

Lawmakers gave thumbs down to proposed landfill rules. What now?

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The Department of Environmental Services argues that the proposed landfill rules “are substantially more protective than the current existing rules and need to be adopted in order to achieve the additional human health and environmental protections that they afford.” (Dana Wormald | New Hampshire Bulletin)

When a legislative oversight committee sends an agency back to work on regulations, it doesn't necessarily mean the content of the proposal will change.

It's still to be seen if that will be the case with the Department of Environmental Services' proposed updates to the state's landfill rules, which attracted fierce opposition from some members of the public, particularly those in the North Country near where Casella Waste Systems is trying to build a new landfill. The committee's unanimous decision to issue a preliminary objection to those rules last month set off a new series of steps in what has been a monthslong process to refresh the decade-old regulations that control how landfills are sited, designed, built, and managed.

“What it really would require us to do,” said Michael Wimsatt, the department's solid waste division director, on the committee's decision, “is to either change our rules or explain how we believe – and we do believe – that we were responsive to the public, that we did indeed duly consider all comments from all commenters, and that we did a workman-like job of evaluating those and decide how and where the rules should be amended at least on those. So, we'll be working on that.”

The Joint Legislative Committee on Administrative Rules, or JLCAR, gave the department three reasons for its preliminary objection: 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 statement to the Bulletin, a department spokesperson said there were “immediate consequences to delaying the adoption of these proposed rules.”

“Specifically, NHDES has received (and anticipates soon receiving additional) applications from existing landfill facilities which have been approved for expansion and are seeking approval for installation of liner systems and capping systems,” the statement said. “If the adoption of the proposed rules is delayed, these

applications will be subject to review and approval under the less stringent and less protective design criteria in the current rules.”

Those proposed rules, the department argued, “are substantially more protective than the current existing rules and need to be adopted in order to achieve the additional human health and environmental protections that they afford.” The department planned to make its response in writing to the committee, the statement said.

The rules attracted an unusual amount of attention. Members of JLCAR received hundreds of pages of testimony against the proposed rules. Wimsatt commented on the decision during a meeting of the state’s Solid Waste Working Group a day after lawmakers made their decision at a crowded JLCAR meeting in Concord.

Asked if it was common for the panel to receive testimony like that, Wimsatt said: “No, I mean I’m not a student of JLCAR’s past experiences, but for us, most of our rulemaking goes through, and we don’t typically get a lot of attention from the public.”

This time was an exception. For months, DES has faced criticism from lawmakers, residents, and advocates who don’t feel the proposed rules are protective enough. When the department held a public hearing on the rules in May, none spoke in support of the agency’s proposal, several people at the meeting told the Bulletin. Many of those critics said industry played an outsized role in shaping the regulations. The department, though, has maintained its position that the new rules are better than the existing ones and will protect the public and environment.

In a letter to the department, Christina Muñiz, a senior attorney for the committee, said DES has 45 days to respond to the preliminary objection, during which it may amend the rules, withdraw the rules, or not make any changes.

Then, she wrote, the committee “may take further action ranging from approval of the objection response to voting to support the sponsorship of a joint resolution to address the issues remaining with the proposal.” JLCAR has 50 days to take action on a joint resolution, she said.

“Please note that there is no deadline by which the Committee must act to approve the rules or to enter final objections,” Muñiz wrote, “and the Committee may do so even after the adoption of the rules by the Department.”

However, that adoption may not come until one of two things happens, Muñiz wrote: “1) the expiration of the objection response review period without the Committee having taken action with respect to voting to support the sponsorship of a joint resolution; or 2) the Committee has taken action that is specifically in lieu of voting to support the sponsorship of a joint resolution.”

Though the department has more time to respond, Wimsatt said the chair of JLCAR “made it pretty clear in her remarks that she would really like to have these rules come before the committee at its Dec. 19th meeting,” which was less than 30 days from its preliminary objection. “It’s our plan at this point to provide a response to the committee in advance of that meeting with the anticipation that we will be on the agenda” for that meeting, he said.

And though a new law on rulemaking doesn’t go into effect until Dec. 9, Wimsatt said, “I think they’re looking to basically apply that standard to it.” The measure, which the Legislature passed into law over the objection of Gov. Chris Sununu, requires agencies to explain how they incorporate public comments into their rules – and if they don’t use a piece of input, they have had to justify that decision with “facts, data, interpretations, and policy choices.”

Though Wimsatt disagreed with arguments made by the public and advocates, he expressed understanding of the decision.

“They had 500 pages of testimony that was submitted to them in advance of the meeting from advocates and the public, and there were probably a dozen people there yesterday who were putting in pink cards looking to testify. So ... good on them. They weren’t blind to that,” Wimsatt said of JLCAR. “They saw that, and they felt

that they wanted to give the agency the opportunity to respond to those, essentially those allegations that we hadn't followed the process.”