

**April 11, 2012: Letter from SPO/Casella Appealing the Chair's Ruling
Finding that Mr. Spencer has Standing to Appeal the Juniper Ridge
Public Benefit Determination**

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April 11, 2012

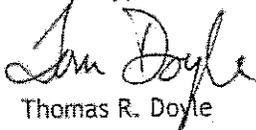
Susan Lessard, Chair
Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

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

Dear Madam Chair and Members of the Board:

Enclosed please find the State Planning Office and NEWSME Landfill Operations, LLC's Appeal of the Chair's Ruling Denying SPO/NEWSME's Motion to Dismiss the Appeal of Edward Spencer for lack of standing.

Sincerely,


Thomas R. Doyle

TRD/dcu
Enclosure

cc: Service List

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF

<p>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)</p>

PUBLIC BENEFIT
DETERMINATION

PARTIAL APPROVAL

**STATE PLANNING OFFICE
AND
NEWSME LANDFILL OPERATIONS, LLC'S
APPEAL OF THE CHAIR'S RULING
DENYING THE MOTION TO DISMISS THE APPEAL OF EDWARD SPENCER**

On March 15, 2012, the State Planning Office ("SPO") and NEWSME Landfill Operations, LLC ("NEWSME") jointly filed a motion to dismiss Edward Spencer's appeal of the Commissioner's Public Benefit Determination (the "Determination") for lack of standing. By letter dated April 2, 2012, the Chair of the Board of Environmental Protection (the "Board") denied this motion and provided SPO and NEWSME until April 11, 2012 to appeal her ruling (the "Ruling") to the full Board. SPO and NEWSME respectfully submit this appeal of the Ruling.

As explained in SPO and NEWSME's motion to dismiss (the "Motion"), only a person aggrieved by the Determination may appeal the Determination to the Board. This standard is set in Maine statute. 38 M.R.S. § 341-D(4). Rather than restate here why Mr. Spencer is not a person aggrieved by the Determination and, therefore, lacks standing to appeal, SPO and NEWSME incorporate the Motion by reference and highlight in this appeal two key ways in which the Ruling deviates from Maine law, both of which require reversal of the Ruling.

I. The Determination is Separate and Distinct from Any Future DEP Licensing Proceeding that Could Permit Expansion of the Juniper Ridge Landfill and Mr. Spencer Only Alleges Impacts Associated with that Future Proceeding.

Title 38, Section 341-D(4) provides 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.) Here, the Commissioner decision Mr. Spencer appealed is the Determination, yet the potential impacts he alleges, such as those associated with noise, odor, and traffic, only could flow from actual expansion of the Juniper Ridge Landfill (“JRL”). All the Determination does is provides SPO and NEWSME with the option of filing a landfill expansion application with the Department of Environmental Protection (“DEP”). Actual expansion will require a DEP license that is separate and distinct from the Determination. Mr. Spencer’s claim to be aggrieved by potential impacts flowing from a potential future licensing decision is legally insufficient to establish standing to appeal the Determination.

In finding the nexus between the Determination and a potential, future DEP expansion permit to be sufficient to allow allegations of impacts associated with the latter to serve as the basis for appealing the former, the Ruling notes:

[T]he interpretation proposed by SPO/Casella¹ [is] 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.

(Ruling at 2.) Title 38, Section 1310-AA(2), the statutory section referenced in this quote, provides that a Public Benefit Determination (a “PBD”) “may be appealed to the [B]oard.” Nothing in the language or any other statutory section indicates the Legislature intended to treat this one category of determinations differently from any other Commissioner decision that may be appealed to the Board. Simply put, nothing in statute supports any inference that the

¹ NEWSME is a wholly owned subsidiary of Casella Waste Systems, Inc.

Legislature intended to authorize anyone other than a person aggrieved by a PBD to be able to appeal that decision.

While this plain reading of the statutory language may not allow Mr. Spencer to appeal, by authorizing appeals of PBDs to the Board the Legislature ensured that an applicant for such a determination who is aggrieved by the Commissioner's decision may appeal to the Board. Additionally, a competitor disposal facility that may be adversely impacted by the approval of a PBD or local businesses or facilities that rely on continued operation of JRL to dispose of their waste affordably and are adversely impacted by denial of a PBD, both may be able to demonstrate standing to appeal. While the universe of persons who might be aggrieved by a PBD might not be as large as the universe of persons who might be aggrieved by a license authorizing actual expansion, this is the simple result of the difference between the two types of approvals and application of existing Maine law.

The Seventh Circuit case involving wetland impacts and landfill construction in Illinois cited in the Ruling, *American Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 653 (7th Cir. 2011), is not relevant here. In that case, the Conservancy challenged an Army Corps of Engineers permit issued to Waste Management that authorized destruction of wetland in order to obtain fill to use as daily cover at a nearby landfill. After applying for the Corps permit, Waste Management applied to the Illinois EPA for a permit to construct a new landfill in the same area where the wetland would be destroyed. Because no additional wetland would be filled as a result of construction of the landfill, an additional Corps wetland permit was not needed by Waste Management. *Id.* at 654-655. The one permit would serve two purposes.

In *American Bottom*, members of the Conservancy provided affidavits stating that they engaged in wildlife viewing (watching mainly birds and butterflies) in a park located a half mile

from the wetlands licensed to be destroyed and that these wetlands provided critical habitat for wildlife, especially birds and butterflies. *Id.* at 657. These claims were not contested by the Corps or Waste Management. *Id.* The court found that these impacts, directly associated with the activity licensed by the challenged Corps permit, provided the Conservancy with standing. *Id.* at 660. Mr. Spencer, on the other hand, has not even alleged any impacts directly associated with the Determination, let alone submitted an affidavit with fact-based claims of injury.² He is not like the individuals in *American Bottom*.

