

**March 15, 2012: SPO/Casella's Motion to Dismiss the Appeals of the
Juniper Ridge Landfill PBD**

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March 15, 2012

Ms. Susan Lessard, Chair
Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

RE: Separate Filings by Charles Leithiser, Edwards Spencer, and Sam Hunting.
In the Matter of State of Maine/State Planning Office
Public Benefit Determination #5-020700-W5-AU-N

Dear Madam Chair:

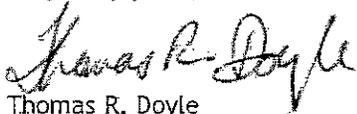
I enclose the State Planning Office and NEWSME Landfill Operations, LLC's Motion to Dismiss the Filings of Charles Leithiser, Edward Spencer, and Sam Hunting. Although these three individuals each have submitted their own, standalone filings, for ease of review SPO and NEWSME file this single Motion to Dismiss that addresses all three.

As explained in the Motion to Dismiss, the three individuals identified above have filed three separate challenges to the Commissioner's recent public benefit determination ("PBD") concerning the Juniper Ridge Landfill in Old Town. Mr. Leithiser's filing, a request for modification of the PBD, is barred by a recent statutory amendment. The filings by Mr. Spencer and Mr. Hunting, both appeals of the PBD, also should be dismissed. Neither individual is aggrieved by the PBD and, therefore, neither possesses standing to appeal. Similarly, if the filing by Mr. Leithiser is treated as an appeal, he too is not aggrieved by the PBD and lacks standing to appeal.

To avoid unnecessary expenditure of time and resources either by the Board in reviewing the three filings or by SPO and NEWSME in responding to the claims in the filings, SPO and NEWSME respectfully request that the Chair stay the deadline for responding to the merits of the filings until the issues presented in this Motion to Dismiss are fully resolved.

Thank you very much for your attention to this matter.

Very truly yours,


Thomas R. Doyle

cc: Commissioner Patricia Aho, Esq.
Cindy Bertocci
Cyndi Darling
Nancy Macirowski, Esq.
George MacDonald
Charles Leithiser
Edward Spencer
Sam Hunting

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF

STATE OF MAINE, ACTING THROUGH THE STATE PLANNING OFFICE OLD TOWN, PENOBSCOT COUNTY, MAINE JUNIPER RIDGE LANDFILL EXPANSION #S-020700-W5-AU-N (APPROVAL WITH CONDITIONS)

PUBLIC BENEFIT
DETERMINATION

PARTIAL APPROVAL

**STATE PLANNING OFFICE
AND
NEWSME LANDFILL OPERATIONS, LLC'S
MOTION TO DISMISS THE FILINGS OF
CHARLES LEITHISER, EDWARD SPENCER, AND SAM HUNTING**

In three separate filings, Charles Leithiser, Edward Spencer, and Sam Hunting challenge the Commissioner's January 31, 2012 determination that an expansion of the Juniper Ridge Landfill ("JRL") in Old Town, Maine will provide a substantial public benefit (the "Determination"). The State Planning Office ("SPO"), the owner of JRL, and NEWSME Landfill Operations, LLC ("NEWSME"), the operator of JRL, jointly file this motion to dismiss each of the three filings.

Leithiser's filing, identified by the author as a "Request for change in permit conditions," is barred by a 2011 statutory amendment to 38 M.R.S. § 341-D(3) establishing that individual citizens may not petition the Board of Environmental Protection (the "Board") to modify Department of Environmental Protection (the "Department") approvals. Additionally, none of the three individuals is aggrieved by the Determination. Spencer and Hunting, both of whom filed appeals, therefore lack the statutorily required standing to have done so. Similarly, even if his filing is treated as an appeal, Leithiser is not aggrieved and lacks the required standing.

Notably, in 2010 Spencer and Leithiser jointly appealed a Department licensing decision

involving JRL.¹ See Board Order in #S-020700-WU-AJ-N (Dec. 2, 2010) (denying appeal). Both claim in their current filings to have been “granted standing” by the Board for purposes of that appeal, concluding that they are now automatically entitled to challenge the Determination. (Spencer Appeal at 2; Leithiser Request at 1.)²

This claim is false. The prior appeal in which Spencer and Leithiser joined was one of two appeals challenging the same Department licensing decision. The Board found that the appellant who filed the other appeal had standing. Although SPO and NEWSME challenged the standing of Spencer and Leithiser to file their own, separate appeal in that matter, the Board chose not to address the standing of Spencer and Leithiser, unequivocally stating: “Given that the two separate appeals are consolidated and contain similar objections, the Board declines to address the standing of appellants Dolan, Spencer, and Leithiser.” *Id.* at 4. Any suggestion by Spencer and Leithiser that the standing determination in the prior appeal should apply to this decision is without merit.

