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.	)	**RESPONDENT'S BRIEF**

INTRODUCTION

The State of Maine's Department of Environmental Protection ("Department") respectfully asks this Court to affirm the public benefit determination it issued for the proposed expansion of Juniper Ridge Landfill. In this appeal, Petitioners Conservation Law Foundation ("CLF") and the Penobscot Nation (collectively "Petitioners") challenge the Department's decision, claiming that the Department erred when it determined that the proposed expansion of the landfill provides a substantial public benefit. Specifically, Petitioners claim that the Department erred when it concluded that (1) the proposed expansion is consistent with the State Waste Management and Recycling Plan and the State Waste Management Hierarchy, and (2) the proposed expansion is not inconsistent with ensuring environmental justice. The Department made no error of law, and its decision is supported by substantial evidence in the record. Accordingly, the Department's decision should be affirmed and the Petition for Review should be denied.

FACTUAL AND REGULATORY BACKGROUND

Proposals for new or expanded solid waste disposal facilities must undergo a two-step review process. *See* 38 M.R.S. §§ 1310-AA(1), 1310-N(1)(B), (3-A). First, before a project applicant may submit a license application, it must apply to the Department "for a determination of whether the proposed facility provides a substantial public benefit," what is known as a "public benefit determination" ("PBD"). 38 M.R.S. § 1310-AA(1); 06-096 C.M.R. ch. 400, § 5(C), Administrative Record ("R.") 2241. If the Department determines that the proposal will confer a "substantial public benefit," as further described below, the Department shall approve the PBD application, partially or in full, with or without conditions. 38 M.R.S. §§ 1310-AA(3), (7)(A); 06-096 C.M.R. ch. 400, §§ 5(E), (H)(1), R. 2242-43. Only after having received such approval may the applicant embark on the lengthy process of applying for a license for the proposed expansion. *See* 38 M.R.S. § 1310-N(3-A)(B); 06-096 C.M.R. ch. 400, §§ (5)(C)(2), (D), R. 2241. Thus, a PBD is simply a threshold determination that allows the applicant for a proposed expansion to pursue licensing but does not determine the outcome of the licensing process.

Public Benefit Determination Process

The Department[1] "shall find that the proposed facility . . . provides a substantial public benefit if the applicant demonstrates . . . that the proposed facility":

A. Meets the immediate, short-term or long-term capacity needs of the State;
B. Is consistent with the state waste management and recycling plan and promotes the solid waste management hierarchy;
C. Is not inconsistent with local, regional, or state waste collection, storage, transportation, processing, or disposal; and
D. Is not inconsistent with ensuring environmental justice for the community in which the expansion is proposed.

[1]Although the relevant statutes and regulations assign the public benefit and licensing determinations to the Department Commissioner, and Commissioner Loyzim issued the PBD at issue in this matter, this brief will refer to the "Department" as the ultimate decisionmaker for brevity and consistency.

38 M.R.S. § 1310-AA(3).[2]

The solid waste management hierarchy ("Hierarchy") establishes a State policy to "plan for and implement an integrated approach to solid waste management . . . which must be based on the following order of priority":

> A. Reduction of waste generated at the source, including both amount and toxicity of the waste;
> B. Reuse of waste;
> C. Recycling of waste;
> D. Composting of biodegradable waste;
> E. Waste processing that reduces the volume of waste needing land disposal, including incineration; and
> F. Land disposal of waste.

38 M.R.S. § 2101(1). The Hierarchy further provides, "It is the policy of the State to use the order of priority in this subsection as a guiding principle in making decisions related to solid waste management." *Id*.

The State Waste Management and Recycling Plan is published by the Department every five years as required by statute and is "an analysis of, and a plan for, the management, reduction, and recycling of solid waste for Maine." R. 101; *see* 38 M.R.S. §§ 1303-C(35), 2122, 2123-A. The State Plan "includes information about existing disposal capacity in order to plan for projected capacity needs." *Id.* In 2024, the Department published the state plan under the title, "2024 State Waste Management and Recycling Plan Update and 2022 Waste Generation and Disposal Capacity Report," referred to herein as the State Plan.[3] R. 98-148.

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[2] Pursuant to a provision not at issue in this matter, some facilities must also demonstrate that their operations would be precluded or significantly impaired if they do not accept certain waste generated out of state. *See* 38 M.R.S. § 1310-AA(3)(D).

