in conjunction with these other required applications.⁶ Evaluating the impacts of only Phase One of the landfill and not the entire three-phase development, however, will not result in

³ Granite State Landfill, NHDES Standard Wetland Impact Permit Application – Section 3.3: Project Description, p. 1. (August 2020).

⁴ Letter from Rene Pelletier to John Gay, August 26, 2021. (Attachment 1)

⁵ *Id.*

⁶ *Id.*

contemporaneous or complementary review of the project by the relevant federal and state agencies. Nor will it ensure a holistic assessment of the impacts to water resources.

To develop the proposed landfill, GSL must receive a Federal Wetland Permit from the U.S. Army Corps of Engineers (“USACE”) under Section 404 of the Clean Water Act. This review process, in turn, triggers requirements under NEPA. Under the NEPA review process, neither the applicant nor the federal agency may divide the full project into smaller segments for purposes of conducting its impact review. To do so would constitute illegal segmentation, i.e., dividing the applicant’s overall plan and project into smaller parts or components to create the appearance that the proposed action will have less significant environmental effects.⁷ Instead, the proposed action must be assessed and understood in light of all “connected, cumulative, and similar actions.”⁸ The courts have not allowed segmentation when it is clear that the projects under review are interconnected and dependent.⁹

As mentioned above, GSL has clearly indicated that Phase One is part of its larger three-phase landfill development. Thus, when USACE undertakes its review of the project under both the Section 404 wetlands permitting process and under NEPA, the agency will have to look at the entire planned landfill development, not simply Phase One. Therefore, evaluating the impacts of only Phase One will not achieve the Department’s stated goal of providing a contemporaneous review at both the federal and state level. Instead, reviewing only one phase of the larger project will only create a division between the review processes.

Additionally, reviewing only one portion of a larger project will not advance the Department’s other stated objective: ensuring a holistic review of the impacts on water resources. Instead, it will limit the review to only one distinct portion of the larger planned development, thereby ignoring the impacts from the later phases of development and giving the artificial appearance of a less environmentally harmful project. The First Circuit has stated that an agency “need not speculate about all conceivable impacts, but **it must evaluate the reasonably foreseeable significant effects of the proposed action.**”¹⁰ In this context, “reasonable foreseeability means that the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”¹¹ Here, the reasonably foreseeable significant effects are well documented as part of a clear plan of development. In the 2020 Wetland

⁷ See, *City of West Chicago, Ill. v. U.S. Nuclear Regulatory Com'n*, 701 F.2d 632, 650 (7th Cir. 1983).

⁸ 38 C.F.R. § 200.4(b)(1)(i)(A).

⁹ See *Matter of Town of Blooming Grove v. County of Orange*, 959 N.Y.S.2d 265 (App. Div. 2013) (county improperly attempted to segment extension of sewer district from impact statement for rest of mixed-use development, issuing negative declaration for sewer extension).

¹⁰ *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1286 (1st Cir. 1996). Emphasis added.

¹¹ *Id.*

Application, GSL stated “the landfill is proposed to be developed in three phases, each with smaller cells to be constructed approximately every 2 to 7 years.”¹² Moreover, the Department specifically asked GSL about future landfill development at the site. In response, GSL stated: “the GSL Wetlands Application presents the full and complete planned buildout for the site. GSL does not contemplate any expansion of the facility beyond Phase Three.”¹³

If the Department truly intends to provide a holistic assessment of impacts on water resources, the Department must – at a minimum – consider the full planned buildout as articulated by the applicant. These actions are reasonably foreseeable and directly relate to the scope and severity of the impacts to water resources.

B. Failure to Fully Evaluate and Consider the Impacts of the Project in Its Entirety Would Violate the State’s Requirement that Cumulative Impact be Analyzed

The Department’s request to narrow the scope of review also undermines the cumulative impact analysis required by Env-Wt. 302.04(a)(16). Rule Env-Wt 302.04(a)(16) requires that an applicant for a wetland permit must demonstrate that when designing the project, it considered the cumulative impacts that would result if all parties owning or abutting a portion of the affected wetland or wetland complex were also permitted alterations to the wetland or wetland complex. Here, GSL has documented a clear and well-developed plan to build a larger landfill on the site beyond Phase One. This plan has three phases of development, each of which will have individual and cumulative impacts on the affected wetlands and larger Alder Brook wetland complex.

In order to satisfy the requirements of Env-Wt 302.04(a)(16), the Department must consider and evaluate the cumulative impacts of all planned development and potential future development within the wetland complex by all owners and abutters, including the applicant. Dividing and segmenting review of the proposed development into distinct smaller phases will obscure and ignore the full cumulative impacts on the surrounding environment. As stated above, GSL clearly intends to further develop the proposed site through Phases Two and Three. Therefore, the Department must consider the full three-phase build out when reviewing any wetland application for this project.

¹² Granite State Landfill, NHDES Standard Wetland Impact Permit Application – Section 7.3: Siting, Evaluation and Minimization Report, p. 1. (August 2020).

¹³ Granite State Landfill, Response to Department’s Request for More Information – NHDES File Number 2020-02239, p. 1. (March 17, 2021).



IV. Conclusion

CLF remains strongly opposed to GSL's proposal to develop a new landfill in Dalton, New Hampshire. CLF urges the Department to require the applicant to continue to address the full impacts from all three phases of development and to itself comprehensively consider those impacts in rendering a permit decision. Such an approach is necessary to ensuring that the full scope of impacts to wetlands are fully evaluated and understood, to advancing the Department's stated objectives, and to complying with clear requirements pertaining to cumulative impacts and prohibiting segmentation. Thank you for your time and consideration.

