STATE OF MAINE
PENOBSCOT, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. PENSC-APP-2024-00014

THE PENOBSCOT NATION

and

CONSERVATION LAW FOUNDATION,

Petitioners,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,

and

NEWSME Landfill Operations, LLC,

Party-in-Interest.

RULE 80C BRIEF OF PARTY-IN-INTEREST NEWSME LANDFILL OPERATIONS, LLC

NEWSME Landfill Operations, LLC ("NEWSME") respectfully requests that the Court affirm the well-reasoned Public Benefit Determination ("PBD") issued by the Department of Environmental Protection ("Department") for the expansion of Juniper Ridge Landfill ("JRL"). As the Department concluded following its thorough and extended review of the application filed by NEWSME on behalf of the Bureau of General Services ("BGS"), the proposed expansion of JRL provides a substantial public benefit.

In appealing the PBD, the Conservation Law Foundation and the Penobscot Nation ("Plaintiffs") challenge two of the four statutory findings required under 38 M.R.S. § 1310-AA(3): (1) that the proposed expansion is consistent with the State Waste Management and Recycling Plan ("Waste Plan") and promotes the solid waste management hierarchy (the "Waste Hierarchy"); and

(2) that the proposed expansion is not inconsistent with ensuring environmental justice. Plaintiffs, however, have not shown any error by the Department.

STATEMENT OF FACTS

I. Juniper Ridge Landfill.

JRL is a landfill located on an approximately 780-acre parcel of land located in Old Town and Alton, Maine. AR-0041. JRL has existed since 1993, when James River Company constructed the landfill. AR-0001, 43. The State of Maine owns JRL through BGS, a part of the Department of Administrative and Financial Services. P.L. 2011, ch. 655, § GG-69. The State acquired the landfill, which was initially developed to serve the paper mill in Old Town, from Fort James Operating Company in 2004. AR-0001-2, 43. Today NEWSME operates JRL on behalf of BGS under a thirty-year Operating Services Agreement between the State of Maine and NEWSME's ultimate parent, Casella Waste Systems, Inc. ("Casella"). AR-0002, 41, 276-384.

JRL is a secure waste disposal facility. AR-0046. The groundwater beneath and adjacent to the landfill is protected by a composite liner and a leachate collection system. *Id.* Leachate generated in the landfill is collected, stored in an aboveground glass-lined leachate storage tank, and transported off-site for treatment and disposal. *Id.* The site includes multiple leachate/leak detection pump stations, sedimentation/detention ponds, an active landfill gas extraction and Thiopaq® treatment system, and a landfill gas flare. AR-0043. These latter systems remove sulfur and methane to meet the facility's air license requirement. *Id*; AR-0505. Removal of sulfur controls odors and destruction of methane reduces emissions of greenhouse gasses from the landfill. AR-0079, 119, 460-61, 717. The site also includes a renewable natural gas facility, currently under construction, that will convert the cleaned landfill gas to pipeline quality biomethane that is interchangeable with fossil-based natural gas. AR-0043. JRL operates under a solid waste facility

license issued by the Department containing strict environmental conditions and imposing design standards for the liner and leachate systems. AR-0432-544.

JRL plays a critical role in Maine's waste management system. JRL accepts a wide variety of non-hazardous waste streams including construction and demolition debris ("CDD") and CDD processing residue, oversized bulky wastes ("OBW"), contaminated soils, non-friable asbestos in demolition waste, catch basin and grit screenings, and oil spill debris. AR-0003, 41, 51. JRL also accepts waste, such as ash, from other waste management facilities, including waste-to-energy ("WTE") facilities (*i.e.*, incinerators), CDD processing facilities, and the Waste Solutions facility in Hampden, Maine, when those facilities are operating, and bypass waste[1] from them when they are not. AR-0003, 10, 41, 57-59, 134-35. Further, JRL accepts 90% of Maine's municipal and industrial sludge, a waste product from the operation of wastewater treatment plants that under Maine law must be landfilled.[2] AR-0007, 41-42, 55-56, 135-36, 208. Because JRL can accept so many types of waste, JRL accepts for disposal approximately 52% of Maine's solid waste. AR-0007, 10, 60, 72, 129, 134, 139. JRL does not, however, accept out-of-state waste or hazardous waste. AR-0052, 1416-17; *see* 38 M.R.S. § 1310-N(11) (barring state-owned waste disposal facilities like JRL from accepting "waste that is not waste generated within the State," referred to informally as "out-of-state waste").[3]

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[1] In this context, "bypass" is waste that is destined for another facility higher on the Waste Hierarchy than JRL, such as an incinerator, but cannot be handled at that facility because of a temporary malfunction or shutdown. 38 M.R.S. § 1303-C(1-C).

[2] In 2022, Maine banned municipal and industrial sludge land spreading—a practice that the Department had allowed for decades—due to concerns about per- and polyfluoroalkyl substance (PFAS) contamination in the sludge. AR-0055 (citing 38 M.R.S. §§ 1304(20), 1306(7)). Maine has landfilled all municipal and industrial sludge since then. AR-0055-56, 110, 135-36.

[3] Despite Plaintiffs' repeated assertions that JRL accepts out-of-state waste, *see, e.g.,* Pet. Br. at 8-10, JRL does not do so. AR-0011, 52. JRL does accept wastes from private processing and recycling facilities in Maine that have themselves processed out-of-state waste and need an outlet for disposal of their own. AR-0056, 135. Plaintiffs are expressing a policy view that the statutory definition of out-of-state waste should be amended to hinge on where a particular item was originally discarded, but this is not how the Legislature has defined what counts as out-of-state waste. *See* 38 M.R.S. § 1303-C(40-A); AR-0113, 1416-17. This is

If approved, this will be the second expansion for JRL. After obtaining a PBD in 2012, JRL received a solid waste facility license in 2017 for a 9.35 million cubic yard expansion, known as the Phase I Expansion, for disposal of Maine-generated waste. AR-0045, 54; *see* AR-0432-544. At the time, it was anticipated that the Phase I expansion would provide 10-12 years of capacity. AR-0437. Several factors, however, combined to consume the permitted capacity faster than anticipated, including changes in Maine legislation, reduced capacity at solid waste processing facilities and WTE facilities, and the impact of non-recurring waste streams. AR-0054, 123-124. Legislative changes include the 2022 PFAS legislation banning land spreading, which greatly increased the need for landfilling—JRL is now accepting 90% of Maine sludge, and there is currently no alternative outlet in Maine. AR-55-56; *see also* AR-0007, 41-42, 68, 135-36, 208. JRL has also been required to landfill bypass municipal solid waste ("MSW") from the inoperable Waste Solutions facility in Hampden, Maine, AR-0057, and to handle increasing rates of disposal as the result of reduced operations at the WTE facility in Orrington, Maine, AR-0058. Further, JRL has had to handle increased tonnage from unusual events such as natural/manmade disasters. AR-0059. This pressure on JRL is magnified by Maine's ban on new commercial landfills. *Id*; *see also* 38 M.R.S. § 1310-X(1). At its current fill rate, JRL's Phase I Expansion will run out of landfill capacity in 2028, just three years from now. AR-0007, 42, 54, 70. Moreover, this is not just a problem at JRL—the entire state has less than ten years of landfill capacity available anywhere. AR-0008, 72, 139.

particularly important here because much of this waste is composed of OBW and other materials that are vital for bulking wet sludge for safe landfilling. AR-0055-56, 135-36, 1407-08. Since 2022, when JRL began disposing of large quantities of Maine's sludge due to the land spreading ban, it has also had to increase its intake of other wastes, such as OBW, to ensure that the landfill remains stable. *Id.*; *see* AR-0056, 135-36, 172.

