

### **NCES Court Update, April 2005**

The parties in this case have long disputed the town's authority to regulate the private landfill that exists on an 87-acre parcel in Bethlehem. In 1976 the town granted the original owner a variance for a landfill on four acres. The landfill later expanded to 10 acres and then, as a result of a special exception granted in 1985, it expanded to 51 acres. The owner received a state permit for landfill operations on 18. of the 51 acres in 1987, known as Stage I. A second state permit, for Stage II, was granted in 1989 to allow expansion of the landfill on another seven of the 51 acres.

Stage II expansion involved two phases. The town sought to stop the second phase, and the New Hampshire Supreme Court decided that case in 2001. The Court held then that North Country Environmental Services, Inc. (NCES), the subsequent landfill owner, had approval to use 51 acres for its landfill operations-the entire area encompassed by the 1976 variance and the 1985 special exception. *North Country Environmental Services, Inc. vs. Town of Bethlehem*, 146 N.H. 348 (2001).

*NCES I*, as the case is known, left unanswered the issue of whether RSA Chapter 149-M, the State Solid Waste Management Act, preempted two zoning amendments enacted by the Town of Bethlehem in 1987 and 1992 because, as the Court held, the landfill operations "were pre-existing, permitted uses at the time of the 1987 amendment." However, preemption is at the heart of the current case decided by the Court.

The 1987 zoning amendment prohibits the existence of any private solid waste disposal facility in town. The 1992 zoning amendment prevents the location of any solid waste disposal facility or the expansion of an existing landfill unless the town owns the facility.

While *NCES I* was pending in the courts, NCES received a state permit for Stage III expansion of the landfill within the 51 acres, and it leased the construction and operation of a landfill gas utilization (LGU) facility on the 51 acres. The town sought to require NCES to receive site plan approval and building permits for landfill expansion and notified Commonwealth Bethlehem Energy, LLC (CBE) that it could not construct the LGU facility without first obtaining a building permit and site plan approval. The town claimed that the LGU facility violated a 1986 town ordinance prohibiting incinerators.

In 2000 and 2001 the town enacted zoning amendments limiting the height of solid waste disposal facilities to no more than 95 feet "measured from the natural and undisturbed contour of the land under any existing or future landfill\_ "

NCES filed suit against the town in this case in 2001 seeking to have the town's site plan review authority and its landfill height ordinance declared preempted by RSA Chapter 149-M and to have the town precluded from applying site plan review and the height ordinance to the landfill expansion within the 51 acres.

After the lawsuit was filed, NCES applied for (and in March 2003 received) a state permit for Stage IV of the landfill, most of which involves land outside the 51 acres. In response, the town included in its case a claim that expansion outside the 51 acres is prohibited by the town's zoning ordinance, including the 1987 and 1992 amendments.

In this current case, known as *NCES II*, the Court held that RSA Chapter 149-M "constitutes a comprehensive and detailed regulatory scheme governing the design, construction, operation and closure of solid waste management facilities," but one that authorizes additional municipal regulation by way of RSA 149-M:9, VII. That statute provides that issuance of a state facility permit does not affect the applicant's obligation to obtain local approvals required under "all applicable, lawful local ordinances, codes and regulations not inconsistent" with RSA Chapter 149-M. The Court wrote that additional language in the statute "clarifies that the lawfulness of local land use regulation of facility location will be presumed when it is administered in good faith."

The Court wrote, "A plain reading of the statute is that RSA chapter 149-M does not preempt lawful, applicable local regulations that are consistent with State law" and rejected NCES' argument that local regulation is limited to facility location. However, due to the comprehensiveness of the state's regulatory scheme involving solid waste management, the Court said it would construe RSA 149-M:9, VII narrowly. The Court wrote:

Accordingly, when evaluating whether a particular local regulation conflicts with the State scheme, courts should err on the side of finding State law preemption, unless the local regulation concerns where, within a town, a facility may be located.

The Court held that the town may not require NCES to obtain a building permit before constructing the Stage IV landfill operations outside the 51 acres because, as the town conceded, the landfill structure is regulated exclusively by the Department of Environmental Services (DES). "Structure" includes the footprint, content and final grade slope.

The Court also held that it "would frustrate the intent of RSA chapter 149-M for the town to apply its height ordinance to the landfill's development" because, as the Court has held in previous cases, local regulation is preempted when it has either the effect or intent of frustrating the state's regulatory authority.

However, the Court held that the 1992 zoning amendment preventing the location of any solid waste disposal facility or the expansion of an existing landfill unless the town owns the facility, is not preempted by state law, either on its face or as applied to the portion of Stage IV outside the 51 acres. The Court said the zoning amendment neither prohibits what is permitted by state law nor permits what is prohibited by state law. It affirmed the trial court's finding that the 1992 amendment "reflects `the choice a town is permitted to make under the general parameters of municipal responsibility established by RSA 149-M: 17, I. '" The Court wrote, "The amendment indicates that, in the future, presumably when there is no additional capacity in NCES' landfill on the fifty-one acres, the town will either provide its own facility or assure its residents access to another approved facility."

The Court noted that RSA 149-M: 9, VU required NCES to comply with "all applicable, lawful local ordinances, codes, and regulations not inconsistent with" RSA Chapter 149-M before it obtained a state permit for Stage IV outside the 51 acres. "It cannot now rely upon the State permit to argue that the town ordinances with which RSA 149-M:9, VII mandated it comply are preempted."

The Court remanded several additional issues to the trial court for determination.. One involves a claim by NCES that the 1992 zoning amendment improperly distinguishes between the users of land, not the uses of land. The other claims that the 1992 zoning amendment "contravenes the general welfare of the region it affects," citing *Britton vs. Town of Chester*, 134 N.H. 434 (1991), the case that prohibits municipalities from using their zoning power to exclude low-income housing.

Because the Court was never provided a copy of the town's site plan review regulations, it said it could not determine whether they are inconsistent with RSA Chapter 149-M as they were applied to NCES' Stage IV expansion. Instead, it also remanded that issue to the trial court. The Court said, however, "To be lawful, the town must have applied the regulations in good faith and without exclusionary effect." It defined "applicable" as those regulations "to which any industrial facility would be subjected."

The town did not appeal the trial court's finding that RSA Chapter 149-M preempts site plan review regulations related to drainage, flooding and groundwater protection; smoke, soot and particulate discharge; and odor.

The town was barred from requiring NCES to comply with site plan regulations related to construction of Stage III and the portion of Stage IV within the 51 acres. That issue had been decided by *NCES I*.

NCES claimed that RSA Chapter 125-C, the State Air Pollution Control Act, preempts local building permit requirements related to the LGU facility. RSA Chapter 125-C does not contain provisions similar to those in RSA Chapter 149-M authorizing additional municipal regulation. The town argued that the state permit received for the LGU facility stated that it does not exempt CBE from "the need to secure all other required approvals," including local requirements. The Court remanded this issue to the trial court for determination of the extent of preemption under RSA Chapter 125-C. That issue, the Court wrote, "is an important issue ... because the parties have not fully subjected it to the crucible of adversary proceedings.

The trial court had ruled that RSA Chapter 125-C preempted application of the town's 1986 ordinance, prohibiting incinerators in the town, to the LGU facility.

The Court said NCES had failed to preserve claims that the 1992 zoning ordinance violated the equal protection clause of the state constitution in discriminating between town-owned and privately-owned landfills and violated its constitutionally protected property rights. Therefore, the Court declined to consider these claims.