

After preliminary objection, proposed landfill rules head back – unchanged – to legislative panel

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Among those asking JLCAR to issue a final objection to the rules is the North Country Alliance for Balanced Change, a citizen group that opposes the new landfill in the northern part of the state proposed by Casella Waste Systems. (Amanda Gokee | New Hampshire Bulletin)

Last month, a legislative oversight panel sent the Department of Environmental Services back to work on its landfill regulations. On Thursday, that panel will again take up those rules.

In the weeks since the Joint Legislative Committee on Administrative Rules issued its unanimous preliminary objection to the regulations that control how the state's landfills are sited, designed, built, and managed, DES and concerned advocates and residents have remained at odds. Now, a weightier choice lies ahead of the committee.

In response to the panel's vote, DES made no changes to its proposal. It instead provided further explanation of its use of public comments and rebutted the panel's reasons for its vote. JLCAR had objected on the basis that the proposed rules "are contrary to public interest due to a lack of responsiveness to the public," "designed to benefit the administrative convenience of the agency to the detriment of the public," and "contrary to the legislative intent" on solid waste. In a letter to JLCAR, DES Commissioner Robert R. Scott said he believes "the final proposed rules are more protective of the environment, natural resources, and public safety than the currently effective rules, which were adopted in 2014."

On the other side, opponents find fault with the department's explanation of its response to public feedback, saying it did not provide adequate evidence for the choices it made. The much bigger issue, though, they say, is not that the rules haven't been explained adequately, but that they are simply not protective enough. They reject the agency's stance that the proposed rules are an improvement from the existing ones.

Among those asking JLCAR to issue a final objection to the rules is the North Country Alliance for Balanced Change, a citizen group that opposes the new landfill in the northern part of the state proposed by Casella Waste Systems. That project has cast a long shadow over the rulemaking process, with critics arguing it has influenced the agency's decision-making, while DES has asserted that it has had no impact and that it has not yet received a complete application for the proposed landfill nor begun its technical review.

Amy Manzelli, an attorney from BCM Environmental & Land Law representing the group, said in a letter to JLCAR that “qualified scientists on the NCABC team performed a comprehensive qualitative analysis” comparing the proposed rules to the existing ones and concluded that the proposed rules “are not more protective of the environment.”

“The department has not provided any science. They haven’t named a textbook. They haven’t named a peer-reviewed scientific article or journal. They haven’t provided a copy of a chapter from a textbook or peer-reviewed scientific journal,” Manzelli said in an interview. “You know, they have provided nothing that would qualify as science or scientific evidence that justifies setting aside all of the public comment.”

DES declined to make a representative available for an interview ahead of the Thursday meeting, citing a wish for JLCAR to first meet and consider the agency’s response letter.

Competing views

For months now, the agency and its critics have described the proposed rules in starkly different terms.

“I believe that department staff have achieved the healthy balance between the needs of public health and safety, the regulated community, and economic considerations that the law requires,” Scott wrote in his letter to JLCAR. “That balance must include the possibility that new landfills could be sited in New Hampshire, and that existing landfills could expand to meet public need in a safe and economically sound manner. To do otherwise, would ban landfills by administrative rule, which I believe would be contrary to the legislative intent of RSA 149-M.”

Scott pointed to the fact that DES is “currently processing seven applications for modifications of existing landfills and one application for a new landfill,” the latter of which is a reference to the Casella project. DES has argued that it would be better to approve those landfills under its new rules instead of the old ones, on the basis of its argument that the new ones offer more protections.

Adam Finkel, who spent years as the chief rule writer at the Occupational Safety and Health Administration, said the new rules “have a lot of new bells and whistles about the technology and the design,” and that most of those are welcome. However, he has major objections to where the new rules would allow landfills to be sited.

“He’s saying that if you don’t approve these (rules), we’ll have nothing, or we’ll have ... to revert to weaker rules,” Finkel said of Scott’s argument to JLCAR. “In fact, the old rules are stronger.”

In a letter to JLCAR ahead of last month’s meeting, Finkel said the proposed rules “offer the most unscientific, unprotective, biased, and ‘captured’ regulatory language I have seen in 37 years of writing federal and state environmental rules, advising more than a dozen state and local environmental agencies, and co-directing the largest study ever (at the University of Pennsylvania Law School) of how environmental agencies worldwide succeed or fail at the core tasks of ‘listening, learning, and leading.’”

The standards for siting landfills have been a major sticking point in the process. No standard exists in the current rules for something called “hydraulic conductivity,” a figure that explains how fast liquid pollution would permeate through the earth under the landfill footprint in the event of a leak.

The new rules create a standard for this, but critics say it is far too weak and would make New Hampshire an outlier among jurisdictions that have rules around hydraulic conductivity. The latest iteration of the rules also would allow a 2-foot base of imported soil with hydraulic conductivity that pollution could travel through in as fast as eight days in the event of a leak, Finkel said.

In materials submitted to JLCAR, DES said that state-by-state comparisons are “almost always an apples to oranges comparison,” and that “selecting and comparing one specific criterion between jurisdictions does not allow a fair comparison of the level of protection afforded by the rule set as a whole.”

What’s on the table

The clock for action doesn’t run out for JLCAR on Thursday.

“According to the statutory deadlines, the JLCAR has until February 25, 2025 to take action on this proposal,” said Christina Muñoz, the senior attorney for JLCAR, in an email.

Until then, a few options are on the table.

DES is asking JLCAR to vote to approve the rules. Advocates want JLCAR to vote for a final objection. In the event of either decision, the agency has 30 days to adopt the rules; in other words, a final objection does not prevent DES from adopting the rules. If it does not adopt the rules within 30 days in either case, then the existing rules expire. Those rules, which were set to expire in July, have been extended because of the rulemaking process.

There is a practical difference between JLCAR issuing a final objection and an approval. If they take the objection route, then the “penalty is that the burden of proof is flipped if the rule were to be challenged in a court,” Muñoz said. Manzelli said she hopes DES would take a final objection “to heart,” meaning it would “go back to the drawing board and start this process again.”

JLCAR can also vote for a joint resolution, a route that is “exceedingly rare,” Muñoz said. Such a step would not “veto” the rule, but “delays its adoption for a limited time in order for the Legislature to consider the joint resolution as a piece of legislation,” according to the JLCAR website. “If enacted, the joint resolution may permanently prevent the adoption.”

JLCAR can vote in favor of both a joint resolution and a final objection, or just one of those options, Muñoz said.

There have been small changes to JLCAR’s membership and alternates since the November meeting. On Thursday, members will elect a senator as their new chair, a position that switches between the House and the Senate every two years.