

**06-096 C.M.R. ch. 400: Maine Solid Waste Management Rules: General Provisions**

**BASIS STATEMENT**

**Note:** This statement was adopted by the Department pursuant to the *Maine Administrative Procedure Act*, 5 M.R.S. § 8052(5), which requires agencies, at the time of adoption of any rule, to also adopt a written statement explaining the basis for the rule.

**Background and Purpose.** On January 13, 2020, the Department of Environmental Protection received a Petition to Require Agency Rulemaking, submitted pursuant to 5 M.R.S. §8055 and signed by 257 qualified State of Maine voters, thereby requiring the Department to initiate rulemaking and hold a public hearing. The petition requested specific amendments to 06-096 C.M.R. Chapter 400 (Maine Solid Waste Management Rules: General Provisions) to: “clarify requirements for Public Benefit Determinations relating to approval of waste facilities, by ensuring that the definition of ‘waste that is generated within the State’ accurately describes the sources of waste materials disposed in the State, and by requiring Public Benefit Determinations to include consideration of the impacts on health and welfare, environmental justice and equal protections for communities where waste facilities operate.”

**Rule development.** On March 5, 2020, the Board of Environmental Protection voted to post the proposed changes to public hearing pursuant to 5 M.R.S. § 8055. Notice of rulemaking was posted on the Department of Environmental Protection website and comments were accepted beginning on April 9, 2020. A public hearing was held on September 17, 2020 via video conference as authorized by PL 2019 Chapter 617. The comment period was closed on September 28, 2020. Subsequently, the Department prepared a proposed draft rule for consideration by the Board of Environmental Protection that addressed the regulatory provisions identified in the rulemaking petition and included the statutory definition of “bypass”, a provision of P.L 2019 Chapter 291.

**Comments Received:** During the comment period from April 9, 2020 to September 28, 2020, and including the public hearing, comments were received from a total of 206 parties. Commenters have been assigned a commenter number (C#) used for reference in the comment/response section of this statement:

- C1 Affleck, Amanda
- C2 Ammerman, H.D.
- C3 Andrews, Penny
- C4 Anne, Esther
- C5 Ashby, Dale
- C6 Atlee, Dick
- C7 Baker, Barb and Terry
- C8 Banks, Andrew
- C9 Banks, Dennis
- C10 Banks, EV
- C11 Banks, John
- C12 Barnett, Alice

C13 Bassett, Ed  
C14 Benson, Mary Ann  
C15 Berman, Jean  
C16 Birkett, Lucy  
C17 Blaisi, Antonio  
C18 Bourgoin, Kathryn  
C19 Bourne, Susan Hillman  
C20 Bradford, Abigail (Maine Conservation Voters)  
C21 Bradley, Linda  
C22 Brooks, Robin  
C23 Burns, Penthea  
C24 Burt, Anne  
C25 Capone, Suzy  
C26 Carson, Brownie, (Sen.) (Maine State Senate)  
C27 Carter, Bill  
C28 Christoforo, Fay  
C29 Clark, Jani  
C30 Cloutier, Tammy  
C31 Coffee, Brandy  
C32 *#32 not assigned to any commenter*  
C33 Colihan, Dana (Community Action Works)  
C34 Cooper, Debbie  
C35 Cowan, Jensen  
C36 Crandall, Nichole  
C37 Cranford, Meghann  
C38 Crockett, Peter  
C39 Cunnane, Kelly  
C40 Curran, Michael  
C41 Currier, Shannon  
C42 Dale, Eric  
C43 Daniels, Tess  
C44 Darcy  
C45 Davis, Timothy  
C46 Dibiase, Barbara  
C47 Dimoula, Ariadne  
C48 Duncan, Nancy  
C49 Dunn, M.  
C50 Dunn, Mary  
C51 Dunton, Londa  
C52 Eaton, Charles (Maine Logistic Solutions)

