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FEATURED

Appeal Of Stage VI Landfill Expansion Heats Up

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The state and Casella Waste Systems have entered into a settlement agreement that resolves, at least for the moment, what DES said were Casella's violations of the state waste rules by placing trash outside the permitted vertical limits of its landfill in Bethlehem. (File photo by Robert Blechl)

The appeal of the Stage VI expansion permit at the North Country Environmental Services landfill in Bethlehem is heating up with a flurry of new filings as the appellant, the Conservation Law Foundation, argues that NCES should be denied its requested rehearing.

It's not yet determined if the ultimate outcome will result in a pulling of the Stage VI operating permit or if any party on the losing side will appeal to the New Hampshire Supreme Court.

In May, the New Hampshire Waste Management Council issued a final order stating that NCES's Stage VI expansion permit approved by the New Hampshire Department of Environmental Services in October 2020 was unlawful and unreasonable because it lacks a "substantial public benefit," as defined under New Hampshire law, because the landfill phase would be operating for most of its life during a time of capacity excess in New Hampshire.

The council remanded the substantial public benefit determination to DES Commissioner Robert Scott.

On June 10, NCES, a subsidiary of Casella Waste Systems, filed a motion for a rehearing in which its attorneys argue that the council's ruling and New Hampshire RSA 149-M, the state's solid waste management statute, "have laid bare the discriminatory intent" against out-of-state waste and that the appeal by CLF, which has voiced concerns about the amount of waste being imported into New Hampshire, should be dismissed because the organization lacks legal standing.

On June 20, the WMC suspended its final order pending the outcome of NCES's rehearing request.

More recently, on Monday, July 18, CLF attorneys Tom Irwin and Heidi Trimarco filed an additional reply to their objection to a rehearing for NCES.

They argue that NCES's references to RSA 541, New Hampshire's Administrative Procedure Act, and the company's "faulty characterization of NCES embodying an entirely new legal posture do not constitute good cause for a rehearing," "NCES's untimely attempt to introduce new evidence is not good cause for a rehearing," and "NCES has not demonstrated good cause for a hearing based on the dormant Commerce Clause."

The dormant Commerce Clause references a prohibition implicit in the Commerce Clause of the U.S. Constitution against states passing laws that burden or discriminate against interstate commerce, which includes solid waste.

In their June 24 memorandum in support of CLF's objection to NCES's motion for a rehearing, Trimarco and Irwin called NCES's rehearing motion "without merit" and argue the motion "improperly attempts to advance legal theories NCES has waived, raises issues that have been fully litigated, and attempts to introduce exhibits long after the record has closed."

They also argue that the council correctly interpreted RSA 149-M:11, III(a) "to require a capacity need for New Hampshire-generated waste during the operating life of a proposed facility."

On June 24, DES, while disagreeing with the council's determination on a "substantial public benefit," filed a limited objection to NCES's motion for a rehearing, arguing that the department is not reinterpreting the RSA 149-M, as NCES alleges, and there is no identified burden on interstate commerce, no violation of the Commerce Clause, and no discriminatory language regarding out-of-state waste in RSA 149-M, as alleged by NCES.

In October 2020, DES approved the Stage VI expansion, which would accommodate about 1 million more tons of trash and take the landfill life through 2026 before it reaches capacity.

DES has projected that New Hampshire won't have a landfill capacity shortfall under after 2025.

CLF representatives have said the landfill would therefore be operating without a capacity need in the state for five of the six Stage VI years.

In WMC's May 11 order, hearing officer Zachary Towle said the record reflects that NCES would operate for a period without capacity need, which is a required element for a finding of "substantial public benefit" under 149-M.

While DES's "substantial public benefit" determination was found to be unlawful by the Waste Management Council, the council's May 11 ruling was mixed one, with most components of DES's Stage VI approval found to be lawful, among them that DES acted reasonably when relying on an outdated New Hampshire solid waste management plan.

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