Facing this imminent capacity issue, the Department noted in the 2024 update to its Waste Plan that an "expansion of Juniper Ridge Landfill in Old Town will be necessary to ensure there is adequate capacity for the entire State of Maine over the next ten years." AR-0041, 101; *see* AR-0067-70. A report prepared for the Department by a consultant stated the issue more bluntly: "If JRL is not expanded, the state faces a dire situation for solid waste generally in Maine." AR-0041, 165. With respect to sludge, the report noted that "there is no current or proposed alternative outlet in the state that would be able to accept the tonnage currently handled at JRL." AR-0041-42, 165. The Department has further observed that, while Maine might have adequate capacity for 10 years before several existing facilities reach their capacity, this conclusion assumed that the Department would approve a license application for JRL: "The loss of JRL as a disposal facility would create catastrophic capacity issues as it receives over 50 percent of all material landfilled in Maine annually." AR-0060; *see* AR-0139, 165 (recommending "the State work with [Casella] to ensure that an application [to expand JRL] is submitted as soon as possible"), 167 ("If [JRL] isn't expanded, there will be no Maine landfill with enough capacity to meet solid waste needs and much of the biosolids . . . will need to be sent out of state at greatly increased cost for utilities and ratepayers."). Thus, as the Department's Waste Plan update concluded, "Given the increasing quantities of wastes being landfilled at JRL, expansion of this landfill is a critical solution that will be necessary in addition to proactive steps to increase waste infrastructure options as well as enhancing efforts toward meeting statutory waste reduction, diversion, and recycling goals." AR-0139; *see also* AR-0212 (consultant conclusion).

In light of these realities, BGS and NEWSME propose a Phase II Expansion to expand JRL by approximately 61 acres to provide 11.9 million cubic yards of additional capacity. AR-0003, 45, 46. This expansion will add an estimated 11.3 years to JRL's capacity. AR-0003, 46.

II. The Public Benefit Determination Process.

To expand a landfill, the owner or operator must apply for and receive a solid waste facility license from the Department. 38 M.R.S § 1310-N(1). Prior to filing such an application, however, the owner/operator must first obtain a PBD, which requires that the Commissioner of the Department decide that the landfill expansion would provide "a substantial public benefit." *Id.* § 1310-AA(1). This ensures that the proposed landfill expansion is needed before the Department spends considerable time and resources reviewing whether the expansion would meet the State's extensive technical and environmental requirements. A PBD itself thus does not allow any physical changes to a landfill; rather, it is simply a threshold step that allows the licensing process to begin.[4]

For the Department to find a proposed landfill expansion would be a significant public benefit, the Department must find that the expansion: (1) meets immediate, short-term and long-term capacity needs of the State; (2) is consistent with the Waste Plan and promotes the Waste Hierarchy; (3) is not inconsistent with local, regional or state waste collection, storage transportation, processing or disposal; and (4) is not inconsistent with ensuring environmental justice for the community in which the expansion is proposed. 38 M.R.S. § 1310-AA(3).

A. The State's Waste Plan and Waste Hierarchy.

As this statutory scheme recognizes, the PBD application process occurs against the background of extensive study by the Department relating to waste management.

For several decades the Department has relied on the Waste Hierarchy, which—as its name implies—establishes a hierarchy of priorities for solid waste management decisions. *See* 38 M.R.S.

[4] Although not at issue here, in another regulatory step that must be completed before filing an application for a solid waste facility license, the applicant must also file with the Department and receive written comments on a preliminary information report (PIR). 06-096 C.M.R. ch. 401 § 2. The PIR must demonstrate that the landfill has been sited in a location that meets performance standards and siting criteria established in Maine's solid waste rules, such as setbacks to natural resources. *Id.* § 1(E); *see* AR-0546 (finding that the proposed expansion is "environmentally feasible" and that the "siting criteria . . . have been met").

§ 2101; *see also* AR-0012. The hierarchy ranks waste management priorities in the following order: waste reduction; waste reuse; waste recycling; composting of biodegradable waste; waste processing to reduce waste volume (*e.g.*, incineration); and land disposal (*i.e.*, landfilling). 38 M.R.S. § 2101. The Waste Hierarchy treats landfilling as the base of the hierarchy. *Id.* Starting in 2011, the Department began preparing a Waste Plan to plan for and implement an integrated approach to solid waste management. 38 M.R.S. § 2122; *see also* AR-0012-13, 103. The State updates the Waste Plan every 5 years (most recently in 2024). AR-0098-155.

The most recent Waste Plan highlights Maine's long term disposal capacity as one of several key concerns. AR-0101. To address those concerns, the Department's Waste Plan calls for reliance on all levels of the Waste Hierarchy, including landfilling, stating: "Increases in waste disposal capacity for Maine will likely need to include *expanding landfill space*, full operation of incineration and waste processing facilities, and/or implementing new technologies to treat waste streams to either reduce volume or prevent the need for landfilling." AR-0101 (emphasis added).

B. Review and approval of the PBD Application for the proposed JRL expansion.

BGS and NEWSME applied for a PBD pursuant to 38 M.R.S. §§ 1310-N(3-A), 1310-AA and 06-096 C.M.R. ch. 400, § 5(G), on June 10, 2024. AR-0003. To comply with 38 M.R.S. § 1310-AA(2) and 06-096 C.M.R. ch. 400, § 5(G), the Department was required to issue a decision within 60 days of receipt of the BGS/NEWSME application. AR-0003. However, at the request of Plaintiffs, AR-1398-1402, 1469-1472, and with agreement from NEWSME, AR-1432, 1473, the Department extended its review period well beyond the statutory timeline, ultimately approving the PBD for the landfill expansion about six weeks late, on October 2, 2024. AR-0025, 1475.

This extended review enabled substantial public input on the PBD application. The Department extended both the public comment period on the publicly available draft PBD and its

review of public comments (including those from Plaintiffs). AR-0005-7, 2376, 2380. The Department granted both enlargements at Plaintiffs' request. AR-1398-1402, 1432, 1469-72, 1473, 1475. The Department also held several public hearings in July 2024. AR-0005, 1278, 1291.

