

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Superior Court Department
Civil Action No.

_____)
CONSERVATION LAW FOUNDATION, INC.,)
)
Plaintiff,)
)
v.)
)
MASSACHUSETTS DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
)
Defendant.)
_____)

COMPLAINT

INTRODUCTION

1. This is an action by Conservation Law Foundation (“CLF”) challenging Massachusetts Department of Environmental Protection’s (“MassDEP”) final decision, issued April 9, 2018 (“Final Decision”), allowing Wheelabrator Saugus, Inc. (“Wheelabrator”) to uncap and fill two stormwater valleys in its landfill in Saugus, Massachusetts (the “Landfill”), thereby expanding the capacity of the Landfill for an additional five to ten years.

2. MassDEP approved the expansion of the Landfill despite the fact that Wheelabrator does not have a valid site assignment for the Landfill. MassDEP’s Final Decision was based on an error of law, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedure, unsupported by substantial evidence, and arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of Mass. Gen. Laws ch. 30A, § 14. Further, MassDEP’s Final Decision violates state laws and regulations governing the disposal of solid

waste, Mass. Gen. Laws ch. 111, § 150A, 310 Mass. Code Regs. 16.00 *et seq.*, and 310 Mass. Code Regs. 19.00 *et seq.*

PARTIES

3. Plaintiff CLF is a non-profit organization with its principal place of business at 62 Summer Street, Boston, Massachusetts. CLF is the oldest regional environmental advocacy organization in the nation. Founded in 1966, CLF is a member-supported organization with offices in Boston, Massachusetts; Portland, Maine; Concord, New Hampshire; Providence, Rhode Island; and Montpelier, Vermont. CLF's attorneys have worked to solve significant environmental problems affecting New England.

4. CLF has been deeply involved in the policy, legal, and regulatory activities related to the Wheelabrator Saugus Landfill at the local and state levels.

5. By and through its members, some of whom reside or recreate in Saugus and Revere in close proximity to the Landfill, CLF is aggrieved and substantially and specifically affected by MassDEP's Final Decision approving expansion of the Landfill. The interests CLF seeks to represent in this cause of action are germane to the organization's purpose.

6. CLF and its members are aggrieved by MassDEP's Final Decision because they are substantially and specifically affected by the addition of more ash to the Landfill and the extension of its operational life, both of which will inevitably cause additional harmful substances to enter the environment. CLF and its members will be exposed to those harmful substances when the capped Landfill cells are reopened, and by ash blowing off of the working face of the Landfill and out of the trucks transporting the ash, for an additional five to ten years under MassDEP's Final Decision.

7. The continued operation of the Landfill decreases CLF's members' ability to enjoy their homes and properties, and the surrounding environment. CLF's members also worry that the Landfill negatively affects their health and the environment. The particularized injuries they will suffer are within the zone of interests protected by the Massachusetts solid waste laws and regulations.

8. CLF and its members' substantial rights are prejudiced by MassDEP's Final Decision because MassDEP is allowing Wheelabrator to expand the Landfill's capacity—and thereby extend its operational life—without first obtaining a valid site assignment. That process would have afforded members of the public, including CLF and its members, the opportunity to raise their concerns and be heard. The Saugus Board of Health (the "Board") would then have made a determination as to whether the operation and/or maintenance of the Landfill results in a threat to public health, safety, or the environment. Because MassDEP issued its approval before the site assignment process took place, CLF and its members did not have an opportunity to raise these issues before the Board.

9. The risks and harms described above are concrete and specific, and are different in kind and nature than the harms that would be experienced by the public at large.

10. Defendant MassDEP is the state agency responsible for ensuring clean air and water, safe management and recycling of solid and hazardous wastes, timely cleanup of hazardous waste sites and spills, and the preservation of wetlands and coastal resources. MassDEP's headquarters are located at 1 Winter Street, Boston, Massachusetts, and MassDEP's Northeast Regional Office, from which the Final Decision was issued, is located at 205B Lowell Street, Wilmington, Massachusetts.

JURISDICTION AND VENUE

11. This Court has jurisdiction over the subject matter of this Complaint under Mass. Gen. Laws ch. 111, § 150A and Mass. Gen. Laws ch. 30A, § 14.
12. Venue is proper with this Court pursuant to Mass. Gen. Laws ch. 30A, § 14.
13. CLF has properly filed this Complaint within thirty days of receipt of MassDEP's Final Decision, which was issued on April 9, 2018, pursuant to 310 Mass. Code Regs. 19.033(5)(a).
14. CLF has properly filed this Complaint at least five days after providing notice of its intent to appeal to MassDEP General Counsel Benjamin Ericson and MassDEP Northeast Regional Office Director Eric Worrall, pursuant to 310 Mass. Code Regs. 19.033(5)(b). A true and correct copy of CLF's notice of intent to appeal is attached hereto as Exhibit A.
15. CLF has no further administrative remedies available to exhaust. *See* Mass. Gen. Laws ch. 111, § 150A ("For the limited purposes of any such appeal, the department action shall be deemed to be a final decision in an adjudicatory proceeding.").

