

Critics say industry has had outsized role in shaping New Hampshire's new landfill regulations

BY: CLAIRE SULLIVAN - JUNE 13, 2024 5:00 AM



Lawmakers can put stricter guidelines in place for landfills outside the regulatory process. (Getty Images)

This story was corrected at 8:51 a.m. on June 13 to remove a quote that mischaracterized the context in which it was spoken.

Other states dump trash in New Hampshire at a rate of around 900,000 tons per year, in large part because those neighbors have significantly stricter landfill rules.

The Department of Environmental Services says its new regulations – currently in the process of being updated, as required every decade – will be more protective of human health and the environment than the current ones. But critics say companies that operate landfills have had outsized influence in the rulemaking process and that the proposed regulations will allow New Hampshire to remain the dumping ground of New England.

Those who have raised concerns about industry's influence have pointed to a proposed criterion for ground permeability that is magnitudes weaker than other states, which DES weakened in response to claims from industry that were made without evidence, and a council that advised DES through the rulemaking process that had vacancies in key roles like public interest and health.

Ever-present in the dialogue on the rules, too, is that DES wrote them while simultaneously in receipt of an active permit filed by Casella Waste Systems to build a landfill in the small town of Dalton, just half a mile from Forest Lake.

Michael Wimsatt, the department's waste management division director, said the rulemaking and permit application are "separate processes," noting that, at this stage, DES is simply checking that Casella has submitted all the necessary information.

He described the proposed rules in starkly different terms than their critics, calling them, "in virtually every respect, better, stronger, more protective than our existing rules."

"People have said that these rules are weakening our existing rules," Wimsatt said. "I don't think anything could be further than the truth from that."

Casella, in a statement from Jeff Weld, its vice president of communications, said the proposed rules were a “step forward in advancing” the goals laid out in the state’s solid waste management plan.

“It is imperative that all stakeholders are given an opportunity to provide input during the rulemaking process,” the statement said, “and we were one of many service providers in this space, along with other environmental experts and the general public to do so.”

Though Rep. Nicholas Germana, a Keene Democrat who served on a House subcommittee that followed the rulemaking process, has criticisms of the rules, he said they have been improved in some ways, such as adding more monitoring. Additionally, the current 200-foot setback from water bodies has been extended to 500 feet.

But the representative said that it would make more sense for New Hampshire – like all the other states he’s aware of – to focus on the time it would take for pollutants to get to water bodies, not what he called an “arbitrary” distance.

“What matters is if there was a leak in this site,” he said, “how long would it take to get to a body of water?”

An outlier

A major point of divergence between DES and critics is the department’s proposed standard for hydraulic conductivity, a metric that describes how easily water, including the polluted liquid called leachate that leaks out of landfills, moves through the ground.

Water moves more quickly through some materials, like gravel and coarse sand, than others, like clay and silt.

No hydraulic conductivity standard exists in the current rules, but the figure proposed by DES – which could still change as the department weighs the feedback it received in the public comment period that closed earlier this month – would allow landfills to be built on ground that is much more permeable than that allowed by other states.

To put a number to it, the proposed standard would be between 50 and 50,000 times weaker than 25 other jurisdictions in the nation and around the world reviewed by Adam Finkel, a Dalton resident who spent years as the chief rule writer at the Occupational Safety and Health Administration. Finkel has also advised environmental agencies in six states and two cities, is currently a professor at the University of Michigan School of Public Health, and previously taught at Rutgers, Princeton, and the University of Pennsylvania.

New Hampshire's proposed hydraulic conductivity of 0.005 centimeters per second would allow landfills to be built in areas where liquid could move through the ground at a rate of 15 feet per day, Finkel said.

By comparison, Illinois, Texas, and Arkansas have hydraulic conductivity standards that allow liquid to move only up to an inch per year, according to Finkel's review. In Mississippi, Colorado, New Jersey, California, and Kansas, it's a foot per year. In Missouri, Ohio, Maine, and Florida, it's 10 feet per year. In South Carolina and Vermont, it's 10 feet per month.

"DES has somehow managed to create the weakest locational criteria in the entire world," Finkel said in written comments to the department. "I have been researching other states, provinces, and countries, and have not found a single jurisdiction anywhere nearly as weak as DES wants us to be."

Asked in an interview why New Hampshire's proposed standard is so much weaker than other states, Wimsatt said, "I'm just not gonna comment on that."

"At this point, we're still working on these rules," he said. "I don't really think it's appropriate for me to engage in a really detailed discussion of that."

He rejected the comparison to other states when asked similar questions by House subcommittee members in March, calling it "apples to oranges."

"When reviewing other states' rules," Wimsatt said, "individual provisions have to be taken in the context of the entire rule framework, which requires significant experience with a particular rule set."

States that have single-lined facilities may have stricter hydraulic conductivity requirements, for instance, Wimsatt said. But Germana said that New Hampshire's rules should be crafted to be protective in the event of a leak.

