

STATE OF MAINE / STATE PLANNING OFFICE – JUNIPER RIDGE  
LANDFILL // Public Benefit Determination (PBD) Permit #S-020700-W5-  
AU-N: Motion to Dismiss Appeal – Edward Spencer

- Draft Proposed Board Order



DRAFT  
BOARD ORDER

IN THE MATTER OF

STATE OF MAINE, ACTING THROUGH THE ) STATE PLANNING OFFICE ) OLD TOWN, PENOBSCOT COUNTY, MAINE ) JUNIPER RIDGE LANDFILL EXPANSION ) PUBLIC BENEFIT DETERMINATION ) #S-020700-W5-BA-N )	APPEAL OF CHAIR'S RULING ON MOTION TO DISMISS  SPENCER APPEAL FINDINGS OF FACT AND ORDER (DENIAL)
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Pursuant to the provisions of 38 M.R.S.A. Sections 344 and 341-D(4) and *Rules Concerning the processing of Applications and Other Administrative Matters*, 06-096 CMR 2.24(B) (last amended April 1, 2003) of the Department of Environmental Protection's regulations, the Board of Environmental Protection has considered the applicant's Motion to dismiss the appeal of EDWARD SPENCER, the response of Mr. Spencer, the appeal of the applicant from the Chair's decision, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. BACKGROUND

The State of Maine, acting through the State Planning Office (SPO), owns the Juniper Ridge Landfill (JRL) in Old Town, Maine. The State Planning Office contracts with Casella Waste Systems, Inc. (Casella) for the operation of the Juniper Ridge Landfill. Under the terms of the operating contract, Casella is required to fund all costs associated with development of capacity, operations and closure activities at the landfill, including the submission of an application to expand the landfill. NEWSME Landfill Operations, LLC, a subsidiary of Casella is the operator of the Juniper Ridge Landfill.

In the first regular session of the 124<sup>th</sup> Legislature, the public benefit determination statute (38 M.R.S.A. §1310-AA) was amended to extend applicability to new state-owned facilities or expansions to existing state-owned facilities. On September 15, 2011, the applicant filed an application for a determination of public benefit. The Department held a public meeting on October 24, 2011 and also accepted written comments on the application. On January 31, 2012 the Commissioner issued partial approval of the public benefit determination application.

2. PROCEDURAL HISTORY

426 STATE OF MAINE, ACTING THROUGH THE )	APPEAL OF CHAIR'S RULING
STATE PLANNING OFFICE )	ON MOTION TO DISMISS
OLD TOWN, PENOBSCOT COUNTY, MAINE )	
JUNIPER RIDGE LANDFILL EXPANSION )	SPENCER APPEAL
PUBLIC BENEFIT DETERMINATION )	FINDINGS OF FACT AND ORDER
#S-020700-W5-BA-N )	(DENIAL)

On February 29, 2012 Edward Spencer filed an appeal of the Commissioner's Public Benefit Determination (PBD) for the proposed JRL expansion to the Board of Environmental Protection (Board). On March 15, 2012 Pierce Atwood, LLP, representing SPO/Casella, filed with the Board a Motion to dismiss the appeal. In part, the motion argued that Mr. Spencer failed to establish that he would be aggrieved because he did not demonstrate that he has suffered a particularized injury from the issuance of the public benefit determination. In a letter dated March 20, 2012, the Board Chair offered Mr. Spencer the opportunity to respond to the applicant's motion to dismiss for lack of standing as an aggrieved person. On March 26, 2012, Mr. Spencer filed a response to the applicant's motion to dismiss his appeal. Following review of these submissions, the Board Chair found on April 2, 2012 that Mr. Spencer had made an adequate showing of standing and that there is a sufficient connection between his particularized injury and the approval of the public benefit determination decision. On April 11, 2012 Pierce Atwood, LLP, representing SPO/Casella, appealed the Chair's decision on standing to the full Board.

### 3. REGULATORY FRAMEWORK AND DISCUSSION

Although Chapter 2 of the Board rules does not apply to public benefit determinations pursuant to Section 2.B., these Rules are useful and instructive for the purpose of determining standing in this context. Section 24.B(1) of the rule provides that “an aggrieved person may appeal to the Board for review” of a decision of the Commissioner. As set forth in Section 24.B(2), the written notice of appeal must include evidence demonstrating that the appellant is an aggrieved person. Section 1.B of the rule states that an “ ‘aggrieved person’ means any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision.” In addition, the Board is informed by the interpretation by Maine courts of the terms “aggrieved person” and “particularized injury” in determining standing before the Board.

Casella/SPO argues that the approval of the Public Benefit Determination (PBD) is unrelated to the odor and noise impacts that Mr. Spencer alleges as the basis for standing. It is important to note that the Maine Legislature expressly provided for appeals to the Board from a PBD. 38 M.R.S.A. § 1310-AA(2). The requirements for standing before the Board from a PBD must take into account that the Legislature contemplated such appeals. In addition, 38 M.R.S.A. § 1310-N(3-A)(B) expressly states that the PBD is not subject to review as part of the technical licensing of the proposed expansion. Thus, for citizens adversely impacted by expansion of the JRL, appeal of the PBD is the only opportunity to challenge that Determination.