The Department's PBD found that the proposed expansion of JRL met all the PBD criteria, as set forth in 38 M.R.S. § 1310-AA(3), and thus would provide a substantial public benefit if ultimately granted a solid waste facility license. AR-0022-23, 25. The Department also imposed multiple conditions of approval. AR-0015, 21-25. The most significant findings in the PBD included the following:

(1) That the expansion is needed to meet both short- and long-term capacity needs for solid waste disposal in Maine.

(2) That the expansion is consistent with Maine's Waste Plan and promotes the Waste Hierarchy, provided that the applicants take additional steps to submit a plan for recycling mattresses, expand the deployment of a mobile recycling app, and provide annual reports to the Department about both recycling and diversion opportunities with municipalities and opportunities to reduce the volume of treatment plant sludge that is sent to JRL.

(3) That the expansion is not inconsistent with local, regional, or state waste collection, storage, transportation, processing, or disposal.

(4) That the expansion is not inconsistent with ensuring environmental justice for the local community, provided that the applicants design and install a PFAS treatment system for landfill leachate prior to operating the expansion, pay for a third-party to analyze odor issues and recommend solutions, conduct two additional scans each year of the intermediate cover at JRL to identify fugitive gas emissions, and develop a system to provide public notice of significant landfill events in near real time.

AR-0012, 15-16, 21-23.

CLF and the Penobscot Nation appealed the Department's decision on November 12, 2024. Notably, Plaintiffs challenge only the second and fourth findings of the Department; they make no effort to challenge the Department's determination that the expansion is necessary to meet the immediate, short-term, or long-term capacity needs of the state. AR-0007-12, 16.

STANDARD OF REVIEW

In an appeal under M.R. Civ. P. 80C, a court reviews the agency's findings of facts and conclusions of law under different standards. Here, Plaintiffs assert both legal and factual arguments. First, Plaintiffs argue that the Department erred as a matter of law by misconstruing the requirement that the JRL expansion be consistent with the Waste Plan and promote the Waste Hierarchy, Pet. Br. at 16-20, and that the Department's finding on this point is unsupported by the record, *id.* at 20-22. Second, Plaintiffs argue that the Department misconstrued the requirement that the expansion not be inconsistent with environmental justice, and then argue that its environmental justice finding is unsupported by substantial evidence. *Id.* at 22-25, 25-37.

A court reviews an agency's conclusions of law *de novo*. *Med. Mut. Ins. Co. of Me. v. Bureau of Ins.*, 2005 ME 12, ¶ 5, 866 A.2d 117. When interpreting a statute, "the starting point . . . is the statutory language itself." *Murphy v. Bd. of Envtl. Prot.*, 615 A.2d 255, 258 (Me. 1992). "Unless the statute itself reveals a contrary legislative intent, the plain meaning of the language will control its interpretation." *Id.* While a court must give an unambiguous statute its plain meaning, a court will give great deference to an agency's interpretation of an ambiguous statute. *Reed v. Sec'y of State*, 2020 ME 57, ¶ 14, 232 A.3d 202; *see Conservation L. Found., Inc. v. Dep't of Env't Prot.*, 2003 ME 62, ¶ 23, 823 A.2d 551. A court will reject an agency interpretation only if it is "unreasonable." *Conservation L. Found., Inc.*, 2003 ME 62, ¶ 23, 823 A.2d 551.

A court reviews an agency's findings of fact by determining if they are supported by substantial evidence. *See* 5 M.R.S. § 11007(4)(C)(5). This is a deferential standard; a court may not substitute its judgment for that of the agency. *See id*. § 11007(3); *Dyer v. Sup. of Ins.*, 2013 ME 61, ¶ 14, 69 A.3d 416. A court need only determine whether there is *any* competent evidence in the entire record to support the agency's decision. *See 21 Seabran, LLC v. Naples*, 2017 ME 3, ¶ 10, 153 A.3d 113; *see also Friends of Lincoln Lakes v. Bd. of Envtl. Prot.,* 2010 ME 18, ¶ 14, 989 A.2d 1128. "That inconsistent conclusions can be drawn from evidence does not mean that a finding is not supported by substantial evidence." *Toomey v. Frye Island*, 2008 ME 44, ¶ 12, 943 A.2d 563. Nor is it enough that the agency "could have made choices more acceptable to the appellant or even to a reviewing court." *Stein v. Maine Criminal Justice Acad.*, 2014 ME 82, ¶ 23, 95 A.3d 612. Thus, a court can reverse an agency's finding of fact only if the evidence before the agency *compels* a different result. *See Tarason v. S. Berwick,* 2005 ME 30, ¶ 6, 868 A.2d 230. It is the appellant's burden to prove the record compels a contrary conclusion. *Id.*

ARGUMENT

I. The Department did not err in finding that the expansion of JRL is consistent with the Waste Plan and promotes the Waste Hierarchy.

Plaintiffs' first attack on the PBD—that the Department erred by finding that the expansion of JRL is consistent with the Waste Plan and promotes the Waste Hierarchy—is framed as though it were primarily an issue of law. Pet. Br. at 16-20. Plaintiffs try to characterize the PBD as though the Department misconstrued the governing statute, *id.* at 16-17; however, the central premise of Plaintiffs' argument is that, *as a factual matter*, the proposed expansion of JRL would run contrary to both the Waste Plan and Waste Hierarchy, *id.* at 17-20. Accordingly, Plaintiffs' purported "legal" argument is almost indistinguishable from their short substantial evidence argument. *Id.* at 20-22. No matter how they are construed, Plaintiffs' attacks fail.

A. The Department did not misconstrue Section 1310-AA(3)(B).

Under Section 1310-AA, the Department may issue a PBD only if the proposed expansion "is consistent with the state waste management and recycling plan and promotes the solid waste management hierarchy." 38 M.R.S. § 1310-AA(3)(B). Plaintiffs' argument focuses on the words "consistent" and "promotes"; Plaintiffs contend that the Department misconstrued these terms as a matter of law. Pet. Br. at 16-17. Plaintiffs proffer definitions for both terms, defining "consistent" in terms of the proposed expansion being "compatible" with the Waste Plan and defining "promote" in terms of the expansion "furthering" the Waste Hierarchy. *Id.* (citing dictionary definitions). There is nothing in the PBD, however, that indicates that the Department misinterpreted Section 1310-AA(3)(B) by adopting an erroneous reading of the statute.