In the present instance, Leithiser, Spencer, and Hunting all raise different issues and present different arguments. There is no one filing upon which the others may piggyback. Before the Board expends the time and resources to review the merits of these individual claims and requires SPO and NEWSME do the same in preparation of their responses, consideration of whether each filing is grounded in a legal basis justifying review and response is appropriate.

For the reasons stated above and further articulated below, all three filings should be dismissed. SPO and NEWSME respectfully request that the Board Chair stay or suspend the

¹ In 2010, Mary Dolan, Edward Spencer, and Charles Leithiser filed a joint appeal challenging Department Order #S-020700-WU-AJ-N. Dolan has not submitted a filing in the present matter.
² One of the characteristics of the filings by Leithiser, Spencer, and Hunting is that they do not have page numbers. For the purpose of referencing each document in this motion, we have treated each document as though its pages were numbered. The Leithiser Request is four pages; the Spencer Appeal is five pages; the Hunting Appeal is four pages.

time for responding to the merits in the three filings until the issues raised in this motion to dismiss are fully resolved.

I. Background

SPO and NEWSME desire to expand JRL to meet the State's solid waste disposal needs. On September 15, 2011, SPO filed its application for public benefit determination. This application was filed pursuant to 38 M.R.S. § 1310-AA, which specifies that prior to submitting an application for expansion of a landfill a person must apply for and obtain from the Commissioner a determination that the proposed expansion provides a substantial public benefit. Licensing of a landfill expansion is a separate, comprehensive administrative permitting process that follows a public benefit determination. A public benefit determination itself does not authorize construction of an expansion, or any new or different activities at a landfill.

On January 31, 2012, the Commissioner issued her decision, the Determination, concluding that expansion of JRL will provide a substantial public benefit. She concluded, however, that the size of the expansion that satisfies the public benefit determination standards in Section 1310-AA is smaller than the expansion SPO and NEWSME believe is needed. In filings dated February 28, February 29, and March 1, Leithiser, Spencer, and Hunting, respectively, each filed papers challenging the Determination.

II. Leithiser's Filing is a Request to Modify the Commissioner's Determination and is Prohibited by 38 M.R.S. § 341-D(3).

Leithiser has captioned his filing a "Request for change in permit conditions" and in it, unambiguously states:

I am not appealing Commissioner Aho's partial approval of the PBD [the Determination] for the proposed expansion of Juniper Ridge.

Leithiser at 2 (emphasis added).³

He freely admits he has not filed an appeal, but rather a request for modification “asking the Board for a change in specific permit conditions.” *Id.* While he notes that the Department’s informational sheet outlining appeal rights allows an appellant to seek a change in a permit condition as a remedy in the course of an appeal, and Leithiser desires such a result, he expressly selected a different procedural route – a request for modification – in pursuit of his objective.

Id. Therefore, his filing should be treated as such and dismissed for the following reason:

Section 341-D(3) now provides that the Board only may hear requests to modify made by the Commissioner:

At the request of the commissioner and after written notice an opportunity for a hearing pursuant to Title 5, chapter 375, subchapter 4, the board may modify in whole or in part any license, or may issue an order prescribing necessary corrective action, whenever the board finds that any of the criteria in section 342, subsection 11-B have been met.

38 M.R.S. § 341-D(3).⁴ The Commissioner has made no such request. Leithiser’s request to modify must be dismissed.

III. Leithiser, Spencer, and Hunting Each Lack Standing to Appeal.

Even if Leithiser’s filing is treated by the Board as an appeal, he, along with Spencer and Hunting, all lack standing to appeal the Determination.

A. The Legal Standard: Only a Person Aggrieved May Appeal the Commissioner’s Public Benefit Determination.

“The right to appeal from an administrative decision is governed by statute.” *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 9. The statutory provision governing public benefit

³ Leithiser also states that, in fact, he “strongly support[s] and completely agree[s]” with certain of the Commissioner’s provisions in the PBD “regarding oversize bulky waste (as a result of CDD processing) and Municipal Solid Waste (MSW) bypass.” Leithiser Request at 2.