C53 Ede, Kristin  
C54 Ednie, Catherine  
C55 Elliott, Jacquelyn  
C56 Elsinger, Jane  
C57 Elwood, Lauren  
C58 [Email4lew@gmail.com](mailto:Email4lew@gmail.com)  
C59 Estabrooks, Paul  
C60 Farrin, Robin  
C61 Farrington, Anne  
C62 Feiner, Susan  
C63 Ferraz, Clara  
C64 Ferreira, Ed  
C65 FitzGerald, Alyssa  
C66 Follansbee, Mark  
C67 Francis, Donald  
C68 Gilman, Ben (Maine State Chamber of Commerce)  
C69 Giouard, Maria  
C70 Gluck, Sonya Buglion  
C71 Graffam, Jordan  
C72 Graffam, Nicole  
C73 Green, Amy  
C74 Grguras, Young  
C75 Haas, Misha  
C76 Harper, Julia  
C77 Harrell, Henry  
C78 Haskell, Tim (York Sewer District)  
C79 Hawkhavn  
C80 Henckel, Barbara  
C81 Herz, Michael  
C82 Hester, Joshua  
C83 Hewitt, S.  
C84 Hoffman, Nancy  
C85 Hood, Rachael  
C86 Horton, Victor (Maine Resource Recovery Association)  
C87 Hotchkiss, Jeffrey  
C88 Huber, Ron (Friends of Penobscot Bay)  
C89 Hustus, Robert  
C90 Jackson, Nick  
C91 Jean, Ruby  
C92 Joanne

C93 Johnson, Myke  
C94 Kauppila, Joshua  
C95 Kerr, Brad  
C96 Ketchum, Cynthia  
C97 Kiipman, Elizabeth  
C98 Kim, Shelby  
C99 Kingsbury, Lewis (The Alliance for the Common Good)  
C100 Kinney, Sean  
C101 Knox, Bailey  
C102 Kondilis, Debra  
C103 Kriva, Audrey  
C104 Lamson, Athena  
C105 Laner, Morgan  
C106 Lang, Henry (PERC)  
C107 Lauchlan, Susan  
C108 Leahey, Gregory (ReEnergy)  
C109 Leitheiser, Charles  
C110 Li, Yan  
C111 Libby, Nate (Sen.) and Sen. Robert Foley (Maine State Senate)  
C112 Lincoln, David  
C113 Lippincott, Bill  
C114 List, Henrietta  
C115 Lister, Hillary (Maine Matters)  
C116 Locke, Carolyn  
C117 Lolar, Dale  
C118 MacBrayne, Pamela  
C119 Malis-Andersen, Suzanne  
C120 Mann, Shaw  
C121 Marysdaughter, Karen  
C122 Miller, Marie  
C123 Milliken, Douglas  
C124 Moffatt, Lydia  
C125 Monteleon, Marjorie  
C126 Moore, Anna  
C127 Morris, Lia  
C128 Mortimer, Claire  
C129 Motter, Emily  
C130 Mrozicki, Kate  
C131 Nehls, Breana  
C132 Neptune Adams, Dawn

- C133 Neptune, Angelique
- C134 Nichols, Sarah and Kirstie Pecci (Natural Resources Council of Maine and Conservation Law Foundation)
- C135 Niolar, Eric
- C136 O'Brien, Mary
- C137 Olsen, Jon
- C138 Oltarzewski, Diane
- C139 Orem, Carole
- C140 Panepinto, Lisa
- C141 Pariser, Ellen
- C142 Paul Kathy
- C143 Pauls, Beth
- C144 Pease, Roderick
- C145 Perry, Steve (Sargent Corporation)
- C146 Pessoa, Ignacio
- C147 Piechocki, Sandra
- C148 Pierce, Brian and Rhonda Forrester (Sevee and Maher Engineers)
- C149 Pollock-Reyes, Tina
- C150 Pontoh, Daniel
- C151 Powers, Scott
- C152 [primalbirthdoula@gmail.com](mailto:primalbirthdoula@gmail.com)
- C153 Rayback, Brian (NEWSME Landfill Operations, LLC)
- C154 Rayner, Bruce
- C155 Reagan, Robin
- C156 Reynolds, Austin
- C157 Rice, Adam
- C158 Rice, Ellen
- C159 Robertson, Cheryl
- C160 Robin, Ellen
- C161 Robins, Susanne
- C162 Roderick, Ryan
- C163 Roeber, Thomas
- C164 Ryan, Rachael
- C165 Saffer, Jeff
- C166 Sapiel, Sandy
- C167 Sapiel-Bassett, Irving
- C168 Scherr, Stephanie Cooper
- C169 Schmitt, Catherine
- C170 Schofield, Nicole
- C171 Sharland, Susan