Respectfully submitted,

Peter Blair

Peter Blair, Esq.
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Conservation Law Foundation
53 Exchange St. #200
Portland, ME 04101.

CC:

Robert R. Scott
Commissioner
N.H. Dept. of Environmental Services
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List of Attachments

- Attachment 1: Letter from Rene Pelletier to John Gay, August 26, 2021.
- Attachment 2: Letter from John Gay to Rene Pelletier, August 27, 2021.

Attachment 1:

Letter from Rene Pelletier to John Gay, August 26, 2021.



The State of New Hampshire
Department of Environmental Services

Robert R. Scott, Commissioner



August 26, 2021

Joe Gay
Granite State Landfill, LLC
1855 Vermont Route 100
Hyde Park, VT 05655

SUBJECT: NHDES Water Division Permits for the Granite State Landfill

Dear Mr. Gay:

On September 3, 2020, Granite State Landfill, LLC submitted an application for a Wetlands Permit from the N.H. Department of Environmental Services (NHDES), Water Division (File # 2020-02239). This application is currently under review. The purpose of this letter is to request an amendment to the Wetlands application, pursuant to RSA 482-A:3, XIV(e), and that other Water Division-related permit applications be submitted at the same time to allow for a comprehensive and coordinated review of the impacts of the project on water resources.

The Wetlands application proposes to fill wetlands to facilitate the construction of a solid waste landfill on the property. The NHDES Waste Management Division is currently reviewing an application for a Solid Waste Permit, and the NHDES Air Resources Division is reviewing an application for a temporary permit for the proposed landfill. While the Wetlands application requests approval to impact wetlands for all three phases of the proposed landfill, the Solid Waste application covers only Phase 1 of the proposed landfill. In order to align the proposed areas of impact between the Solid Waste application and the Wetlands application, NHDES is requesting that Granite State Landfill, LLC submit an amendment to the pending Wetlands application to reflect only those wetland impacts associated with Phase 1 of the project. Please include the Amendment Request Form for a Wetlands Application or Permit available from the NHDES website¹. NHDES is also requesting that you respond, in writing, with a projected timeline for submitting the amended application and an extension request that would provide a reasonable timeframe for NHDES to conduct a comprehensive review of the amended application.

In addition, to allow a holistic assessment of impacts on water resources, NHDES requests that the amended Wetlands application be submitted in conjunction with other required applications under the NHDES Water Division's purview and related federal programs. Specifically, Granite State Landfill will need an Alteration of Terrain Permit to address land disturbance, stormwater management, flood storage, and wildlife & habitat impacts; an Individual 404 Federal Wetlands Permit from the U.S. Army Corps of Engineers; and a State-issued 401 Water Quality Certification of the Federal Wetlands Permit to ensure that proposed and potential discharges meet state water quality standards. These other applications have significant overlap with the Wetlands application and should be reviewed contemporaneously. Accordingly, NHDES recommends holding a meeting with all of the Water Division permitting programs and their federal partners prior to application submittal to coordinate the schedule for the various permit applications.

¹ <https://onlineforms.nh.gov/app/#/formversion/4262f89a-8b52-4ea3-990e-ffa8f015389a>

If you have any questions, please contact me at (603) 271-2951.

Sincerely,

A handwritten signature in black ink, appearing to read "Rene Pelletier". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

Rene Pelletier, P.G.
Assistant Director, Water Division

cc: Robert Scott, Commissioner
Michael Wimsatt, Director, Waste Management Division
Craig Wright, Director, Air Resources Division
Philip Trowbridge, Manager, Land Resources Management Program
Bryan Gould, Cleveland, Waters and Bass, P.A.

Attachment 2:

Letter from John Gay to Rene Pelletier, August 27, 2021.



GRANITE STATE LANDFILL, LLC

1855 VT Route 100 • Hyde Park, VT 05655 p. 802.651.5454 f. 802.888.7931

August 27, 2021

Mr. Rene Pelletier, P.G. Assistant Director
New Hampshire Department of Environmental Services
Water Division
29 Hazen Drive, PO Box 95
Concord, NH 03302-0095

**RE: Granite State Landfill, LLC
Proposed Lined Landfill - Dalton, New Hampshire
Wetlands Permit Application (File # 2020-02239)**

Dear Mr. Pelletier:

Please accept this letter on behalf of Granite State Landfill, LLC (GSL), in response to the New Hampshire Department of Environmental Services (NHDES) correspondence dated August 26, 2021, requesting an amendment to GSL's NHDES Standard Dredge & Fill Wetlands Permit Application, which is referenced above. GSL expects to file the amended application along with the other NHDES referenced applications by December 15, 2021. With this proposed timeline for application submittals, GSL requests an extension for NHDES's review of the amended wetlands application and asks that NHDES render its decision on or before December 31, 2022.

We will contact the various NHDES departments and federal agencies to schedule the coordinated permit review and scheduling meeting recommended in your letter next week. Thank you for your assistance, and should you have any further questions, please contact me at (802) 651-5454.

Sincerely,

GRANITE STATE LANDFILL, LLC

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

- c. *Robert Scott, Commissioner NHDES
Michael Wimsatt, NHDES Waste Management Division
Craig Wright, NHDES Air Resources Division
Phil Trowbridge, NHDES Land Management Resources Program
Brian Oliver, GSL
Samuel Nicolai, GSL
Kevin Roy, GSL
Bryan Gould, Cleveland, Waters and Bass P.A.*
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