⁴ A “license” includes any license, permit, order, approval or certification issued by the department. 38 M.R.S. § 341-D(3).

determinations provides that while the Board is not authorized to assume jurisdiction over a public benefit determination on its own action, the Board may hear appeals of the Commissioner's decision. 38 M.R.S. § 1310-AA(2). Title 38, Section 341-D(4) governs such appeals, establishing that the Board may hear:

Final license or permit decisions made by the commissioner when a person aggrieved by a decision of the commissioner appeals that decision to the board within 30 days of the filing of the decision with the board staff.

(Emphasis added.)

The term "person aggrieved" is not defined in Title 38, but this term commonly is used to establish who may appeal an administrative decision and has been interpreted by Maine courts.⁵

The Law Court has interpreted a person aggrieved to be a person who:

has suffered particularized injury – that is, if the agency action operated prejudicially and directly upon the party's property, pecuniary or personal rights. The injury suffered must be distinct from any experienced by the public at large and must be more than an abstract injury.

Nelson, 2008 ME 91, ¶ 10. Additionally, the issue of standing should be examined "in context to determine whether the asserted effect on the party's rights genuinely flows from the challenged agency action." *Id.*

A person seeking to appeal carries the "burden of proving" that they are an aggrieved person. *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 14. "It is well established that in order to have standing . . . the appellant must prove . . . that it suffered a particularized injury as a result of the agency's decision." *Norris Family Assocs., LLC v. Town of Phippsburg*, 2005 ME 102, ¶ 11; *see also Nergaard*, 2009 ME 56, ¶ 16 ("To establish standing, one must demonstrate . . . that he or she has suffered a particularized injury or harm.")

⁵ Chapter 2 of the Department's rules defines the term "aggrieved person," however, Chapter 2 does not apply to public benefit determinations. Department Rules, Ch. 2(2)(B).

B. Neither Leithiser, Spencer, nor Hunting Has Suffered a Particularized Injury as a Result of the Determination.

None of the three individuals separately challenging the Determination has suffered a particularized injury as a result of that determination. Nor has any one of them alleged any impact resulting from the Determination. Rather, the two individuals who actually allege any impacts, Spencer and Hunting, claim, for example, that the expansion may have adverse traffic, noise, odor, or aesthetic impacts. *See, e.g.*, Spencer Appeal at 1-2; Hunting Appeal at 1-2. None of these alleged impacts, however, could result from the Determination – the decision challenged here. All the Determination does is allow SPO and NEWSME, if they choose, to file an expansion application. The alleged impacts only could flow from a separate licensing decision authorizing actual expansion of the landfill – a decision that has not yet occurred.

It would be in the course of any future licensing proceeding that the types of impacts Spencer and Hunting allege would be addressed. As a result, that future licensing record would have reports and other information on potential traffic, noise, odor, aesthetics, and other impacts. The absence of any such factual information in the record involving the Determination, which is exactly what one would expect, is material for two important reasons. First, as discussed below, without any factual information to support their claims that they are aggrieved by future expansion of the landfill, each of the three individuals fails to carry his burden of proof and “demonstrate that he . . . has suffered a particularized injury or harm.” *Nergaard*, 2009 ME 56, ¶ 16. Second, the absence of any record evidence related to the alleged impacts of a yet-to-be approved expansion has the potential to force into SPO and NEWSME into the inequitable position of having to engage in a “he said, she said” type argument in order to refute the unsubstantiated claims, or conducting the very type of studies that would be part of any future licensing of an expansion, now, and then seeking to supplement the public benefit determination

record to rebut would-be appellants' unsupported claims of injury. This makes no sense and underscores why the public benefit determination process should not be conflated with the separate expansion licensing process, and why the potential impacts associated with the latter should not be considered when evaluating standing to appeal the former.

This potentially messy result can and should be avoided simply by following the statute and precedent. "[A] person aggrieved by a decision of the [C]ommissioner" may appeal "that decision" to the Board. 38 M.R.S. § 341-D(4) (emphasis added). Thus, to challenge the Determination, the alleged particularized injury must result from the challenged determination. *Storer v. DEP*, 656 1191, 1192 (Me. 1995) ("The agency's action must operate prejudicially and directly upon a party's property, pecuniary or personal rights."). Here, while the decision being challenged is the Determination, the alleged impacts only could follow a separate Commissioner licensing decision for an expansion that has not even been applied for. As a result, all three filings should be dismissed.

