

Spencer: Chair Lessard's April 2, 2012 Ruling

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



PAUL R. LEPAGE
GOVERNOR

Susan M. Lessard, Chair

Cynthia S. Berford
Executive Analyst

Terry Dawson
Office Specialist II

April 2, 2012

Edward Spencer
PO Box 12
Stillwater, ME 04489

RE: Motion to Dismiss Appeal by E. Spencer in the Matter of:
State of Maine / State Planning Office
Public Benefit Determination #S-020700-W5-AU-N

Dear Mr. Spencer:

By letter dated March 15, 2012, Attorney Doyle filed, on behalf of the licensee, State Planning Office (SPO) and Casella, a motion to dismiss your appeal of the Public Benefit Determination for the proposed expansion of the Juniper Ridge Landfill. That motion to dismiss argues that you do not have standing as an aggrieved person to bring an appeal in this matter. You were subsequently provided with an opportunity to respond to the motion. By letter dated March 26, 2012 you filed your response to the Motion to Dismiss.

The requirements for filing an appeal of the Commissioner's licensing decision are set forth in the Department's Chapter 2 *Rules Concerning the Processing of Applications and Other Administrative Matters*. Among these is a requirement that the notice of appeal must include "...evidence demonstrating an appellant's standing as an aggrieved person." An "aggrieved person" is defined in rule as "any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision." Further, "if the Chair decides an appellant is not an aggrieved person, "the Chair may dismiss the appeal." The rules provide that the Chair's decision regarding standing may be appealed to the full Board.

I have reviewed the appeal documents dated February 29, 2012, the motion to dismiss, the response to the motion to dismiss, and have consulted with the Office of the Attorney General regarding the cases cited in these submissions. As required by the rules governing appeals before it, the Board requires an appellant to set forth a particularized injury. You claim that you suffer odor and noise from the landfill at your home, which is located approximately 1.75 miles from the landfill.

The motion to dismiss argues that you lack standing for two reasons. First, it argues that the approval of the Public Benefit Determination (PBD) is unrelated to the odor and noise impacts you allege as the basis for standing. I disagree with this analysis for several reasons. As an initial matter, 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 for a PBD must

take into account that the Legislature contemplated such appeals. Moreover, as you point out, 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. Therefore, any injury that would create standing to challenge the ultimate license decision should also create standing to challenge the PBD determination. I find the interpretation proposed by SPO/Casella to be overly restrictive because it would seem to operate to preclude virtually any appeal of a PBD, a result that would contravene the apparent intent of the statute.

The motion to dismiss also argues that your allegation of impacts from odor and noise from the landfill at your residence are factually insufficient to establish standing. First, I should note that I am not making an ultimate decision as to any fact at this juncture. I also observe that your appeal provided little in the way of elaboration or substantiation to support your assertions as to odor and noise, and this relatively thin record makes the standing issue a closer call than it might otherwise have been. However, I find that it is plausible that you suffer impacts from odor and noise emanating from the landfill at a distance of 1.75 miles where your residence is located. Therefore, I find your assertion of injury to be a minimally sufficient, *prima facie* showing establishing a particularized injury. *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").

Accepting this *prima facie* showing of standing is consistent with how Maine courts approach the issue and also avoids a mini-trial before the Board on the facts underlying the claim of injury. *Wister v. Town of Mount Desert*, 2009 ME 66, ¶¶ 13-14, 974 A.2d 903 (Me. 2009). Convening an evidentiary hearing to examine this threshold issue further would needlessly delay a decision on the merits and may well take as much or more time as the appeal itself. That result is in no one's interest, including SPO/Cassella's, which is entitled to an expeditious decision on the appeal.

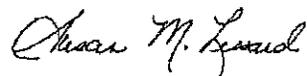
Finally, I find that there is a sufficient connection between your particularized injury and the PBD approval, because the PBD is a legal prerequisite to the subsequent licensing of the landfill expansion. *American Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 658 (7th Cir. 2011) (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). I also want to clarify that, although your standing is based on alleged impacts from odor and noise, the Board will consider all the issues that are raised in appeal. *Matter of Lappie*, 377 A.2d 441, 443 (Me. 1977) (once standing is granted based on particularized injury, appellant may raise any issues related to validity of the challenged decision, whether or not related to appellant's injury).

As stated above, my ruling in this matter may be appealed to the full Board. Any such appeal must be submitted by Wednesday, April 11, 2012 at 5:00 pm and will be considered by the Board at its May 3, 2012 meeting.

Lessard letter to E. Spencer April 2, 2012
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If you have any questions regarding this ruling, please contact Cynthia Bertocci, the Board's Executive Analyst, at 287-2452 or Nancy Macirowski, Assistant Attorney General, at 626-8868.

Sincerely,



Susan M. Lessard, Chair
Board of Environmental Protection

cc: Service List