To the contrary, the Department expressly referenced the statutory standard in the PBD. AR-0012. It noted that the Waste Plan is based on the Waste Hierarchy and the State's goals for recycling, composting, and waste reduction. *Id.* The Department then explained that the Waste Hierarchy establishes priorities for making waste management decisions, prioritizing actions in the following order: (1) reduction of waste, (2) reuse of waste, (3) recycling of waste, (4) composting of biodegradable waste, (5), processing of waste to reduce volume, (6) and land disposal. *Id.* It also observed that the State's goals included aggressive targets for recycling/composting of municipal solid waste tonnage and reduction of per capita disposal rates. AR-0012-13. Accordingly, the Department required NEWSME to satisfy the following standard: "A solid waste disposal facility must show that waste has been reduced, reused, recycled, composted, and/or processed to the maximum extent practicable prior to landfilling." AR-0014.[5]

[5] This is the same standard that the Department has set out in the Solid Waste Rules, which provide that a facility is "consistent with" the Waste Hierarchy when there is "evidence that demonstrates that . . . waste has been reduced, reused, recycled, composted, and/or processed to the maximum extent practicable prior to . . . landfilling." 06-96 C.M.R. ch. 400, § 4(N)(2).

This standard is completely in accord with the statutory mandate that the Department only grant a PBD if it would be "consistent" with the Waste Plan and "promote" the Waste Hierarchy. 38 M.R.S. § 1310-AA(3)(B). An applicant who has demonstrated that waste has been reduced, reused, recycled, composted, and/or processed to the maximum extent practicable will have necessarily shown that the expansion is compatible with the Waste Plan and furthers the Waste Hierarchy. Thus, even accepting Plaintiffs' plain-language interpretation of Section 1310-AA(3)(B), the Department did not make any error of law by misconstruing that provision.

Plaintiffs also cite to the Department's Solid Waste Rules for licensing, emphasizing that the Rules require the applicant to show that the waste has been "reduced, reused, recycled, composted, and/or processed to the *maximum extent practicable* prior to . . . landfilling." Pet. Br. at 19 (quoting 06-96 C.M.R. ch. 400, § 4(N)(2) (emphasis in original)). It is not at all clear, however, how the language requiring an applicant to demonstrate that waste has been addressed "to the maximum extent practicable" could possibly support the conclusion that the Department misconstrued Section 1310-AA(3)(B). It rather demonstrates that the Department has in fact adopted a stringent test that is meant to ensure consistency with the Waste Plan and promotion of the Waste Hierarchy—as required by statute. *Id*. "Consistency" and "promotion" (or "compatibility" and "furtherance," as Plaintiffs would have it) are terms that inherently require the exercise of judgment, and the Department has adopted a standard that reasonably guides the Department's exercise of judgment in assessing that legal standard. *See Reed*, 2020 ME 57, ¶ 14, 232 A.3d 202. The Department made no error of law.

B. The Department's finding that the proposed expansion of JRL is consistent with the Waste Plan and promotes the Waste Hierarchy is supported by substantial evidence in the agency record.

The true focus of Plaintiffs' argument is that the proposed expansion of JRL, "as conditioned, is incompatible with the State Waste Plan and runs contrary to the State's Solid Waste Management Hierarchy." Pet. Br. at 17. Plaintiffs must do more than show that there is some evidence in support of their view; rather, they must show there is *no* competent evidence supporting the Department's findings. *See 21 Seabran, LLC,* 2017 ME 3, ¶ 10, 153 A.3d 113. They cannot, as the Departments findings were supported by copious evidence in the agency record.

Plaintiffs make several arguments why the expansion is not consistent with the Waste Plan and Waste Hierarchy. They blame JRL's current management—namely, its acceptance of CDD and of the State's municipal and industrial sludge—for "encourag[ing] landfill expansion," which, they contend, is necessarily contrary to the Waste Plan and Waste Hierarchy. Pet. Br. at 17; *see id.* at 21. Plaintiffs also claim that the Department erred by finding that waste has been reduced, reused, recycled, composted, and/or processed "to the maximum extent practicable" prior to landfilling. *Id.* at 19. Plaintiffs also argue that the Department's conditions intended to support the Waste Hierarchy—requiring that NEWSME create a mattress recycling program, expand its mobile recycling app, and submit annual reports to the Department on municipal engagement in recycling and waste diversion and on solutions to reduce municipal sludge volume—are insufficient. *Id.* at 17-18, 21-22. Plaintiffs' arguments oversimplify the appropriate analysis, fail to consider the evidence upon which the Department's finding relied, misread the Waste Plan and Solid Waste Rules, and seek to substitute this Court's judgment for the Department's.

1. Plaintiffs oversimplify the necessary agency analysis and disregard the substantial evidence in the record that supports the Department's PBD.

As an initial matter, Plaintiffs oversimplify the necessary analysis by suggesting that because JRL is a landfill—which is at the base of the waste management hierarchy—expansion of JRL without significant waste limits is fundamentally inconsistent with the Waste Plan and cannot promote the Waste Hierarchy. Pet. Br. at 17. This argument fails to consider what the Department understands: that JRL fills a crucial role in Maine's waste management system by supporting other waste management facilities. AR-0007-08, 10-11, 14-15, 48, 51, 57-58, 132, 134-35. Landfills, together with WTE facilities, "are the foundation on which all else on waste management rests." AR-0142. JRL accepts over 50% of Maine's solid waste, almost none of which is generated in the first instance by BGS or NEWSME and a significant portion of which is waste generated by other waste management facilities higher on the Waste Hierarchy. AR-0003, 7-8, 51, 57-59, 60, 72, 75, 129, 134-35. JRL also fills in gaps in Maine's waste management system, accepting bypass waste from other waste management facilities when they are not operating and accepting wastes, like municipal sludge, which cannot be handled through any other waste management facility. AR-0003, 7-8, 10-11, 14-15, 41-42, 51, 55-59, 132, 134-36. Determining whether expanding JRL is consistent with the Waste Plan and Waste Hierarchy requires a comprehensive analysis of the impact JRL's expansion (or failure to expand) would have on Maine's entire waste management system—of which JRL is a necessary part.

The Department engaged in just that comprehensive analysis, and its findings—which reflect the agency's expertise in waste management issues—are due substantial deference. 5 M.R.S. § 11007(3). The Department considered Maine's waste goals, the state-wide waste reduction programs NEWSME proposed in the PBD application, and JRL's role in Maine's waste management system. AR-0012-15. The Department concluded that NEWSME's parent, Casella,

had implemented substantial programs to control the amount of waste sent to the landfill. AR-0014 ("Casella has existing programs in place to reduce and reuse waste and to encourage recycling."). The Department also, importantly, concluded that Casella has limited power to control upstream waste. AR-0014-15 ("Casella cannot control the amount of MSW that is bypassed from waste-to-energy incinerators or the Hampden waste processing facility. The volumes of CDD delivered to the landfill from non-Casella haulers or transfer stations . . . similarly are beyond Casella's control."). Based on its analysis, the Department also imposed conditions on JRL. AR-0015. Given Casella's substantial efforts and the limitations on Casella's ability to control the waste stream, and given the conditions imposed by the Department, it was reasonable for the Department to conclude that expansion would be consistent with the Waste Plan and promote the Waste Hierarchy.[6]

The Department's analysis is supported by substantial evidence in the record. As the record shows, the proposed expansion supports recycling efforts by providing a location to dispose of unprocessable residues from volume reduction facilities and serves as a back-up when those facilities are not operating. AR-0074. JRL provides a significant amount of the required disposal capacity for both MSW and residues associated with in-state WTE and solid waste processing facilities. AR-0074-75. Supporting WTE facilities that reduce the volume of MSW and require landfill disposal for residues is consistent with the Waste Plan. *Id.* at 75, 78-79. The landfill also provides a location for material that cannot be safely used as feed for incineration at WTE facilities or composted, such as sludge containing PFAS. AR-0074. Further, as discussed at length in NEWSME's application, its ultimate parent company, Casella, is a key driver of sustainable materials management in Maine; it has established programs for recycling, wood waste management, composting and recovering organics, and education. AR-0080-84; *see* AR-1406-14

[6] The Department's analysis is further bolstered when viewed in light of the agency's finding that it is necessary to expand JRL—a finding Plaintiffs do not dispute. *See* AR-0007-12; *see also id.* at 62-73.