PROCEDURAL AND LEGAL BACKGROUND

Site Assignment of Solid Waste Facilities in Massachusetts

16. "No place in any city or town shall be maintained or operated by any person, including any political subdivision of the commonwealth, as a site for a facility, or as an expansion of an existing facility, unless, after a public hearing, such place has been assigned by the board of health of such city or town in accordance with the provisions of this section." Mass. Gen. Laws ch. 111, § 150A.
17. "Facility" is defined as "a sanitary landfill, a refuse transfer station, a refuse incinerator rated by the department at more than one ton of refuse per hour, a resource recovery facility, a refuse composting plant, a dumping ground for other refuse or any other works for treating, storing, or disposing of refuse." *Id.*

18. Local boards of health have the authority to rescind, suspend, or modify the site assignment at any time “[u]pon determination that the operation or maintenance of a facility results in a threat to the public health and safety or to the environment,” after due notice and public hearing. *Id.*; 310 Mass. Code Regs. 16.22(1) (“In accordance with M.G.L. c.111, §150A, the assigning board of health . . . may at any time rescind, suspend or modify a site assignment upon a determination that the operation or maintenance of a facility results in a threat to public health, safety or the environment after due notice and public hearing.”).

19. For site assignment purposes, “Major Modifications” to a landfill include “vertical expansions beyond the limits of an approved plan” and alternative use of an assigned site. 310 Mass. Code Regs. 16.22(2); *id.* at 16.21(1) (“[w]here a site has been assigned as a dumping ground or a refuse disposal incinerator pursuant to St. 1955, c. 310, § 2, a different solid waste activity shall not be conducted at the site except in accordance with a new or modified site assignment established in accordance with 310 CMR 16.00, except as specified at 310 CMR 16.21(3)(a).”).

20. Major Modifications require “submittal of a new site assignment application that addresses all criteria affected by the modification, as determined by the Department in writing, and shall be reviewed in accordance with the requirements established at 310 CMR 16.08 through 16.20.” *Id.* at 16.22(2).

21. All other requests to modify a site assignment, “including any request to modify conditions established by the Board of Health in the site assignment, or to increase daily or annual tonnage limits . . . are deemed to be ‘Minor Modifications.’” *Id.* at 16.22(3).

22. “The Board of Health may modify a site assignment to address a minor modification . . . without requiring the filing of a new application by the applicant or site suitability report by the Department, provided the Board of Health provides public notice and holds a public hearing in

accordance with the requirements of 310 CMR 16.00 prior to deciding on the minor modification.”

Id.

23. Abutters to the facility, ten-citizen groups, and anyone else who is specifically and substantively affected may intervene in the public hearing. 310 Mass. Code Regs. 16.20(9). “Any person permitted to intervene shall have all rights of, and be subject to, all limitations imposed upon a Party.” *Id.*

24. All parties to the public hearing “shall have the right to present evidence, cross-examine, make objections and make oral arguments,” and whenever appropriate, redirect and recross may also be permitted. *Id.* at 16.20(10)(e).

25. “A board shall determine that a site is suitable for assignment as a site for a new or expanded solid waste facility unless it makes a finding, supported by the record of the hearing, that the siting thereof would constitute a danger to the public health, safety or environment, based on the siting criteria set forth and established under 310 CMR 16.40.” *Id.* at 16.20(10)(k). “The board may include in any decision to grant a site assignment such limitations with respect to the extent, character and nature of the facility or expansion thereof, as may be necessary to ensure that the facility or expansion thereof will not present a threat to the public health, safety or the environment.” *Id.* at 16.20(12).

26. Only after there is a valid site assignment from the Board of Health can MassDEP approve a new or modified permit. Although the terminology is similar, a major or minor modification to a site assignment issued by a Board of Health involves a separate and distinct process from a major or minor modification to a permit issued by MassDEP.

Permitting of Solid Waste Facilities in Massachusetts

27. “No person shall construct, operate, maintain, expand or modify a facility to store, process, transfer, treat or dispose of solid waste except in accordance with . . . a valid site assignment. . . .”