C172 Shetterley, Robert  
C173 Simpson, Elizabeth  
C174 Sivik, Carolyn  
C175 Skerry, Priscilla  
C176 Smith, Trisha  
C177 Sok, Leakana  
C178 Spencer, Ed  
C179 St. Germain, Mark (St. Germain)  
C180 Stanton, Maureen  
C181 Stanton, Sally  
C182 Staples, Barry (Staples Trucking, Inc.)  
C183 Sun, Rivera  
C184 Swackhamer, Linda  
C185 Talan, Susa  
C186 Tarrantino, Robyn  
C187 Tasker, Heidi  
C188 Taylor, Kat  
C189 Thanhauser, David  
C190 Thomas, Haley  
C191 Torry, Cynthia  
C192 Trafton, David  
C193 Troiano, TJ (Troiano Waste Services, Inc.)  
C194 Van Duysen, Jillian  
C195 Walker, Laurie  
C196 Watson, Sue  
C197 Wells, Ebony  
C198 White, Gail  
C199 Wilder, Sofia  
C200 Willett, Sara  
C201 Williams, Sally  
C202 Wingo, Chek  
C203 Woodbury, Sarah (Environmental Health Strategy Center)  
C204 Worcester, Ben (EMR Solid Waste Facility)  
C205 Yin, Melody  
C206 Zhang, Maggie  
C207 Zurkan, R.M.

## **Response to Comments**

Comments received are summarized below and are grouped by topic area. Similar comments have been consolidated and paraphrased to facilitate response and reduce repetition, consistent with the provisions of 5 M.R.S. § 8052(5)(A). Following each comment is a list of the commenters making that, or a similar, comment. Many of the comments submitted included detailed discussion of underlying solid waste management policy, issues and history that influenced the commenters' positions but did not directly address the content of the proposed rule. Although all of this information has been considered by the Department in development of a recommendation to the Board of Environmental Protection concerning the rule, the responses in this document are focused primarily on those comments directed to the content of the rule itself and do not otherwise include discussion and analysis of all the issues raised.

### **DEFINITION OF “WASTE THAT IS GENERATED WITHIN THE STATE”**

#### **Comments In Support of the Petition**

- 1. Comment:** Many commenters expressed their broad support for the amendments proposed in the rulemaking petition related to the definition of “waste that is generated within the State”. Certain commenters also specifically expressed their opposition to the importation/disposal of out-of-state waste in Maine landfills, with some referencing “closing the loophole” that allows out-of-state waste to come to Maine. Some commenters linked their opposition to the importation of waste to specific, potential outcomes of out-of-state waste disposal in Maine including environmental and public health impacts.  
(C1-C25, C27-C42, C44-C51, C53-C66, C69-C77, C79-C105, C107, C109, C110, C112-C144, C146-C147, C149-C152, C154-C178, C180, C181, C183-C188, C190-C192, C195-C203, C205-C207)
- 2. Comment:** Out-of-state waste disposed at the Juniper Ridge Landfill (JRL) and leachate from JRL trucked to Old Town for treatment harm the watershed and the Penobscot River, impacting people living in neighboring communities.  
(C10, C12, C20, C23, C43, C47, C54, C65, C67, C69, C72, C79, C87, C88, C93, C96, C98, C103, C122, C124, C132, C133, C140, C142, C162, C170, C178, C184, C189, C194, C200, C202)
- 3. Comment:** The definition of “waste that is generated within the State” should be changed as proposed in the rulemaking petition in order to improve the effectiveness of the existing public benefit determination rule.  
(C134)