[3] Petitioners do not dispute that the document titled "2024 State Waste Management and Recycling Plan Update and 2022 Waste Generation and Disposal Capacity Report" is the "state waste management and recycling plan" the Department was required to consider during the PBD process. *See, e.g.*, Pet'rs' Br. at 11 (citing to the document at R. 98-148).

Reflecting the threshold nature of the PBD process, the statute provides a default deadline of 60 days for the Department to act on a PBD application. 38 M.R.S. § 1310-AA(2); 06-096 C.M.R. ch. 400, § 5(G), R. 2243.

Licensing Process

If the Department issues a positive PBD, the project proponent may submit a license application.[4] *See* 38 M.R.S. § 1310-AA(1). The Department's consideration of a license application is governed by numerous licensing criteria and standards, including those in the Department's Solid Waste Management Rules: *General Provisions*. *See* 38 M.R.S. § 1310-N; 06-096 C.M.R. ch. 400, § 4; R. 2193-2286. Among these considerations:

- The Department must determine that the project will not unreasonably adversely affect air quality, surface water quality, protected natural resources, rare, threatened and endangered animal or plant species, or other natural resources; that it will not have an unreasonable adverse effect on existing uses and scenic character; and that it will not pose an unreasonable risk of discharge to a significant ground water aquifer. 06-096 C.M.R. ch. 400, §§ 4(E)-(I), (K), R. 2233-37.

- The Department must again determine that the proposal is consistent with the Hierarchy, 06-096 C.M.R. ch. 400, § 4(N)(1), R. 2239. Further, the applicant must provide evidence that "the purpose and practices of the solid waste facility are consistent with" the Hierarchy by demonstrating, among other things, that "the waste [that will be accepted by the facility] has been reduced, reused, recycled, composted, and/or processed to the maximum extent practicable prior to incineration or landfilling, in order to maximize the amount of material recycled and reused, and to minimize the amount of waste being disposed." 06-096 C.M.R. ch. 400, § 4(N)(2)(a), R. 2239-40.

[4] The applicant must also submit a Preliminary Information Report ("PIR") to the Department before applying for a license "to determine whether or not the facility will pose an unreasonable threat to ground and surface water or to public health and safety." 06-096 Ch 401, § 1(B), R. 2290. The Department issued a Determination of Environmental Feasibility based on the PIR in a November 6, 2023, letter, determining that the proposed expansion is environmentally feasible and that none of the siting criteria prohibit the proposed development. R. 546.

- The Department must consider its landfill siting, design, and operations criteria in assessing the license application. 06-096 C.M.R. ch. 400, § 3(D), R. 2223; ch. 401, R. 2287-2372. Chapter 401 of the Department's Solid Waste Management Rules: *Landfill Siting, Design and Operation* contains specific landfill siting, design, and operational criteria that must be met to ensure the protection of public health, welfare, and the environment, including requirements for a composite liner system, the submission and implementation of a quality assurance plan to ensure that design specifications and performance standards are met during construction, and the submission and implementation of a monitoring program to ensure that there are no discharges from the landfill to the environment. The Department's Solid Waste Management Rules also require the Department to exercise strict oversight of landfill activities, such as those occurring during construction and operations, including requirements for the applicant to submit weekly construction reports and a final construction report to the Department. The applicant must receive Department approval prior to the commencement of operations, and it must submit for Department review results of waste characterization, cell development plans including a schedule for cover placement, and annual reports, among other requirements. 06-096 C.M.R. ch. 401, R. 2287-2372.

During the licensing process, the Department reviews proposed design plans, engineering analyses, environmental testing, and other technical work in light of these broad licensing criteria. Due to the extensive information that is typically submitted and must be considered by the Department, a licensing review may take 540 days or longer, far longer than the 60 days provided for the PBD process by statute.[5] Licensing proceedings are open to robust public involvement at multiple points in the process, including public meetings and opportunities for public comment. 06-096 C.M.R. ch. 400, § 3(A), R. 2220; 06-096 C.M.R. ch. 2. Finally, if the Department ultimately licenses the proposed expansion, it "may impose any requirement as a license condition to assure compliance with State law or these rules." 06-096 C.M.R. ch. 400, § 3(F), R. 2225.