310 Mass. Code Regs. 19.028.

28. Under the Massachusetts Solid Waste Regulations, an application submitted pursuant to 310 Mass. Code Regs. 19.033 for modification of a landfill, as Wheelabrator’s application was, “shall comply with the criteria set forth at 310 CMR 19.038(2)(a) 1. through 12,” *id.* at 19.038(1)(d), one of which is that “the facility is located within the boundaries of a valid site assignment and is proposed to be constructed, operated and maintained in accordance with the terms and conditions of that site assignment.” *Id.* at 19.038(2)(a).

29. “Any person aggrieved by the final permit decision . . . may file an appeal for judicial review of said permit decision in accordance with the provisions of M.G.L. c. 111, § 150A and M.G.L. c. 30A no later than 30 days following the date of issuance of the final permit decision to the applicant.” *Id.* at 19.033(5)(a).

30. “Any person aggrieved by the action of the department in granting or refusing to grant a permit may appeal that decision under section 14 of chapter 30A.” Mass. Gen. Laws ch. 111, § 150A.

STATEMENT OF FACTS

The Wheelabrator Saugus Landfill

31. Wheelabrator’s approximately 140-acre Landfill is located at the confluence of the Saugus and Pines Rivers and within the boundaries of the Rumney Marshes Area of Critical Environmental Concern (“ACEC”).

32. An ACEC is a state designation for “those areas within the Commonwealth where unique clusters of natural and human resource values exist and which are worthy of a high level of concern and protection.” 301 Mass. Code Regs. 12.02.

33. The site where Wheelabrator’s Landfill now sits was historically a tidal salt marsh.

34. The decision document designating the Rumney Marshes ACEC states that “[t]he Saugus and Pines Estuary, situated landward of the barrier beach of Revere, contains one of the most extensive salt marsh systems in the greater Boston metropolitan area.”

35. According to the U.S. Fish and Wildlife Service, the Rumney Marshes ACEC is “one of the most biologically significant estuaries in Massachusetts north of Boston.”

36. In the decision document designating the Rumney Marshes ACEC, the Secretary of Environmental Affairs stated: “I . . . hereby find that the coastal wetland resource areas included in the Rumney Marshes ACEC . . . are significant to flood control, the prevention of storm damage, the protection of land containing shellfish, and fisheries; the prevention of pollution, the protection of wildlife habitat, the protection of public and private water supplies; public interests defined in the Wetlands Protection Act (MGL c. 131, s. 40; 310 CMR 10.00).”

37. The Landfill’s coastal location makes it extremely vulnerable to climate change impacts, including sea level rise and damaging storm surge, creating a significant risk of erosion and of pollution from the Landfill washing into the surrounding rivers and coastal wetlands. *See Massachusetts v. EPA*, 549 U.S. 497, 521-22 (2007) (“The harms associated with climate change are serious and well recognized. . . . According to petitioners’ unchallenged affidavits, global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. These rising seas have already begun to swallow Massachusetts’ coastal land.”) (citation omitted).

38. Beginning in about 1950, and continuing until 1975, the salt marsh was filled with solid waste from surrounding communities.
39. That solid waste dump, which did not adhere to sanitary landfill practices, is the base upon which the Landfill now sits.
40. Since 1975, Wheelabrator, and its predecessor RESCO, have been dumping incinerator ash from the adjacent municipal solid waste incinerator at the Landfill.
41. Across the site, there is an average of approximately twenty feet of solid waste, and then another thirty feet of ash above it.
42. Unlike other landfills in the state, Wheelabrator's Landfill is unlined.
43. Unlike other landfills in the state, Wheelabrator does not conduct any testing of groundwater quality to determine whether and how much pollution from the Landfill is leaching into the surrounding environment.
44. Wheelabrator relies on a slurry wall surrounding the Landfill and a leachate collection system to contain pollution within the Landfill's boundaries.
45. Wheelabrator only uses pairs of piezometers to measure groundwater levels inside and outside of the slurry wall around the perimeter of the Landfill to measure the effectiveness of its containment system. The system is considered to be working properly if the piezometers show that water levels inside the landfill are lower than water levels outside the landfill, as that would indicate that water is flowing in rather than out.
46. MassDEP's position is that groundwater quality testing is unnecessary because the piezometer measurements demonstrate that the slurry wall is functioning as designed to provide effective containment within the Landfill.

47. The piezometer data submitted by Wheelabrator to MassDEP routinely shows that water levels at some piezometer locations are higher inside the Landfill than outside the Landfill, indicating that the containment system is not functioning as designed and leachate is likely escaping the Landfill.

48. The incineration process produces two types of ash: fly ash from the air pollution control equipment, and bottom ash, which is the non-combustible residue remaining after combustion.