(discussing recycling, both at JRL and at Casella's transfer stations, universal and e-waste facilities, wood waste processing, composting, and consumer education efforts). JRL is therefore just one part of Casella's overall waste management program, as it is for the State. AR-0084. Although at the base of the hierarchy, it "is an essential resource for the citizens of Maine." *Id.*

2. Plaintiffs misread the Waste Plan and Solid Waste Rules.

Ignoring the Department's analysis and the supporting evidence in the record, Plaintiffs instead mischaracterize the Waste Plan, claiming that it concludes that NEWSME is mismanaging JRL in violation of the Waste Hierarchy. Pet. Br. at 17. To the contrary, the Waste Plan nowhere characterizes JRL as mismanaged. Rather, it recognizes that larger forces—such as the ban on land spreading municipal and industrial sludge and the need to stabilize sludge with bulky materials—account for increased landfilling at JRL, not NEWSME's management of JRL. *See* AR-0111, 134-139. The Waste Plan further acknowledges the important role JRL's expansion will play in Maine's continued management of waste, stating: "[t]he expansion of Juniper Ridge Landfill ("JRL") in Old Town *will be necessary* to ensure there is adequate capacity for the entire State of Maine over the next 10 years" and "[t]he loss of JRL as a disposal facility *would create catastrophic capacity issues* . . . ." AR-0101, 139 (emphases added). Notably, the Waste Plan was prepared by the Department itself; thus, the Department is well positioned to assess the meaning and the import of the Waste Plan on NEWSME's application for a PBD.

Plaintiffs' mischaracterization of the Waste Plan and NEWSME's management of JRL is magnified by Plaintiffs' myopic focus on two waste streams—CDD and sludge. Plaintiffs argue, simplistically, that because JRL has accepted increasing percentages of sludge and CDD annually in recent years, expanding JRL without limiting those waste streams is not consistent with the Waste Plan and does not promote the Waste Hierarchy. Pet. Br. at 17. The analysis, however, is not

that simple. Determining whether JRL's expansion promotes the Waste Hierarchy requires a much broader analysis of the management of *all* waste, not just the two waste streams that Plaintiffs have deemed most concerning, and *why* it is important for the State's solid waste management goals for JRL to be able to accept them. *See* AR-0108, 134-136 (Waste Plan comprehensively discussing all waste landfilled at JRL). The Department properly engaged in this broader, wholistic analysis. *See* AR-0003, 7-15 (discussing all wastes landfilled at JRL, including, for example, that NEWSME cannot control how much MSW is bypassed from processing facilities and incinerators).

Plaintiffs also wrongly blame JRL for accepting sludge (which it does not generate) and increased quantities of CDD, while failing to acknowledge the crucial role that JRL is playing for the health and safety of the state by providing a safe disposal option for PFAS-laden materials that cannot practically go anywhere else. Pet. Br. at 17-18. If not for the legislative ban on land spreading of sludge, JRL would not have to accept sludge in the quantities that it is accepting now, nor would it have to accept increased quantities of other wastes, like CDD, needed to safely bulk the sludge. AR-0055-56, 109-111, 135-36.[7] The Department points out it expects a reduction in CDD coming to JRL because of improvements at Maine's largest CDD processor and recognizes that refusing to accept sludge at JRL "would increase the burden on municipalities and require time to develop and implement a solution." AR-0015. Further, given its position at the base of the Waste Hierarchy, even if projects for sludge dryers or anerobic digestion prove viable in the future (which, as discussed below, is not certain), JRL would still need to be available for disposal both when those facilities are not operating and to handle their wastes. *Id.*; AR-1404 (calculating that if pending projects to develop a dryer and a digestor are successful, even a 90% reduction in volume

[7] Plaintiffs focus on CDD fines, but these materials do not waste landfill space; rather, they replace clean soil and gravel that would otherwise be needed for grading and shaping the landfill and as daily cover for the waste. AR-1407-08, 1416-17.

of sludge to the landfill would extend the life of the Phase II Expansion by approximately only 2 years); *see* AR-209.

Finally, Plaintiffs rely on Maine's Solid Waste Rules, which—as noted above—provide that a facility is "consistent with" the solid waste hierarchy when there is evidence that waste has been minimized to the "*maximum extent practicable* prior to . . . landfilling." 06-96 C.M.R. ch., 400, § 4(N)(2)(a) (emphasis added). Plaintiffs' reliance on the Solid Waste Rules is misplaced.

Contrary to Plaintiffs' contention, the language of the Rules does not mean that the Department should have looked solely to "JRL's management of the waste entering JRL" and not look to Casella's other affiliate facilities to "to meet this requirement." Pet. Br. at 19. The Rules explicitly acknowledge that a "maximum extent practicable" analysis requires consideration of *all* waste reduction programs that are within control of an applicant. 06-96 C.M.R. ch. 400, § 4(N)(2) (evidence of reducing waste to the "maximum extent practicable" includes "reus[ing], recycling, composting and/or processing programs . . . that are *sufficiently within the control of the applicant to manage or facilitate*" and that do not cause "unreasonable increases in facility operating costs or unreasonable impacts on other aspects of the facility's operation" (emphasis added)). The Department therefore acted reasonably in considering Casella's waste reduction and recycling activities in determining whether the application satisfied Section 1310-AA(3)(B).

Plaintiffs' argument that the Department needed to impose additional conditions—particularly a sludge drying requirement—to meet the "maximum extent practicable" standard also fails. Pet. Br. at 19. Determining whether a facility complies with the Waste Plan and Waste Hierarchy is a nuanced analysis that required the Department to exercise its judgment. When an agency must use its judgment to interpret and apply language in its own regulation, the agency's reasonable interpretation is given "considerable deference." *Beauchene v. Dep't of Health &*

Human Svcs., 2009 ME 24, ¶ 11, 965 A.2d 866. Here, the Department's interpretation of "maximum extent *practicable*" was reasonable. The Rules contemplate a balancing test. 06-096 C.M.R. ch. 400 § 4(N)(2) (providing that the maximum extent practicable analysis includes a balancing of factors, such as "availability and cost of technologies and services, transportation and handling logistics, and overall costs"). Applying this balancing test, the Department was justified in concluding that it may not be feasible to timely implement any sludge drying solution at the JRL site and that the Maine Regional Conversion Facility will sufficiently address the issue. AR-0015; *see* AR-0068 (noting need for testing for viability and scalability), 111 ("these technologies are still in the pilot phase"), 136 (noting that Crossroads model, "if successful," could serve as a prototype elsewhere), 183 (discussing status of potential sludge treatment facilities).

