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To: Board of Environmental Protection
From: Paula M. Clark, Director, Division of Materials Management, BRWM
Date: September 17, 2020
Subj: 06-096 C.M.R. c. 400; Petition for Rulemaking; Public Hearing
Background Information

The rulemaking petition presented for public hearing this morning proposes to modify Chapter 400 of the Solid Waste Management Rules for two primary purposes:

- 1) To revise the definition of “waste that is generated within the State”; and,
- 2) To include consideration of “equal protection” and “environmental justice” in the standards applicable to public benefit determinations for solid waste disposal facilities.

Definition of “waste that is generated within the State”

Earlier this year, the Maine Legislature passed LD 401 which, in part, revised the statutory definition of “waste that is generated within the State”. The language proposed in the rulemaking petition with regard to this definition is not consistent with the new law. Prior to 2020, Maine law provided that “waste that is generated within the State” included “residue and bypass generated by incineration, processing and recycling facilities within the State or waste whether generated within the State or outside of the State if it is used for daily cover, frost protection or stability or is generated within 30 miles of the solid waste disposal facility.” In part, this language addressed the inherent problem, particularly in the case of Maine incinerators, of attempting to identify and potentially segregate residues (e.g. ash) that had been generated through the incineration or processing in Maine of waste that originated in another state, and also took into account such issues as the seasonal fluctuations in the volumes of out-of-state generated waste accepted by Maine incinerators.

The significance of classifying waste as “generated within the State” is that by law (38 M.R.S. § 1310-N(11)) a solid waste disposal facility owned by the State may not be licensed to accept waste that is not generated in Maine. (Juniper Ridge Landfill in Old Town is the single currently operating State-owned solid waste disposal facility in Maine.) Further, statute requires that any other publicly owned solid waste landfill that proposes to accept waste that is not generated within the State, obtain a determination of public benefit pursuant to the provisions of 38 M.R.S. § 1310-AA.

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Maine law (38 M.R.S. § 1310-N(5-A)(B)(2)) requires that a solid waste processing facility that generates residue requiring disposal, recycle or process into fuel for combustion all waste accepted at the facility to the maximum extent practicable, but in no case at a rate of less than 50%. At the time of statutory enactment, “recycle” in this context included the use of processing residue as shaping, grading or alternative daily cover (ADC) materials at landfills. The intent of the legislation was to maximize recycling and to minimize the volume of processing residues disposed in landfills. This law was passed in 2008 at a time when the production of biomass boiler fuel derived from CDD drove the operations of CDD processing facilities. The Department promulgated rules to implement the recycling requirement with the expectation that recycling rates at processing facilities would increase over time. It was not anticipated that the primary method of “recycling” processing residues would become placement in a landfill. In the case of CDD processing facilities¹, concerns have arisen regarding the volume of post-processing residue that is ultimately shipped to a landfill for disposal or use, as compared to the total volume of waste accepted for processing. By percentage, the vast majority of incoming CDD waste (most of which originates in other states) is disposed or placed in the state-owned Juniper Ridge Landfill in Old Town following processing. In the aggregate, CDD processing fines for ADC and other landfill placement is now the principal product of these facilities.

In the Department’s 2019 update to the *State Waste Management and Recycling Plan (Maine Materials Management Plan)*² a variety of actions and strategies were included to support waste reduction, reuse, and recycling, and to focus on addressing current conditions and trends that create disincentives to managing wastes further up the Solid Waste Management Hierarchy. Among those were 3 in particular that guided the development of language by the Department for inclusion in LD 112 (An Act to Implement Changes to Maine’s Solid Waste Laws Pursuant to a Review of the State Waste Management and Recycling Plan):

- Evaluate potential effects of legislation to better align landfill operations and economic incentives with managing wastes in accordance with Maine’s Solid Waste Management Hierarchy (including restrictions on the amount of waste that can be disposed in state-owned landfills that is derived from wastes originating from outside of Maine)
- Review data and information concerning construction/demolition debris (CDD) processing operations focused on the nature and volume of processing residues being landfilled to identify opportunities to drive a reduction in the volume of CDD fines and residues being landfilled; and,
- Evaluate the effect and utility of the statutory provision that allows processing facilities to include the use of CDD fines as landfill shaping, grading and alternative

¹ There are 2 commercial construction/demolition debris processing facilities in Maine currently: ReEnergy in Lewiston and Aggregate Recycling Corp. (ARC) in Eliot.

² Updates to the *State Waste Management and Recycling Plan* are required, by statute (38 M.R.S. § 2122), to be presented to the Maine Legislature every 5 years.

daily cover material when calculating their recycling rate for consistency with the State's Solid Waste Management Hierarchy.

LD 112, in part, proposed to:

- revise the definition of “waste that is generated within the State”, while maintaining the status of residue generated by incinerators and recycling facilities as “waste generated within the State”; and,
- limit the amount of residue placed in a landfill that could count toward a facility's recycling rate.

Ultimately, this topic was carried over to the Second Regular Session of the 129th Legislature to accommodate additional work and discussion and was addressed in LD 401 (An Act to Preserve State Landfill Capacity and Promote Recycling) earlier this year, prior to the early adjournment of the Legislature. The bill was signed by the Governor on March 18, 2020.

The resulting statute (PL 2019 Chapter 619) (Attachment 1) revised the definition of “waste generated within the State” to provide, in part, that residue generated by an incineration or recycling facility located in Maine, regardless of whether the waste incinerated or processed by that facility was initially generated within or outside the State, continued to be considered waste generated within the State. Further, it narrowed and revised the circumstances under which processing residue may be used for various operational purposes at a landfill and still be considered “waste generated within the State”. In part, the law requires that the use of this waste be consistent with the statutory provisions requiring waste processing facilities to recycle to the maximum extent practicable but in no case at a rate less than 50%, and further requires that at least 50% of the waste that a solid waste processing facility characterizes as recycled must have been reused or recycled by the facility through methods other than placement in a landfill (i.e. 50% of 50%).

There is an exception in the statute that provides that a processing facility that was in operation during calendar year 2018 that accepts exclusively CDD and that accepted more than 200,000 tons of such waste in calendar year 2018, is required to recycle 15% (rather than 50%) through methods other than placement in a landfill by January 1, 2022, and 20% by January 1, 2023. The single processing facility that qualifies for this exception sends the largest volume of residue to the Juniper Ridge Landfill. The exception was crafted in view of the projected negative impacts that the imposition of the 50% standard would have on the processing business, and in view of facility modifications that are planned to increase waste recycling. The statute requires that the department include an evaluation of this matter and any recommendations in its 2024 update to the state waste management and recycling plan.

Equal Protection and Environmental Justice

The Department supports consideration of the concepts of equal protection and environmental justice in the regulatory process.

The Department is reviewing information and materials from other jurisdictions and organizations in an effort to identify the most appropriate options. We have recently been made aware that the Northeast Waste Management Officials Association (NEWMOA), in which the Department is an active participant, is establishing an environmental justice working group with regional representation. The group will, in part, be evaluating approaches to environmental justice in the regulatory context. The department plans to participate in this effort and, from it, possibly develop additional ideas for the Board's future consideration.