49. These ash deposits contain high concentrations of harmful compounds, including dioxins, which have been described as the most toxic chemicals known to mankind and are recognized human carcinogens.

50. Heavy metals such as lead, which is known to impair cognitive and behavioral development in children, and mercury, which is known for impacts to the central nervous system, kidneys, and developing fetus, are also present in the ash.

51. Other compounds and metals such as polychlorinated biphenyls (“PCBs”), polychlorinated naphthalenes (“PCNs”), cadmium, and arsenic have also been discovered in bottom and fly ash, all of which are known to be toxic to humans and animals.

52. Fly ash in particular has a high concentration of toxic compounds, and over the years has become more contaminated as improved air filtration equipment effectively removes more pollutants prior to emission.

53. The U.S. Supreme Court, in *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994), recognized that ash generated by municipal solid waste incinerators constitutes hazardous waste.

54. EPA allows for the highly toxic fly ash to be mixed with lime and bottom ash prior to toxicity testing. Diluting the fly ash allows incinerators to avoid hazardous waste regulations, but

the ash itself is no less dangerous—the same toxic chemicals are merely spread out over a larger volume of combined ash.

55. Incineration also increases the mobility and bioavailability of toxic metals compared with raw municipal waste.

56. The potential for leaching is also greatest under acidic conditions, which occur when solid waste breaks down into organic acids.

57. Given that the Landfill was originally used for solid waste, soil acidification has likely already taken place and may continue to take place, increasing the risk of leaching.

58. According to Massachusetts Cancer Registry reports for the period 2009 through 2013, people living in Saugus and Revere experienced higher than expected cases (as defined by the Massachusetts Cancer Registry) for many different types of cancer, including, but not limited to, brain cancer, bladder cancer, and lung cancer.

History of Regulation and Oversight of the Landfill

59. In 1974, the Saugus Board of Health granted a “license for maintaining a Sanitary Landfill Dump on land off the Salem Turnpike hereby assigned by the Board of Public Health of the Town of Saugus as a dumping ground and designated by the State Board of Health and the Commissioner of Natural Resources of the Commonwealth of Massachusetts as available for such dumping,” which is hereinafter referred to as the “1974 Site Assignment.”

60. In 1989, MassDEP and RESCO, Wheelabrator’s predecessor, entered into a consent order in an attempt to bring the existing ash management and disposal requirements at the Landfill into compliance with newly-promulgated regulations and policies.

61. The 1989 consent order required the Landfill to close in 1996.

62. In 1991, MassDEP issued an “Existing Facility Permit” to Wheelabrator.

63. The 1989 consent order has been amended eleven times since it was first signed in order to allow the Landfill to expand its capacity and continue operating.
64. The amendments to the consent order have included corresponding revisions to the “Final Engineering Plan” for the Landfill.
65. Upon information and belief, since at least 1997, there have been no permitting actions taken by MassDEP with regard to the Landfill except for the recent permitting action that is the subject of this appeal. All prior changes to the Landfill were made through amendments to the consent order and Final Engineering Plan revisions, without any public process.
66. There have been no minor modifications to the 1974 Site Assignment.
67. There have been no major modifications to the 1974 Site Assignment.
68. There have not been any new site assignments issued for the Landfill since 1974.
69. On June 28, 2016, the Saugus Board of Health notified Wheelabrator that a site assignment for the Landfill was necessary.
70. On July 26, 2016, the Saugus Board of Health notified the Executive Office of Energy and Environmental Affairs (“EEA”) of its decision to require a site assignment for the Landfill, stating, *inter alia*, that “[t]he proposed expansion of the capacity of the valleys in the Landfill warrants a site assignment due to the increased capacity of the Landfill and the change in quality, character, and degree of use of the Landfill.”
71. On July 26, 2016, the Saugus Board of Health notified MassDEP of its decision to require a site assignment for the Landfill, stating, *inter alia*, that “a valid site assignment remains necessary for the Wheelabrator ash landfill.”

72. In its public comments submitted to MassDEP on January 12, 2018, the Saugus Board of Health again reiterated that Wheelabrator lacked a valid site assignment for the Landfill and that this precluded a decision from MassDEP approving the proposed Landfill expansion.

73. As of the filing of this Complaint, Wheelabrator has not applied for a new or modified site assignment for the Landfill.

MassDEP's Recent Permitting Process

74. On April 19, 2017, Wheelabrator applied to MassDEP for "a major modification for revision to the Final Engineering Plan and the continued use of the Saugus Ash Monofill in Saugus, Massachusetts."