- 4. Comment:** The regulatory loophole that allows out-of-state generated waste processed in Maine to be considered waste generated in-State causes the State to fail to protect an asset held for the people of Maine (i.e. JRL).  
(C134)
- 5. Comment:** The definition of “waste that is generated within the State” should be changed to ensure that out-of-state waste is not disposed at JRL and practices that run counter to the solid waste management hierarchy do not jeopardize the long-term capacity of JRL.  
(C113)
- 6. Comment:** Maine should ban all out-of-state waste or at least impose a temporary moratorium to evaluate whether a ban could be imposed without violating the Interstate Commerce Clause.  
(C188)
- 7. Comment:** The rulemaking petition supports the 2019 Maine Materials Management Plan in that the Plan calls for: “revisiting the provisions that allow processed out-of-state waste into the State-owned landfill and greater specificity as to the appropriate use of state landfill capacity.”  
(C178)
- 8. Comment:** Maine should limit the amount of CDD used as alternative daily cover. Maine’s solid waste processing facilities should not be allowed to dispose of more waste at JRL than they accept from true Maine sources.  
(C109, C134)
- 9. Comment:** CDD used for ADC contains toxic materials (e.g. carpet). CDD received in Maine from out of state is the “dregs” from which most materials of value (e.g. wood) have already been extracted.  
(C33, C88, C113, C134)
- 10. Comment:** The definition of “waste that is generated within the State” should be changed as proposed in the rulemaking petition in order to drive adoption of options for landfill cover other than out-of-state construction and demolition debris; alternatives exist to the use of CDD for this purpose. Use of waste as ADC is not recycling and should not be counted as such.  
(C86, C88, C109, C113, C134)

*(Response to Comments 1-10 appears below, following Comment 18.)*

- 11. Comment:** The definition of “bypass” should also be revised because the list of situations in which bypass is allowed in the current rule includes “for any other reason”.  
(C188)



***Response:** Public Law 2019 Chapter 291 (LD 112) modified the statutory definition of “bypass” as recommended by the Department. In its recommendation to the Board concerning the pending rulemaking petition, the Department is proposing that the regulatory definition of “bypass” be made consistent with statute. In so doing, the phrase “for any other reason” would be eliminated.*

- 12. Comment:** Massachusetts and other states have strengthened their rules to protect the environment and prohibit disposal of certain wastes (e.g. construction and demolition debris, organics); Maine has not.  
(C33, C38, C88, C134, C203)

***Response:** Some states have put disposal bans in place for certain wastes (e.g. construction/demolition debris and organics such as food scrap), a principal purpose of which is to increase the recycling rates of those wastes by eliminating the disposal option for handling. Although the Department has discussed the imposition of additional waste bans periodically, it has continued to conclude that for some of these waste streams the recycling infrastructure in Maine at this point is simply not sufficient statewide to preclude disposal as a handling option.*