C. Neither Leithiser, Spencer, nor Hunting Will Suffer a Particularized Injury if JRL is Subsequently Licensed to Expand.

If the Board looks past the direct impact of the Determination and considers potential impacts that might be associated with some yet-to-be applied for or licensed expansion of JRL, Leithiser, Spencer, and Hunting still fail to establish that they would be aggrieved, because none has suffered a particularized injury.

1. Charles Leithiser

The only portion of Leithiser's filing that arguably reflects an attempt to demonstrate that he has suffered a particularized injury is the very first portion of his submission:

My name is Charles Leithiser and I have been a resident of and homeowner in Old Town, Maine for the past 32 years. I have been granted standing and appeared before the Board previously, in a 2010 (unsuccessful) appeal of the DEP

ruling that allows treated biomedical waste to be disposed of in the Juniper Ridge Landfill. I am unable to request that my City Government appeal this partial approval of Public Benefit determination, due to a clause in Old Town's Host Community Agreement that suspends payment to the City in [sic] officials challenge any license or agreements regarding Juniper Ridge and the City's dependence on said payments.

I was present at most, if not all of the public meetings held before the State Planning Office took ownership of the West Old Town Landfill, now know as Juniper Ridge.

Leithiser Request at 1. None of these statements allege a cognizable injury whatsoever, let alone one that is particularized to Leithiser.

a. *"I have been a resident of and homeowner in Old Town, Maine for the past 32 years."*

Status as a resident in a particular municipality or State where an activity is authorized to take place is not sufficient to give an individual standing to challenge the permit authorizing the activity. This is well established in Maine law.⁶ *Nelson*, 2008 ME 91, ¶ 10, 953 A.2d at 382 ("The injury suffered must be distinct from any experienced by the public at large and must be more than an abstract injury."); *Chabot v. Sanford Zoning Board of Appeals*, 408 A.2d 85, 85 (Me. 1979) ("Here plaintiff pleaded only that he was a resident and property owner in the town of Sanford. He did not plead or prove any injury from the zoning board's decision, particular or otherwise."). In addition, resident status within a municipality or the State is insufficient to provide a resident standing to appeal a municipally-held or State-held permit. *Nergaard*, 2009 ME 56 ¶¶ 117-22 (finding residents of the Town of Westport Island lacked standing to appeal the Town's permit authorizing improvements to the Town's boat ramp).

Accordingly, Leithiser's statement that he is a resident of Old Town, Maine makes him no different than any other Old Town resident. This resident status does not provide him with

⁶ Leithiser resides at 394 Fourth Street in Old Town. Leithiser Request at 4. This is a residential neighborhood located a little over 4.5 miles from JRL on the opposite side of I-95 and the opposite side of the Stillwater River from JRL.

standing. He still must establish a particularized injury.

b. *"I have been granted standing ... before the Board previously"*

As noted in the introduction, Leithiser's claim that the Board previously granted him standing in 2010 to appeal a Department licensing decision involving JRL is untrue.

Additionally, even if the Board had granted him standing in an appeal of a separate licensing decision, he still must demonstrate standing in the present matter by showing that he has suffered a particularized injury as a result of the Determination. *Nelson*, 2008 ME 91, ¶ 10 ("We examine the issue of standing in context to determine whether the asserted effect on the party's rights genuinely flows from the challenged agency action.") Leithiser has not attempted to make such a showing nor has he advanced any claim that he will be affected by the Determination, despite being well aware of the standing requirement by virtue of his previous experience before the Board. Simply put, his false claim of prior standing does not establish a particularized injury arising from the Determination and fails to establish that Leithiser is a person aggrieved in the present proceeding.

c. *"I am unable to request that my City Government appeal this partial approval of Public Benefit determination, due to a clause in Old Town's Host Community Agreement that suspends payment to the City in [sic] officials challenge any license or agreements regarding Juniper Ridge and the City's dependence on said payments."*

This statement is both inaccurate and unrelated to standing. With regard to accuracy, there is no provision in the Old Town's Host Community Agreement that prevents Leithiser from asking the City to appeal a Department decision, or the City from initiating such an appeal. Put plainly, no right of Leithiser's is affected by this agreement.⁷ With regard to standing, this

⁷ The Old Town Host Community Agreement is not part of the record associated with the Determination. SPO and NEWSME reserve the right to challenge submission of this supplemental evidence if the filings including this agreement are not dismissed.

statement regarding the long-standing agreement with Old Town in no way establishes a particularized injury resulting from the Determination or even suggests that the Determination or any landfill expansion will affect Leithiser's property, pecuniary, or personal rights in any way.