“The reason why you need that hydraulic conductivity rate is based on the assumption that there is a leak,” Germana said. “Once there's a leak, it doesn't matter if you've got two liners, right? If you get a leak below that second liner, that's what we're ultimately concerned about.”

The proposed rules would also only require that 5 feet of the natural soil beneath a landfill is analyzed for hydraulic conductivity in the siting process – even though leachate can permeate far deeper than that. And it would be taken as an average of the total area, meaning some of the land may be even more permeable.

“They have described the skin of an onion,” Finkel said. “And they don't know whether there's an onion underneath it or a time bomb.”

Not only has the standard itself been criticized, but so has the manner in which it was weakened from the department's first draft of the proposed rules in October to the iteration published in March for public comment.

Wimsatt said DES changed the standard because members of industry told him that the department's first proposed number “would make it very difficult to expand or site any facilities in the state.”

“So we were persuaded that we had very likely, you know, erred in that, in sending that number up,” Wimsatt said, “and we worked to try to identify and propose a different number.”

Germana asked DES if industry members provided evidence to support the idea that the original proposal was so restrictive that it would prevent them from building or expanding landfills here.

“The answer from DES was no,” Germana said, “and that was a really big red flag for me.”

'Unbalanced' guidance

The Waste Management Council gave guidance to DES throughout the rulemaking process, but five of its 13 seats were vacant and a quarter of the members were directly from industry, which some critics say slanted the input.

The council – the members of which are appointed by the governor and the Executive Council – has long had unfilled positions in areas such as a public interest representative, a public health expert, a municipal official, one of the two slots for an elected official, and a member of the business or financial community.

Two of the eight filled positions represent the private solid waste management industry and private industries that generate hazardous waste. The other six include one elected official, a licensed sanitary or environmental engineer, someone in the municipal public works field, a representative from a community that recycles or recovers solid waste, a local conservation commission member, and an associate professor of environmental sciences or sanitary engineering.

“The end result is that the Waste Management Council right now is unbalanced and biased in favor of the waste industry,” said Amy Manzelli, an attorney from BCM Environmental & Land Law who submitted a 448-page comment package to DES on behalf of the citizen-group North Country Alliance for Balanced Change.

Rep. Linda Haskins, an Exeter Democrat, said in a March committee hearing that the vacancies undermined public confidence.

“The fact that these vacancies have happened over years and haven't been addressed puts the public in the backseat when it comes to how the process is set up,” Haskins said.

The governor's office noted in an emailed statement that the council has a quorum.

“As with many council positions across state government, it can take time to fill these volunteer vacancies,” the statement read. “The effort to recruit qualified individuals is ongoing and applications are currently being

accepted. As that process takes place, there remains robust opportunity for public comment on rules, permitting, and the like.”

Wimsatt said that, though he would like the empty positions to be filled, he doesn't feel the absences negatively impacted the rulemaking process.

Because of their dialogue with other interest groups, “I wouldn't say that those positions not being filled on the council necessarily resulted in us not having adequate opportunity to consult with members of those constituencies,” Wimsatt said.

He also said that DES has gone beyond the public engagement required by law, hosting three listening sessions and meeting privately with members of industry and environmental groups.

At a public hearing in May, zero people present expressed support of the proposed rules, according to several people at the meeting. Some present felt that their opinions weren't really being heard.

“There's just a lack of faith that this process is not being driven by industry interests,” Germana said.

Wayne Morrison, president of the North Country Alliance for Balanced Change, said he isn't confident that residents get equal consideration.

“We feel that our voice ... doesn't carry the same weight as industry or the executive office,” he said. “And we think that's a mistake.”

Finkel put it this way: “They get to negotiate, whereas we get to talk.”

What's next

It will be months before the final rules are adopted, Wimsatt said.

First, the department has to review the approximately 70 written and 14 oral comments received during the public comment period, he said, and “determine whether any of those indicate a need to change any of the particular provisions of the initial proposal.”

DES must then present the rules to the Joint Legislative Committee on Administrative Rules. The department aims to do that around August or September, Wimsatt said, and then the final rules would be adopted about a month after that.

Lawmakers can put stricter guidelines in place for landfills outside the regulatory process, something Germana and other legislators will seek to do next session.

A number of landfill bills passed the House overwhelmingly this year, only to be killed in the Senate. Germana would like to continue to push for the idea of state-owned landfills, where New Hampshire would own the land but lease out the operations to private companies.

He would also like to see a more robust system for public input in the regulatory process.

One proposal, House Bill 1622, which might still survive the Legislature after making it out of a committee of conference, would require agencies to indicate how public comments were implemented into the final rule. If a comment isn't incorporated, agencies must give “a detailed explanation that includes the facts, data, interpretations, and policy choices” to justify the decision.

In New Hampshire, landfill issues have united lawmakers and residents across the political spectrum.

“It doesn't matter if you're a Democrat or a or a Republican,” Germana said, “your constituents want and deserve clean air and clean water and clean land.”