### **Comments In Opposition to the Petition**

- 13. Comment:** The Board does not have the authority to change the definition of “waste that is generated within the State” as proposed in the petition because it would conflict with existing statute.  
(C108, C148, C153)
- 14. Comment:** Current law provides that residues from the processing in Maine of wastes originating out-of-state are classified as Maine generated waste. Excluding those residues from the definition of “waste that is generated within the State” would threaten the viability of certain Maine businesses and increase the costs of solid waste disposal.  
(C68)
- 15. Comment:** Adopting the definition of “waste that is generated within the State as proposed in the petition would be contrary to the State’s solid waste management hierarchy and would make activities such as recycling, processing and incineration more difficult and costly for waste facilities, businesses and municipalities. Facilities that operate higher on the hierarchy than landfills (e.g. recycling, processing and incineration facilities) generate residues that cannot be further recycled, processed or incinerated and must be disposed in a landfill.  
(C153)
- 16. Comment:** The proposed rule would have negative economic and operational impacts on multiple waste facilities in Maine that accept some amount of out-of-state waste since

their operations require more waste than is generated in Maine to be efficient. The ability to accept out-of-state waste provides businesses with the revenue to be financially viable, which allows them to help maximize recycling and support the State's solid waste goals. (C52, C68, C108, C148)

**17. Comment:** Legislation (LD 401) passed by the 129<sup>th</sup> Maine Legislature, following an extensive review process, was intended to improve solid waste laws and recycling rates to benefit the economy, municipalities and the environment. The legislation resulted in balanced solid waste policy and should remain unchanged. The rulemaking petition proposal would create uncertainty, threaten the work that has been done, and detrimentally affect businesses and the economy. (C78, C108, C111, C153, C179)

**18. Comment:** Waste processing fines are a preferred alternative daily cover material and oversized bulky waste from processing is used to bulk certain wastes (e.g. sludge). If these materials were not available, virgin soil would have to be used by JRL for cover and the acceptance of certain waste streams, such as sludge, could be curtailed. (C78, C148)

***Response to Comments 1-10 and 13-18:** The Department acknowledges the many comments and the extensive information submitted both in support of, and in opposition to, the proposed change to the definition of "waste that is generated within the State" in the rulemaking petition. Each comment and all information provided was reviewed and carefully considered. The Department, however, agrees with commenters who argued that the petition's proposed definition of "waste that is generated within the State" is inconsistent with statutory language passed by the 129<sup>th</sup> Maine Legislature (PL 2019 Chapter 619), and that the Board of Environmental Protection therefore, does not have authority to adopt it in rule. The Department is proposing that 06-096 C.M.R. Chapter 400 be modified to make its provisions consistent with this legislation.*

**19. Comment:** Commenters support a modification to the proposed rule that would remove residues from incineration as waste not generated within the State, regardless of the source of the waste combusted. (C106, C178)

***Response:** Public Law 2019 Chapter 619 (LD 401) modified the statutory definition of "waste generated within the State" to, in part, include: "Residue generated by an incineration facility or a recycling facility that is located within the State, regardless of whether the waste incinerated or processed by that facility was initially generated within the State or outside the State". In its recommendation to the Board concerning the pending rulemaking petition, the Department is proposing that the regulatory definition of "waste generated within the State" be made consistent with statute.*

## **ENVIRONMENTAL JUSTICE AND EQUAL PROTECTION**

### **Comments in Support of the Petition**

- 20. Comment:** Many commenters expressed their broad support for the inclusion of environmental justice and/or equal protection considerations in the Solid Waste Management Rules to protect the rights of all people impacted by waste facilities, and specifically including the Penobscot Nation.  
(C2-C4, C7-C9, C11, C13, C14, C16, C18-C22, C24, C26, C28-C30, C33-C37, C39-C42, C44-C46, C48-C51, C53, C55, C57-C63, C66, C70, C71, C73- C76, C81-C83, C85, C89, C95, C97-C99, C101-C103, C105, C107, C109, C110, C112, C114-C123, C125-C129, C131, C132, C134-C137, C139, C143, C144, C146, C147, C152, C154, C156-C161, C163-C165, C168, C172, C174-C178, C181, C185, C187, C188, C190, C195, C197-C199, C201, C203, C205, C206)
- 21. Comment:** Inclusion of environmental justice (EJ) and equal protection (EP) as standards in the public benefit determination rule as proposed in the rulemaking petition can help provide EJ and EP to the people and communities adjacent to JRL.  
(C115, C134)
- 22. Comment:** Including consideration of impacts in the context of environmental justice in the public benefit determination process is the least the State can do to protect the people and communities adjacent to landfills and leachate sites, who have historically struggled to acquire adequate legal standing regarding decisions that could impact their health and property.  
(C115)
- 23. Comment:** People most impacted by waste facilities have consistently lacked opportunities for meaningful participation in decision making processes affecting their health and community well-being. Communities impacted by landfills deserve at least equal consideration as the businesses that are impacted by regulatory decisions.  
(C115, 134)
- 24. Comment:** The language in Section 5.E.5 of the proposal should be clarified by eliminating the double negative (“not inconsistent with”) and putting forward a stronger, simpler, clearer standard.  
(C26, C188)