Casella/SPO suggests that standing can only be demonstrated by a facility or a business with a specific interest in the amount of JRL’s capacity. This argument is contrary to principles of standing established in federal and state case law. In *Matter of Lappie*, 377 A.2d 441, 443 (Me. 1977), the

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JUNIPER RIDGE LANDFILL EXPANSION	)	SPENCER APPEAL
PUBLIC BENEFIT DETERMINATION	)	FINDINGS OF FACT AND ORDER
#S-020700-W5-BA-N	)	(DENIAL)

Law Court ruled that an appellant who raised issues of potential future environmental impacts stemming from a proposed solid waste facility had standing to challenge the financial capacity aspect of the license, even though that particular issue was not directly related to the appellant's potential injury. Significantly, the Law Court rejected the argument, analogous to the one posed by Casella/SPO here, that the appellant must be aggrieved by the particular finding that is being appealed.

The federal courts have routinely found that appellants have standing to challenge threshold determinations that serve as a necessary predicate to the ultimate licensing decision. In doing so, courts look to whether the alleged injuries are "fairly traceable" to the challenged conduct, and whether a substantial probability exists that a favorable outcome would redress the appellant's alleged injuries. For example, in *Town of Barnstable, Massachusetts v. FAA*, 659 F.3d 28 (D.C. Cir. 2011), the Court of Appeals ruled that a Town and non-profit organization had standing to challenge the FAA's Determination of No Hazards even though such Determination had no legal effect, because of a reasonable likelihood that such Determination would play a significant role in the ultimate decision-making process of whether the wind farm would ultimately receive a federal permit. *Id.* at 31. See also *Monsanto Co. v. Geertson Seed Farms*, — U.S. —, 130 S.Ct. 2743, 2752–54 (2010) (holding that plaintiffs had standing to challenge an injunction preventing them from planting a regulated crop, even though a decision vacating the injunction would enable plaintiffs only to petition for partial deregulation); *American Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 658 (7<sup>th</sup> Cir. 2011) (fact that challenged decision was required, but not sufficient by itself, to authorize landfill construction due to the need for an additional state permit did not present causation problem for purposes of standing).

Although the PBD is a separate decision, it is a necessary prerequisite to a license for expansion of the landfill. The Board finds that Mr. Spencer's allegations of noise and odor from JRL (discussed more fully below) are fairly traceable to an expansion of the landfill, which will result in a longer life of ongoing landfill operations.

The applicant also challenges Mr. Spencer's allegations that he suffers from noise and odor from the landfill at his residence, which is 1.75 miles away, arguing that these allegations alone are not sufficient to establish standing. However, Maine courts have held that even allegations that are conclusory in nature and lack specificity are sufficient to withstand a motion to dismiss based on standing. *Hammond Lumber Company v. FAME*, 521 A.2d 283, 287 (Me. 1987); see also *Grand Beach Association, Inc. v. Town of Old Orchard Beach*, 516 A.2d 551, 553 (Me. 1986) ("It is important to note that we have not required a high degree of proof of a particularized injury in our efforts to ensure that judicial review of administrative action is afforded only to proper parties"). The Board notes that the Maine courts have followed this approach with respect to standing in cases that do not involve abutters. For example, the plaintiff in *Hammond Lumber Company, supra*,

428 STATE OF MAINE, ACTING THROUGH THE	)	APPEAL OF CHAIR'S RULING
STATE PLANNING OFFICE	)	ON MOTION TO DISMISS
OLD TOWN, PENOBSCOT COUNTY, MAINE	)	
JUNIPER RIDGE LANDFILL EXPANSION	)	SPENCER APPEAL
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challenged a decision to provide financing to the City of Augusta for construction of a large facility which was intended to be leased to Augusta Lumber Company. The Court found that a competing lumber company had standing to sue based upon its bare and conclusory allegations that the project would decrease the local demand for lumber, adversely affecting Hammond Lumber. 521 A.2d at 287. The Board finds that Mr. Spencer's allegations that he suffers from noise and odor at his residence as a result of the operation of the landfill is a reasonable allegation of injury sufficient to establish standing.

For the reasons set forth above, the Board finds that Mr. Spencer is an aggrieved person who has demonstrated a particularized injury. Therefore, the Board finds that Mr. Spencer has standing before the Board for the purpose of appealing the Public Benefit Determination.

Based on the above Findings, the Board concludes that:

1. Edward Spencer filed a timely appeal.
2. Edward Spencer has established that he is an aggrieved person for the purpose of bringing an appeal of Public Benefit Determination #S-020700-W5-AU-N.

THEREFORE, the Board UPHOLDS the Board Chair's denial of the applicant's motion to dismiss the appeal of EDWARD SPENCER.

DONE AND DATED AT AUGUSTA, MAINE THIS \_\_\_\_\_ DAY OF MAY, 2012

BOARD OF ENVIRONMENTAL PROTECTION

BY: \_\_\_\_\_  
 Susan M. Lessard, Chair