Further, the conditions imposed by the Department—which require NEWSME to create a mattress recycling program and expand its mobile recycling app, and to submit annual reports to the Department detailing municipal engagement in recycling and waste diversion and providing solutions to reduce municipal sludge volume—constitute a reasonable exercise of the Department's discretion in determining whether Section 1310-AA(3)(B) has been satisfied. *See Competitive Energy Svcs. LLC v. Pub. Utils. Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039 (an agency decision is reviewed only to determine whether it is "unreasonable, unjust, or unlawful in light of the record"). The Department acted reasonably in determining its various conditions mandating additional recycling would sufficiently promote the State's goals in the Waste Plan and Waste Hierarchy. All conditions are responsive to major areas of focus in the 2024 Waste Plan and therefore promote the Waste Hierarchy. AR-0101. The recycling conditions address one major area of focus in the Waste Plan, namely, enhancing waste diversion and reduction programs, while the sludge condition addresses another major area of focus, namely, Maine's management of sludge.

AR-0101, 110-11. Given the complexity of these issues, this Court should not substitute its judgment regarding the propriety of the conditions for that of the agency. *See Doane v. Dep't of Health & Human Svcs.*, 2021 ME 28, ¶ 38, 250 A.3d 1101.

II. The Department did not err when it found that the proposed expansion of JRL is not inconsistent with environmental justice.

Plaintiffs have also failed to show that the Department erred by concluding that the proposed expansion of JRL is not inconsistent with environmental justice. Section 1310-AA(3)(E) mandates that the Department determine, prior to issuing a PBD, that expansion of a facility "is not inconsistent with ensuring environmental justice for the community in which the facility or expansion is proposed." 38 M.R.S. § 1310-AA(3)(E). "Environmental justice," in turn, is defined in terms of "equal protection" and "meaningful involvement of all people with respect to . . . [waste management] licensing decisions." *Id.* Plaintiffs contend that the Department erred (1) in the interpretation and application of the equal protection requirement, Pet. Br. at 22-25, 25-33, and (2) the meaningful involvement requirement, *id.* at 33-37. The Department's analysis, however, was legally correct and supported by substantial evidence.

A. The Department correctly interpreted and applied the equal protection requirement under Section 1310-AA(3)(E).

1. The Department did not misconstrue Section 1310-AA(3)(E).

The Department correctly interpreted the environmental justice requirement. As the Department noted, quoting the relevant statute, environmental justice is "the right to be protected from environmental pollution and to live and enjoy a clean and healthful environment regardless of ancestry, class, disability, ethnicity, income, national origin or religion." AR-0017 (quoting 38 M.R.S. § 1310-AA(3)(E)). As the Department observed, again quoting the statute, this provision guarantees "equal protection." *Id.* (quoting 38 M.R.S. § 1310-AA(3)(E)).

Plaintiffs' argument that the Department misconstrued the environmental justice requirement depends upon the notion that the statute imposes a "disparate impact" analysis. Pet. Br. at 23-25. They argue that because the Penobscot Nation is a federally recognized tribe and because the Nation purportedly suffers a disparate impact from pollution, the PBD application cannot meet the environmental justice determination criterion. *Id.* at 22-25. Plaintiffs, however, misconstrue the appropriate equal protection analysis. They cite no case law suggesting that equal protection turns on disparate impact—and for good reason: it is well established that disparate impact alone does not violate equal protection.

Under Maine law, equal protection requires that governmental entities treat similarly situated people the same. *See Marshall v. Dexter*, 2015 ME 135, ¶ 30, 125 A.3d 1141; *Aucella v. Winslow*, 583 A.2d 215, 216 (Me. 1990). When a law is not discriminatory on its face but is carried out in a discriminatory way, an equal protection problem arises only if the law has a discriminatory effect *and* was motivated by a discriminatory purpose. *See Polk v. Lubec*, 2000 ME 152, ¶ 14, 756 A.2d 510; *Cottle Enterps., Inc. v. Town of Farmington*, 1997 ME 78, ¶ 16, 693 A.2d 330. "Unequal application of a law to those who are entitled to be treated alike is not a denial of equal protection unless there is shown to be an element of intentional or purposeful discrimination." *Aucella,* 583 A.2d at 216. Discriminatory intent or purpose "may be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself." *Id.* Equal protection analysis therefore does not turn on disparate impact alone—disparate impact is merely a factor in identifying intentional discrimination, together with other indicators of invidious intent. *Id.* (applying a "totality of relevant facts" test); *see Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976).

Thus, the question before the Department was not—as Plaintiffs would have it—simply whether the expansion creates some additional burden on the Penobscot Nation. Rather, the question is whether there is evidence that waste management decisions (such as landfill siting) are being made with an intent to place the environmental burden of those decisions on disadvantaged groups. *Aucella*, 583 A.2d at 216; *see Polk,* 2000 ME 152, ¶ 14, 756 A.2d 510; *Cottle Enterps., Inc.*, 1997 ME 78, ¶ 16, 693 A.2d 330. Plaintiffs have not offered any evidence supporting such a conclusion.[8] For this reason, the Department did not need to analyze equal protection at great length after noting that the Penobscot Nation may be a disadvantaged community. AR-0017-18.

Nevertheless, the Department went much further—indeed, it apparently acted on the assumption that the environmental justice standard gave it authority to impose additional conditions on JRL. The environmental justice standard is not a freestanding substantive guarantee that imposes some unspecified, heightened environmental standard not otherwise imposed by law. *Brockton v. Energy Facilities Siting Bd.,* 14 N.E.3d. 167, 173-74 (Mass. 2014) (rejecting the notion that an environmental justice policy requires an agency to apply "substantive equal protection" principles).[9] If that were the case, "environmental justice" would guarantee a right that is judicially non-administrable because it would impose a standardless test. *Id.*

Nevertheless, the Department addressed at length the environmental concerns raised by Plaintiffs, and imposed additional conditions that it otherwise would not have imposed. After analyzing whether neighboring communities, including the Penobscot Nation, are burdened with pollution using the Environmental Protection Agency's Environmental Justice Screening and

[8] Nor could they. JRL was sited based on proximity to the Old Town paper mill then operated by James River Paper Company, not any intent to place environmental burdens on the Penobscot Nation. AR-0043.
[9] The Massachusetts decision is notable, given that it was made in the context of an environmental justice standard that is more stringent than the one at issue here; the Massachusetts standard for environmental justice analysis specifically contemplated determining whether a disadvantage group "bears an unfair share of environmental pollution." *City of Brockton*, 14 N.E.3d at 171. Maine's statute has no similar language.