- d. *"I was present at most, if not all of the public meetings held before the State Planning Office took ownership of the West Old Town Landfill, now know as Juniper Ridge."*

There is nothing in statute and no legal precedent in Maine that would remotely support a conclusion that Leithiser's attendance at meetings regarding JRL gives rise to a particularized injury as a result of the Determination.

2. Edward Spencer

Spencer includes the following paragraph with the heading, "Aggrieved Status":

As a resident of Old Town, if I was to petition my City Council and convince them that it is in Old Town's best interests to vote in opposition to the Expansion within our borders, as a taxpayer I would be penalized financially since Casella would withhold tip fee payments as enabled in our Host Community Agreement. Furthermore, on any given day I have to smell and hear the landfill at my residence, and when traveling in my community, be threatened by truck traffic going to the Landfill. I am prevented from carrying out a portion of my timber harvesting plan on my land as it would make the landfill visible from my residence, and likewise from other potential house sites on my 120 wooded acres. Visiting my neighbor's farm is a great way to spend time in the country but the mountain of trash rising on the eastern horizon clearly has a negative effect on property values locally. I have previously been granted standing and appeared before the board in appeals regarding Juniper Ridge Landfill.

Spencer Appeal at 1-2. None of these statements demonstrate a particularized injury providing Spencer standing to challenge the Determination.

- a. *"As a resident of Old Town, if I was to petition my City Council and convince them that it is in Old Town's best interests to vote in opposition to the Expansion within our borders, as a taxpayer I would be penalized financially since Casella would withhold tip fee payments as enabled in our Host Community Agreement."*

This statement does not establish a particularized injury resulting from the Determination.

First, the potential impact Spencer alleges – a potential loss of tip fees paid to the City – would not result from either the Determination or an expansion. Neither in any way sets, modifies, or otherwise affects tip fees or payments to Old Town as a host community. *Nelson*, 2008 ME 91, ¶ 10. (the particularized injury must “genuinely flow[] from the challenged agency action”).

Second, in addition to being outside the record and irrelevant to the issue of standing, any provisions of the Host Community Agreement that might attach financial considerations to certain actions do not prohibit the City’s legal right to challenge the Determination if the City’s leaders wish to do so.

Third, any potential loss of fees paid to the City flowing from the City’s decision to appeal the Determination is purely hypothetical; the City has not opposed the PBD. *Id.* (a particularized injury “must be more than an abstract injury”). Fourth and finally, the hypothetical impact from lost fees is an impact that Spencer admits he would experience as a “resident of Old Town” and “taxpayer” by virtue of owning property within the City. This type of impact is no different than the impact other Old Town residents and property owners would experience and does not qualify as a particularized injury. *Id.* (“The injury suffered must be distinct from any experienced by the public at large”); *Chabot v. Sanford Zoning Board of Appeals*, 408 A.2d 85, 85 (Me. 1979).

b. “[O]n any given day I have to smell and hear the landfill at my residence”

This type of completely unsubstantiated statement is insufficient to establish a particularized injury. *Nergaard*, 2009 ME 56. ¶¶ 14, 16 (an appellant has the “burden of proving” he is aggrieved and must “demonstrate” that he has suffered a particularized injury) (emphasis added). As noted above, this type of unsupported claim of particularized injury underscores why allegations of future impacts associated with a future licensing proceeding

should not be considered when evaluating whether Spencer is aggrieved by the Determination. Whether Spencer is aggrieved as a result of odor or sound is an issue that would be developed during actual licensing.