75. On November 1, 2017, MassDEP issued a Provisional Decision to allow Wheelabrator to uncap and fill two stormwater valleys totaling thirty-nine acres, thereby expanding the capacity of the Landfill for an additional five to ten years.

76. MassDEP accepted public comments on its Provisional Decision from November 1, 2017 through January 12, 2018, including at a public hearing held on November 30, 2017.

77. Over 100 people attended the public hearing and over 50 people provided oral comments.

78. MassDEP received over 1800 written comments during the comment period.

79. On April 9, 2018, MassDEP issued a Final Decision approving Wheelabrator's application for a major modification to fill the valleys and expand the Landfill. As part of its Final Decision, MassDEP executed an eleventh amendment to the consent order and approved the proposed revisions to the Final Engineering Plan.

80. MassDEP issued its Final Decision despite the fact that the Landfill does not have a valid site assignment.

81. MassDEP's Final Decision did not reference 310 Mass. Code Regs. 19.038, nor analyze any of the criteria it sets forth, one of which requires that "the facility is located within the boundaries of a valid site assignment and is proposed to be constructed, operated and maintained in accordance with the terms and conditions of that site assignment." 310 Mass. Code Regs. 19.038(2)(a); *id.* at 19.038(1)(d) (stating that an application submitted pursuant to 310 Mass. Code Regs. 19.033 for modification of a landfill, as Wheelabrator's application was, "shall comply with the criteria set forth at 310 CMR 19.038(2)(a) 1. through 12.").

82. MassDEP stated only that "[w]hen reviewing an application for a modification of a permit for a solid waste management facility, Massachusetts law requires MassDEP to base its decision on whether the application meets the standards, as applicable, established by the regulations."

83. In past documents relating to the Landfill, specifically in the 1991 Existing Facility Permit, MassDEP stated that "[i]n reviewing the applicant's request to modify a permit, the Department considered the requirements of the Consent Order and the criteria set forth at 310 CMR 19.038(2)(a)1-10, (c) and (d), as required by 310 CMR 19.038(1)(e)" and then addressed each of the criteria, including the requirement that the facility have and comply with a valid site assignment, one by one.

84. CLF notified MassDEP on May 2, 2018 of its intent to appeal MassDEP's Final Decision.

85. For the reasons that follow, MassDEP's Final Decision was not made in accordance with applicable law.

COUNT I

Unlawful Approval of a Major Modification to a Landfill Without a Valid Site Assignment

86. CLF incorporates the allegations contained in the above paragraphs as though fully set forth herein.

87. Because ash disposal was not contemplated in the 1974 Site Assignment, the current use of the Landfill constitutes an alternative use of an assigned site, for which a major modification to the site assignment is required. 310 Mass. Code Regs. 16.22(2); *id.* at 16.21(1).

88. Wheelabrator's proposed expansion also constitutes a vertical expansion beyond the limits of an approved plan, which requires major modification of the site assignment. *Id.* at 16.22(2).

89. Wheelabrator's proposed expansion also requires a minor modification to the site assignment. *Id.* at 16.22(3).

90. There has not been a major modification to the 1974 Site Assignment.

91. There has not been a minor modification to the 1974 Site Assignment.

92. Despite being informed by the Saugus Board of Health that a site assignment for the Landfill is necessary, Wheelabrator has not submitted an application and the site assignment process has not taken place.

93. As a result, there was no valid site assignment for the Landfill when MassDEP issued its Final Decision to allow expansion of the Landfill, and its decision was therefore unlawful.

REQUEST FOR RELIEF

WHEREFORE, CLF requests that this Court grant the following relief:

1. Find that MassDEP's Final Decision was based on an error of law, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedure, unsupported by substantial evidence, and/or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law;
2. Declare that MassDEP's Final Decision fails to comply with the Massachusetts Solid Waste Regulations, the Massachusetts Site Assignment Regulations, and Mass. Gen. Laws ch. 111, § 150A;

3. Declare MassDEP's April 9, 2018 Final Decision null and void;
4. Vacate MassDEP's Final Decision;
5. Grant a stay of the terms and conditions of MassDEP's Final Decision pending resolution of this appeal;
6. In the alternative, temporarily enjoin Wheelabrator from proceeding with the proposed modifications to the Landfill as approved in MassDEP's Final Decision pending resolution of this appeal;
7. Permanently enjoin Wheelabrator from proceeding with the proposed modifications to the Landfill as approved in MassDEP's Final Decision; and
8. Grant such other relief as the Court deems appropriate.

Respectfully submitted this 9th day of May, 2018,

CONSERVATION LAW FOUNDATION

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