In *dicta*, the Seventh Circuit asked whether the impact associated with construction of the new landfill could be relevant to the plaintiff's standing. *Id.* at 658-659. In answering yes, the court did so based on an interdependence between the wetlands permit and landfill construction not present here. Specifically, the court acknowledged the challenged Corps permit authorized actual activity – the destruction of wetlands – that had to be completed for the landfill to be constructed. *Id.* at 658. The court also noted that once Waste Management obtained the Corps wetland permit it was “likely” Waste Management would be able to obtain the other state and local permits needed to construct the landfill. *Id.* Unlike the Corps permit in *American Bottom*, the Determination does not authorize any physical or construction activity that would have to occur for JRL to expand. Nor does issuance of the Determination make it any more or less likely that DEP will approve expansion of JRL. The DEP licensing process for the expansion of JRL is a separate licensing proceeding yet to be undertaken and in which interested persons will have ample opportunities to participate and express their concerns. The rationale discussed in *American Bottom* does not apply here.

² If Mr. Spencer had claimed any injury, he would have to support the assertions with “evidence” since SPO and NEWSME contest his claim of injury from the PBD. *American Bottom Conservancy*, 650 F.3d at 656.

(W3028583.5)

II. Mr. Spencer's Assertion of Injury is Legally Insufficient to Establish Standing to Appeal.

If the Board does not consider expansion of JRL to be separate from the Determination, Mr. Spencer's appeal still must be dismissed. He has failed to demonstrate he would be aggrieved by any expansion. All he has done is assert he would be impacted by things such as noise and odor, but such unsubstantiated claims are legally insufficient to establish standing.

Citing *Grand Beach Association, Inc. v. Town of Old Orchard Beach*, 516 A.2d 551 (Me. 1986), the Ruling finds Mr. Spencer's "assertion of injury to be a minimally sufficient, *prima facie* showing establishing a particularized injury," therefore satisfying the statutory requirement that he be a person aggrieved. (Ruling at 2.) This is not the correct legal standard.

The minimal standing threshold applied in *Grand Beach* and adopted in the Ruling only applies when evaluating whether an abutter or someone in the immediate neighborhood of a license activity has standing to appeal. *Wister v. Town of Mount Desert*, 2009 ME 66, ¶ 13 ("A statement of abutter status, as occurred here, is enough to establish a *prima facie* showing of standing, absent evidence to the contrary."); *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 18 ("[I]n the context of disputes involving an abutting landowner, the threshold for demonstrating a particularized injury is minimal. Additionally, standing has been liberally granted to people who own property in the same neighborhood . . ."); *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, ¶ 7 ("The threshold requirement for an abutter to have standing is minimal. Because of the abutter's proximate location, a minor adverse consequence affecting the party's property, pecuniary or personal rights is all that is required for the abutting land owner to have standing."); *Brooks v. Cumberland Farms Inc.* 1997 ME 203, ¶ 10 ("when the person . . . is an abutter, a reasonable allegation of a potential for particularized injury is all that is necessary"). Mr. Spencer is neither an abutter of JRL nor does he live in the same

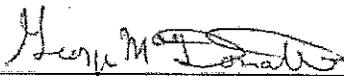
neighborhood. Instead, he lives nearly two miles away.

Given the distance between Mr. Spencer's property and JRL, the burden rests with him to demonstrate a particularized injury and such a demonstration requires more than a mere assertion of injury. *Nergaard*, 2009 ME 56, ¶ 14 ("Nergaard and Stern bore the burden of proving that they met the definition of aggrieved parties."); *id.* ¶ 16 ("To establish standing, one must demonstrate . . . that he or she has suffered a particularized injury or harm"); *see also* DEP Rules, Ch. 2, § 24(B)(2) (stating the notice of appeal "must include . . . evidence demonstrating the appellant's standing as an aggrieved person"). This is further underscored by the fact SPO and NEWSME dispute Mr. Spencer's assertion that he will suffer a particularized injury if JRL is expanded. *See American Bottom Conservancy*, 650 F.3d at 656 (noting that to have standing a person "must allege, and if the allegation is contested must present evidence, that the relief he seeks will if granted avert or mitigate or compensate him for an injury . . . caused or likely to be caused by the defendant"). Mr. Spencer has now had two opportunities to show how he is a person aggrieved, once in his appeal and again following the Chair's March 20, 2012 letter to him in which she provided Mr. Spencer an opportunity to respond to the Motion and expressly stated: "Your response should address only the issue of standing, setting forth the factual basis for your claim of standing in this matter." (Emphasis added.) He has offered no such facts or evidence, only assertions, and has not demonstrated any injury to his property, pecuniary, or personal rights. Accordingly, his appeal should be dismissed.

III. Conclusion

For the reasons set out in SPO and NEWSME's Motion and those set forth above, Mr. Spencer is not a person aggrieved by the Determination. SPO and NEWSME respectfully request that the Board reverse the Ruling and dismiss Mr. Spencer's appeal.

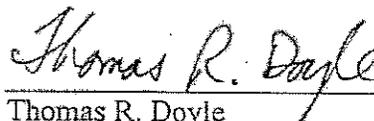
Dated: April 11, 2012



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