The burden does not lie with SPO and NEWSME to disprove Spencer's unsupported assertion. The burden lies with Spencer to support his claim. Nevertheless, in the present case common sense and basic logic is all that is required to demonstrate that Spencer's claim lacks merit. Spencer's property on Kirkland Road is approximately 1.75 miles southwest from the boundary of JRL. The primary source of sound at JRL is the equipment. The type of equipment used at JRL is the same as the standard equipment used at typical construction sites. In other words, the equipment at JRL is not unique and does not generate unique sounds. Given the considerable distance of Spencer's property from JRL it is extremely unlikely that he could hear any landfill activities and, even if he could, any sound would be infrequently audible and at such low levels it could not interfere with his use and enjoyment of his property. Additionally, the potential expansion activity would be to the north of the existing landfill and a greater distance from Spencer's property. Any sound audible by Spencer as part of the expansion would be even less than today. (This is true since sound is attenuated with distance.)

The same is true of any odor Spencer might be able to detect. Recognizing the manner in which the landfill is operated (*e.g.*, the application of daily cover, continuous landfill gas collection and destruction, application of deodorizer both seasonally and as determined appropriate, and application of synthetic intermediate cover) and the distance of Spencer's property from JRL, it would be a rare occurrence that he would be able to detect an odor from the existing landfill, and any expansion would be even farther from his house.

Ultimately, whether Spencer is aggrieved by the Determination is not dependent on

whether, under ideal weather conditions, he might ever hear any sound or detect any odor from the landfill. The question is whether the sound or odor is perceptible enough or frequent enough to prejudicially affect his property, pecuniary or personal rights and whether an impact to Spencer is distinguishable from any impact to the general public. *Nelson*, 2008 ME 91, ¶ 10 (to demonstrate a particularized injury, a person must show that “the agency action operated prejudicially and directly upon the party’s property, pecuniary or personal rights” and the injury suffered must be distinct from any experienced by the public at large”). Based on the factors stated above, mainly the significant distance between Spencer’s property and JRL and the manner in which the landfill is operated, there is no basis for the board to make the inferential leap Spencer invites with his unsupported statement and treat him as though he is aggrieved. Spencer has provided no information about the nature or extent of the alleged sound or odor, has not claimed an injury to any right, and has not distinguished himself from other members of the general public who, like himself, neither abut nor live in the neighborhood of the landfill. Having failed to do so, he has not established that he is an aggrieved person.

c. *“[O]n any given day I have to . . . when traveling in my community, be threatened by truck traffic going to the Landfill.”*

Apart from the fact noted earlier that the Decision itself will not result in generation of any traffic, this alleged threat is not a particularized injury. When traveling in the community any traffic impacts to Spencer⁸ would be no different than the impacts experienced by other community members and other members of the general public traveling through the community. The Law Court has addressed and conclusively rejected claims that generalized community traffic impacts such as those alleged by Spencer constitute a particularized injury to an individual.

⁸ SPO and NEWSME dispute that trucks traveling to or from JRL pose a threat as alleged by Spencer.

In *Nergaard*, two plaintiffs in the Town of Westport Island appealed a permit issued to the Town authorizing improvements to the Town's boat launch. 2009 ME 56. The plaintiffs were not abutters of the boat launch. *Id.* ¶ 19. They claimed they travelled past the launch daily and argued that they would suffer a particularized injury because of the increased traffic that would be associated with the permitted improvements and the dangerous traffic conditions that would result. *Id.* The Law Court rejected this argument, noting that the plaintiffs were "not unique" in their use of the road passing the boat ramp and that there was "no difference between the potential harm asserted by [the plaintiffs] and the potential harm to [those other] drivers and to their passengers – members of the public – who use the same road on a daily basis." *Id.* ¶ 20.

The very same is true about the claim advanced by Spencer. Any traffic impacts he might experience would be no different than those experienced by other members of the general public traveling in the community. He has not alleged a particularized injury.

d. "I am prevented from carrying out a portion of my timber harvesting plan on my land as it would make the landfill visible from my residence, and likewise from other potential house sites on my 120 wooded acres."

With regard to the first part of this statement, whether Spencer can carry out a timber harvesting plan in no way is related to the view shed that would be created as a result of that harvesting. If Spencer wants to harvest trees on his property he is free to do so. Nothing in the Determination imposes any limitation on the number, type, or location of trees he can harvest or the market value of the timber.

With regard to the assertion that if he cleared enough trees he could see JRL in the distance, Spencer fails to provide any factual support for this suggestion. This is insufficient to carry his "burden of proving" he is aggrieved by the Determination. *Nergaard*, 2009 ME 56, ¶ 14.