Mapping Tool, the Department concluded that the Penobscot Nation was above the 95th percentile in Maine for several environmental justice indicators. AR-0017. The Department expressly recognized that the Penobscot Nation is a "federally recognized tribe." AR-0018. The Department then discussed the status of several topics raised during public comment, including the status of PFAS in leachate, environmental monitoring, air quality and odor, and community notification at JRL. AR-0018-21. After analyzing these factors as they might affect the Penobscot Nation, the Department imposed multiple conditions in the PBD. AR-0021-22. Additionally, as part of its analysis, the Department considered NEWSME's plans to invest in communities neighboring JRL, including NEWSME's establishment of a scholarship program for local youths and a program to provide annual funding to local programs designed to improve outcomes for youth. AR-0091. By imposing free-standing conditions and looking to NEWSME's community investment, the Department far exceeded the requirements of Section 1310-AA(3)(E).

2. The Department's finding that the proposed expansion of JRL is not inconsistent with equal protection is supported by substantial evidence.

a. Plaintiffs cannot show there is no competent evidence supporting the Department's finding.

Having sought to impose a "disparate impact" analysis contrary to Maine law regarding equal protection, Plaintiffs then misconstrue the substantial evidence standard. Pet. Br. at 25-28. Plaintiffs argue that because the Penobscot Nation is "distinguished by ancestry, ethnicity, and national origin" and, further, that because there is evidence that the Penobscot Nation is exposed to higher concentrations of pollution, the only possible conclusion is that expansion of the JRL would be inconsistent with environmental justice. *Id.* Not only does this argument depend on an erroneous legal standard, as discussed above, but it also disregards the standards governing judicial review: Plaintiffs must show *there is no competent evidence* to support the Department's finding.

See 21 Seabran, LLC, 2017 ME 3, ¶ 10, 153 A.3d 113. Plaintiffs cannot do that; rather, they simply tell a competing story. The Department conducted a reasoned and thoughtful environmental justice analysis by analyzing whether neighboring communities were overburdened by pollution, engaging with public comments about JRLs' expansion, and ultimately imposing conditions on the PBD approval to address stated concerns. AR-0017-23.

Plaintiffs claim that "no reasonable person" could conclude that the conditions in the PBD adequately mitigate the burdens of pollution on the Penobscot Nation, Pet. Br. at 25; to the contrary, the conditions are meaningful and substantial. The Department imposed four conditions of approval: (1) installation of a Department-approved PFAS treatment system for landfill leachate prior to expansion; (2) an odor analysis of the landfill and surrounding area; (3) addition of two surface scans for fugitive landfill gas emissions; and (4) establishment of a system to inform the public about significant landfill events in real time. AR-0023. These conditions are in response to the biggest concerns raised by the Penobscot Nation, CLF, and other concerned citizens during the public comment period. AR-1390-93, 1394-96, 1438, 1514-1515, 1708-1709, 1721. As such, the Department's conditions are entirely reasonable.

b. The Court should not impose its own judgment for the Department's regarding the PFAS treatment condition.

Plaintiffs argue at length that the PFAS treatment condition, which the Department imposed as part of the PBD, is not adequate to satisfy environmental justice. Pet. Br. 28-33. Although the argument is not clear, it appears to be a factual claim subject to the substantial evidence test because Plaintiffs raise concerns about how well such a treatment system will actually perform. Plaintiffs cite no case law justifying their request that the Court substitute its own judgment regarding the efficacy of the PFAS condition for that of the Department—nor could they. *Doane*, 2021 ME 28, ¶ 38, 250 A.3d 1101. The Court should instead defer to the Department's expertise. *Id.*

As part of its PBD, the Department imposed the following condition: that "[NEWSME] designs and installs a Department-approved system for the treatment of landfill leachate for PFAS prior to expansion operations and submits an implementation schedule with tasks to the Department for review to the Department within 90 days of issuance of this public benefit determination." AR-0023. Plaintiffs characterize PFAS treatment for landfill leachate as an "evolving field," Pet. Br. 28, but in fact that is a significant understatement. There are no state or federal standards for PFAS in landfill leachate whatsoever, AR-1416, and no other landfill in Maine is subject to this requirement.[10] Thus, to meet this condition, BGS and NEWSME will have to design and permit a leachate treatment system without the benefit of knowing what standards the Department will require it to meet. Ultimately, the design will be the subject of a rigorous technical review during the solid waste facility licensing process that is still yet to come.

Plaintiffs nonetheless claim the PFAS treatment condition is not sufficient because it is not stringent enough. Pet. Br. 28. Central to Plaintiffs' argument are two incorrect assumptions: (1) JRL will install a foam fractionation system, a system which Plaintiffs claim does not remove short-chain PFAS and PFAS precursors and which produces VOC air emissions; and (2) NEWSME will install the foam fractionation system without further Department approval or oversight. *Id.* at 28-30, 32-33. Plaintiffs then conclude that the Department should amend the PFAS treatment condition to include additional requirements relating to mitigating the risks of foam fractionation (such as removal of the broadest spectrum of PFAS), air monitoring, and an opportunity for public comment on the system before approval. *Id.* at 31-33. Plaintiffs' argument fails because it is based on speculation and a mischaracterization of the condition itself and the permitting process.

[10] Given that the State's "evolving" understanding of the potential health risks of PFAS is so new and uncertain, the only potentially relevant legal standards thus far apply to drinking water. 40 C.F.R. § 141, 142; P.L. 2021, c. 82, § 2 (setting interim drinking water standards); *see* AR-1416.

As an initial matter, NEWSME is still deciding between several PFAS treatment systems and there is no guarantee that NEWSME will install a foam fractionation system. *See* AR-0003 (Department requiring only installation of "Department approved" PFAS treatment system); AR-0068, 111 (noting PFAS volume reduction and destruction technologies are relatively new and will need to be tested for viability and scalability in Maine); AR-1416 (discussing various methods under evaluation). Further, Plaintiffs have no evidence to support their claim that NEWSME will install a foam fractionation system without adequate review and approval by the Department, other than unfounded accusations about the actions of an affiliated landfill in Vermont. Pet. Br. at 32. Because Plaintiffs' argument is based upon mere speculation, Plaintiffs' argument fails.

Further, Plaintiffs' argument fails because they incorrectly imply that this is the only opportunity the Department will have to review and regulate the PFAS treatment system. *Id.* at 30, 33. On the contrary, the PFAS treatment condition itself requires Department involvement and knowledge of the system and its implementation schedule. AR-0021. Furthermore, the Department will review and evaluate the PFAS treatment system during the landfill expansion licensing process. *See* 38 M.R.S § 1310-N(1). The PBD is just an initial step. *Id.* Now NEWSME must file a solid waste facility application to expand JRL, a process that can take as long as 18 months, requires compliance with stringent environmental regulations, and affords the Department opportunity to impose PFAS treatment requirements (including with respect to the ultimate treatment standards). *Id.* Plaintiffs will likewise have the opportunity during that process to comment on whatever system is proposed. *See* 38 M.R.S. § 1310-S.