**Response:** *Section 5.E.3 of the current rule is constructed similarly to the proposed language of Section 5.E.5 and states: The facility is not inconsistent with local, regional, or state waste collection, storage, transportation, processing, or disposal”. This construction suggests a shift in the nature of the evidence necessary to make a finding with respect to the standard, allowing a positive finding unless evidence is submitted that*

*demonstrates an inconsistency. This approach seems appropriate in view of the issues addressed by these 2 standards. This change was not made in the Department's recommended draft.*

### **Comments in Opposition to the Petition**

- 25. Comment:** It is unclear why the concepts of environmental justice and equal protection need to be included in the rule since Maine's environmental standards are rigorous, must be met by all solid waste facilities, and protect all citizens equally.  
(C68, C148, C153)
- 26. Comment:** The proposed environmental justice and equal protection standards are vague; the ambiguity of the language could lead to inconsistent implementation of the rule.  
(C68, C153, C179)
- 27. Comment:** The concept of equal protection as put forward in the petition, greatly expands how the term is defined and understood in both federal and State law.  
(C153)
- 28. Comment:** The concepts of environmental justice and equal protection are proposed to be inserted into a single, discrete rule. These standards should be fully debated in the context of Maine environmental law.  
(C68, C153)

***Response to Comments 20-23 and 25-28:** The Department acknowledges the many comments submitted both in support of, and in opposition to, the proposed inclusion of "environmental justice" and "equal protection" as standards in the Public Benefit determination process for new/expanded waste disposal facilities. Each comment was reviewed and carefully considered. The Department proposes to modify 06-096 C.M.R. Chapter 400 to include "environmental justice" as a consideration in the Public Benefit determination process as proposed in the petition. Although commenters opposing inclusion of the language in the rule argued that it was vague, and the absence of a detailed regulatory standard could lead to inconsistency in its application, the Department agrees with supporters of the proposed language who pointed out that there are a number of broad standards in the existing rule that are not accompanied by detailed regulatory provisions. The Department is not recommending separate inclusion of the concept of "equal protection" as proposed in the petition since it appears to be redundant in view of the broad definition of "environmental justice" that is proposed. Further, the Department is not recommending inclusion of protection of the "health and welfare of local communities" in the Public Benefit standard since this concept is already clearly incorporated into both statute and rule with respect to solid waste facilities. 06-096 C.M.R. c. 400(3)(D) states, in part, that: "The Department shall issue a license for a*

*solid waste facility whenever it finds, based upon substantial evidence in the record, that the solid waste facility will not . . . constitute a hazard to health or welfare . . .”*

*The Department does agree with commenters opposing inclusion of the new standard that Maine’s environmental standards are rigorous, must be met by all solid waste facilities, and protect all citizens equally. However, the Department finds that the specific inclusion of “environmental justice” in the rule appropriately highlights the importance of this principle and does not generally increase the regulatory burden of applicants. The Department also agrees with those commenting that environmental justice is a concept that should be considered in a broader context than just the Solid Waste Management Rules. The Department is committed to further evaluating this topic and beginning development of an agency-wide environmental justice policy.*

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