The alleged impact is purely hypothetical and highly unlikely to ever occur. Spencer conveniently avoids any discussion of the extent of clearing that would be needed to view JRL from his property. Given the distance that separates his property from JRL and the fact that his property is not located on a mountain or hill, but rather along Pushaw Stream, considerable clearing of the existing trees behind his house would be needed view the horizon 1.75 miles away.⁹ It is not unreasonable to estimate that he would have to clear most, if not all, of the trees within 1,000 feet of the rear of his house in the direction of the stream. Regardless of whether JRL existed, it is extremely unlikely that any landowner would choose to engage in this type of clear cutting in his or her backyard. The hypothetical house sites Spencer references also would have to have similarly extensive and improbable clearing around them to create the potential to see the landfill expansion. Further, development of any house sites on Spencer's property would be significantly restricted by the fact that the majority of his property is zoned Resource Protection in which residential houses are not permitted. Old Town Zoning Ordinance, §§ 104.21(14), 111.12. Putting aside for the moment whether being able to view the landfill expansion would cause injury to Spencer, the unlikely nature of the events that would need to occur for him to be able to see any portion of the landfill expansion makes any possible injury purely hypothetical, abstract, and, therefore, incapable of being a particularized injury. *Nelson*, 2008 ME 91, ¶ 10 (A particularized injury "must be more than an abstract injury.").

Additionally, if the necessary clearing were completed, what Spencer might see through the tree tops is the currently licensed landfill. Any expansion would occur to the north of the existing landfill. The result is that the currently licensed landfill would block nearly all, if not all, of the expansion area from his view. For him to suffer a particularized injury, that injury

⁹ The closer one is to a stand of trees, the shorter the distance one can see over the horizon from that location. Thus, significant clearing would be needed to have a chance to view JRL from Spencer's property.

would have to be related to the expansion and not the currently licensed landfill. Spencer has not alleged how his personal, property, or pecuniary rights might be infringed upon were he able to see a slightly larger profile of the landfill, situated nearly two miles away.

e. "Visiting my neighbor's farm is a great way to spend time in the country but the mountain of trash rising on the eastern horizon clearly has a negative effect on property values locally."

This is not a claim by Spencer that his property, pecuniary, or personal rights are impacted by the Determination, but rather unsubstantiated claims that (1) his neighbor's property value has been negatively impacted, and (2) in general, local property values have been negatively affected, all by unspecified impacts. This type of generic claim that does not involve a specific injury to Spencer fails to establish a particularized injury.

f. "I have previously been granted standing and appeared before the board in appeals regarding Juniper Ridge Landfill."

The only prior appeal of a JRL license that Spencer has filed is the 2010 appeal he filed jointly with Leithiser. For the reasons discussed above, this statement by Spencer is false and fails to establish standing in the present appeal.

3. Sam Hunting

In support of his claim that he is a person aggrieved, Hunting states:

I am a resident of Orono, Maine. The house in which I live is approximately 30 feet from Route 2 (Main Street). The loaded trash trucks headed north to JRL, and the "wheels up" trash trucks from the KTI facility in Old Town¹⁰ headed south, create noise, fumes, stench, and vibration, all of which impact my quality of life, ability to attract tenants, and property values. I am also an Orono taxpayer, and some portion of my taxes goes to the periodic street repairs required by the constant traffic of these heavy trucks. In addition, I bank at People's Bank, directly across Main Street. Therefore, I cross and re-cross Route 2 several times a week, risking injury (or worse) if the brakes on a trash truck fail, or a driver is inattentive.

Hunting Appeal at 1-2.

¹⁰ SPO and NEWSME are not aware of the referenced KTI facility in Old Town.

a. *"I am a resident of Orono, Maine."*

As discussed above, resident status in Old Town is not sufficient to establish standing. For the same reasons residency in the municipality in which JRL is located is insufficient, residency in a neighboring town even farther from the landfill is likewise insufficient.

b. *"The house in which I live is approximately 30 feet from Route 2 (Main Street). The loaded trash trucks headed north to JRL, and the "wheels up" trash trucks from the KTI facility in Old Town headed south, create noise, fumes, stench, and vibration, all of which impact my quality of life, ability to attract tenants, and property values."*

Hunting's house on Route 2 in Orono is located approximately seven miles from JRL. The north and southbound traffic to and from the landfill, the traffic he references, now travels almost exclusively on I-95 due to the weight limit having been raised in 2011 from 80,000 to 100,000 pounds on federal highways in Maine. The entrance to JRL is on Route 16, just 0.4 mile from Exit 199 in Old Town for northbound traffic and an even shorter distance from Exit 199 for southbound traffic. This makes I-95 by far the most convenient way for nearly all haulers to reach JRL. As a result, in the event of an expansion, nearly all northbound or southbound traffic that would be associated with JRL would continue to use I-95 and, therefore, would come nowhere near Hunting's property in Orono.