The Department's decision that the PFAS treatment condition—along with the other conditions of approval—is sufficient to meet "environmental justice" deserves deference. *See Reed*, 2020 ME 57, ¶ 14, 232 A.3d 202. The Department reasonably imposed a PFAS treatment system condition in response to concerns raised by the Penobscot Nation (and the general public) about

PFAS. AR-0021. Further, should the Department determine additional conditions are necessary, including, for example, as to the technology selected and the treatment standards, the Department will impose those during the landfill expansion licensing process. *See* 38 M.R.S § 1310-N(1). Thus, Plaintiffs cannot show the Department's decision to impose its first-ever PFAS treatment condition for landfill leachate is inconsistent with environmental justice.

B. The Department did not err by failing to provide "meaningful involvement."

Section 1310-AA(3)(E)'s environmental justice standard expressly mandates that "all people" be afforded the opportunity for "meaningful involvement" with waste management decisions. 38 M.R.S. § 1310-AA(3)(E). Remarkably, Plaintiffs assert that the Department committed an error of law by failing to allow meaningful involvement in the PBD process. Pet. Br. 33-37. There is no basis for this argument—indeed, as Plaintiffs themselves had to acknowledge, the Department twice extended the PBD process at Plaintiffs' request (and with NEWSME's consent), and in so doing set aside its statutory obligation to issue a decision in 60 days. 38 M.R.S. § 1310-AA(2). As the PBD reflects, the Department and applicant took meaningful steps to engage with the public, providing enhanced notice of the PBD application and significant opportunities for comment, and prolonging the Department's review of the PBD beyond its statutory deadline. AR-0005-7. The Department could not reasonably be expected to do more.

Under the governing statute, as part of the PBD process, the Commissioner is required to (1) accept written public comment and hold a public meeting in the vicinity of a proposed facility; (2) consider public comments when making its determination; and (3) issue a PBD within 60 days of accepting a PBD application. 38 M.R.S. § 1310-AA(2); 06-096 C.M.R. ch. 400 § 5(F)(1), (G). An applicant is also required to provide notice of its intent to file a PBD application within 5 days prior to filing the application. 06-096 C.M.R. ch. 400 § 5(F)(1).

The Department substantially exceeded the notice and comments requirements for a PBD. AR-0005-7. First, although the PBD statute only requires the Department to hold one public meeting, the Department held several public meetings for public comment. AR-0005, 1278, 1291. The Department held the first two public meetings in Old Town on July 16, 2024, from 1:00 p.m. to 3:00 p.m. and from 5:30 to 7:30 p.m. AR-005, 1278. The Department provided ample notice of the July 16 meetings, contacting the Penobscot Nation on June 24, 2024, and July 3, 2024, about the meetings and running a notice in the Bangor Daily News on July 3, 2024. AR-1277, 1279. At the request of CLF, the Department also held an additional public meeting on July 26, 2024, via Zoom, allowing virtual public comments. AR-1291. The Department provided notice of the virtual meeting to the Penobscot Nation and other interested groups on July 11, 2024. AR-1290. The Department accepted more than 150 written public comments both on the application and its draft PBD decision. AR-1514-2192. As part of its PBD application, BGS and NEWSME also agreed to hold four informational public milestone meetings to educate the public about the proposed design for the landfill expansion and hear public input. AR-0092.

The Department also extended the PBD review process twice—even though it arguably had no authority to do so. AR-0003, 6-7. The statutory deadline for the PBD review was originally on August 24, 2024. AR-0003. However, on August 13, 2024, the Department extended the PBD review process by 30 days after Plaintiffs requested a 30-day extension. AR-1398-1402, 1431-32, 2373, 2376-77. Likewise, on September 19, 2024, the Department again extended the PBD review process at Plaintiffs' request. AR-1469-72, 1473-75, 2380. As part of its review of the PBD application, the Department extended the public comment period on the draft PBD by five days and extended its review of comments by three days to ensure adequate time to comprehensively

review all comments submitted. AR-0006-7. The Department ultimately approved the PBD for the expansion on October 2, 2024—about six weeks after its statutory deadline. AR-0025, 2380.

Plaintiffs first take issue with the 60-day time frame, arguing that it was "compressed [in] nature." Pet. Br. 33. But, pursuant to the same statute that imposes the environmental justice requirement, the Commissioner is *required* to issue a PBD within 60 days of accepting a PBD application. *See* 38 M.R.S. § 1310-AA(2) and 06-096 C.M.R. ch. 400, § 5(G). If Plaintiffs think the timeframe is too short, they should be taking their criticism to the Legislature, not the Department or this Court. Furthermore, the Department did not even adhere to the 60-day timeframe requirement but instead extended it *twice*. AR-0003, 6-7, 2376-77, 2380.

Plaintiffs' contention that the process did not allow for meaningful comment or consideration of those comments by the Department, *see* Pet. Br. at 35-36, is belied by the record. The Department offered a listening session to the Penobscot Nation at the very outset of the application process. AR-1277. Further, after receiving the notices described above, Plaintiffs testified at the public hearing and submitted multiple comments that were lengthy and substantive. AR-1338 (video at 2:14:42); 1376-1397, 1433-1440, 1479-1513. They also participated at the public meetings. AR-1326-27. Moreover, there is no question that the Department considered their comments; the Department carefully enumerated the comments in the PBD, *see* AR-0005-6, and specifically referenced the comments again in imposing additional conditions under the environmental justice standard, *see* AR-0018-21.

Ultimately, Plaintiffs' argument must fail in light of the record and because the Department's interpretation of "meaningful involvement" is entitled to deference. *Reed*, 2020 ME 57, ¶ 14, 232 A.3d 202. The Department interpreted "meaningful involvement" reasonably by holding several in-person and virtual public hearings, reviewing public comments, and acting

responsively to Plaintiffs every time Plaintiffs requested an extension. The Department did not commit any clear error. And even if it erred because it failed to allow an additional amount of process (never quantified by Plaintiffs, and not discernable by any reasonably justiciable standard), such error would be harmless given Plaintiffs' consistent and meaningful participation in the process. *Antler's Inn & Restaurant, LLC v. Dep't of Pub. Safety*, 2012 ME 143, ¶ 12, 60 A.3d 1248 (applying harmless error rule). The Department exceeded its obligations to provide meaningful involvement; it certainly committed no reversible error.

CONCLUSION

For all the reasons set forth above, NEWSME respectfully requests that this Court affirm the PBD issued by the Department on October 2, 2024, for the expansion of JRL.

Dated: February 20, 2025

/s/ Joshua D. Dunlap

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