Furthermore, given his home's distance from the landfill, any impact he might experience from this traffic is no different than the impact experienced by the general public. Such an impact does not constitute a particularized injury. *Nergaard*, 2009 ME 56, ¶ 20.

Truck traffic on Route 2 in Orono associated with JRL likely would be extremely limited if the expansion is built. This traffic would almost exclusively involve the hauling of locally generated waste, such as construction and demolition debris from a site in Orono, where traveling on I-95 would not be reasonable. Any impact of the expansion on the volume of traffic

on this road would be negligible due, as stated above, to the convenience of other, more direct routes. If an expansion is approved, (which, we must note again, the Determination does not do) Hunting's has not alleged how attributable to JRL-related traffic on Route 2 might impact his quality of life, ability to attract tenants¹¹, or property value. As a result, he has not alleged, let alone demonstrated, a particularized injury that would provide him standing. *Id.* ¶ 16 (“To establish standing, one must demonstrate . . . that he or she has suffered a particularized injury or harm.”)

- c. *“I am also an Orono taxpayer, and some portion of my taxes goes to the periodic street repairs required by the constant traffic of these heavy trucks.”*

Hunting's status as an Orono taxpayer, which stems from his ownership of property in Orono, is similar to his status as an Orono resident; it situates him no differently than the general public. Even assuming for the sake of argument that there were heavy truck traffic associated with an expansion of JRL that damaged Orono roads and necessitated use of taxpayer money to fund the repairs, this is not a particularized injury to Hunting. *Nelson*, 2008 ME 91, ¶ 10, 953 A.2d at 382 (“The injury suffered must be distinct from any experienced by the public at large . . .”); *Chabot*, 408 A.2d at 85 (denying standing where the plaintiff only claimed “that he was a resident and property owner in the town”).

- d. *“I bank at People's Bank, directly across Main Street. Therefore, I cross and re-cross Route 2 several times a week, risking injury (or worse) if the brakes on a trash truck fail, or a driver is inattentive.”*

The risk Hunting poses in this statement is purely hypothetical and nothing more than speculation. Hunting has not provided, nor are we aware, of a single shred of evidence supporting his conclusion that the risk of walking across the street in Orono, Maine is somehow

¹¹ Hunting states he resides at his Route 2 property. It is unclear whether he rents a portion of his house as well.

greater as a result of the Determination.

In any event, the type of traffic-related risk alleged here is a risk shared by many other members of the public, and in this regard, he is no different than the plaintiffs in *Nergaard* who the Law Court determined lacked standing. Those plaintiffs claimed that they traveled on Route 144 “daily” and that the permitted boat ramp project would cause dangerous traffic conditions at a Route 144 intersection they cross as part of their daily travel. The Law Court noted that numerous other drivers traveled the same route and on an equally frequent basis. The plaintiffs in *Nergaard* were just like other members of the public, as is Hunting here. *Nergaard*, 2009 ME 56, ¶¶ 19-20. Hunting lacks standing to appeal.

IV. Conclusion

Procedural requirements set out in statute governing appeals of Department decisions ensure an equitable process, allowing truly affected individuals to appeal, while not requiring the successful applicant and the Board, respectively, to respond to and review just any challenge filed for any reason. Here, Spencer and Hunting have filed separate appeals, while Leithiser has filed a request for modification.

Leithiser’s request is barred by a recent statutory amendment prohibiting all such requests for modification except those made by the Commissioner. Even if Leithiser’s request is treated as an appeal, his filing, along with the filings of Spencer and Hunting, must be dismissed. The only injuries any of the three alleged are not a result of the Determination they challenge, but rather only could result from an expansion of JRL that would be the subject of a separate, yet-to-be-initiated licensing proceeding. Additionally, none of the three filings contains any facts or record support demonstrating a particularized injury, whether from the challenged Determination or a future expansion. Each of the separate filings should be dismissed.

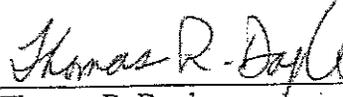
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