[5] *See* Department of Environmental Protection, "Processing Times for Applications, Effective November 1, 2024, to October 31, 2025," available at https://www.maine.gov/dep/processingtimes.pdf; 38 M.R.S. § 344-B; 06-096 C.M.R. ch. 400, § 3(B)(1)(a), R. 2220. Code WD will apply to the JRL expansion application.

Juniper Ridge Landfill

The Juniper Ridge Landfill ("JRL") is located in the towns of Old Town and Alton, Maine. R. 41. The landfill was originally licensed to a pulp and paper company in 1993, but ownership of the landfill and the license to operate it were transferred to the State in 2004. R. 1-2. That same year, the State entered into an Operating Services Agreement ("OSA") with Casella Waste Systems to operate the landfill. R. 2. The Department of Administrative and Financial Services, Bureau of General Services ("BGS"), is the State agency that now owns and holds the license for JRL, and a subsidiary of Casella, NEWSME Landfill Operations LLC ("NEWSME"), operates the landfill pursuant to the OSA. R. 2. JRL is the only State-owned solid waste disposal facility currently accepting waste in Maine. R. 922.

In 2012, the Department partially approved BGS's application for a PBD to expand the landfill, approving just over 9 million cubic yards of expanded capacity—less than half of the expansion that was requested. R. 2. Five years later, the Department licensed the expansion. R. 2. Certain design and construction specifics were revised and approved by the Department in subsequent years, and the second to last "cell" of that expansion is currently under construction. R. 2-3.

JRL provides disposal capacity for Maine-generated non-hazardous waste streams, including construction and demolition debris ("CDD") and the associated processing residues, oversized bulky wastes, municipal solid waste ("MSW") incinerator ash, multi-fuel boiler ash, bypassed MSW from waste-to-energy ("WTE") incinerators and solid waste processing facilities, municipal and industrial wastewater treatment plant ("WWTP") sludge, contaminated soils, non-friable asbestos in demolition waste, catch basin grit and grit screenings, and oil spill debris. R. 41. Of particular note, JRL accepts nearly 90% of the sludge generated by publicly owned WWTPs

in Maine, an amount that has grown significantly because of elevated concentrations of per- and polyfluoroalkyl substances ("PFAS") in sludge and the concomitant prohibition on land application of sludge and sludge-derived products. *See* R. 165, 915, 920-22. Currently, there is no effective and reliable disposal or management option for the quantity of sludge that JRL accepts. *Id*.

Also crucial to note is JRL's acceptance of bypass waste from municipalities that have contracts with waste management facilities. R. 7-8. When those waste management facilities are unavailable, either for short-term repairs or for long-term shutdowns, all of the solid waste from those municipalities bypasses those facilities and goes to JRL instead. R. 8, 133. Thus, JRL plays a pivotal role in statewide waste disposal as one of two solid waste landfills that generally serve the entire state and has accepted slightly over 50% of all waste material generated in Maine since 2018. R. 134, 662.[6]

At current fill rates, JRL is expected to run out of capacity in 2028. R. 42. Given this reality, it is not surprising that the State Plan—which the Commissioner must consider in making the PBD—affirms that "the 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." R. 41. BGS seeks to expand the capacity of JRL by 11.9 million cubic yards on approximately 61 acres of State-owned land, which is anticipated to provide approximately 11.3 additional years of use. R. 3, 41. If approved by the Department, the expanded landfill would continue to accept the types of solid waste that JRL currently accepts. R. 3.

[6] JRL's role in accepting waste initially generated outside the State is limited to residues generated by in-state waste processing facilities that state law defines as "waste generated within the State." *See* 38 M.R.S. §§ 1303-C(40-A), 1310-N(11). The quantity of such waste that JRL may accept is limited by state law, and such waste is used to mix with sludge to maintain JRL's structural stability. *See* 38 M.R.S. § 1303-C(40-A); P.L. 2023, ch. 283, § 2; R. 55-56, 135-36.

JRL Expansion Proposal

On June 7, 2024, BGS applied to the Department for a PBD to expand JRL.[7] R. 32-713. NEWSME, as the operator of JRL, prepared the application with Sevee & Maher Engineers, Inc. R. 32. After a robust public comment process, *see* Section IV infra, on October 2, 2024, the Department approved BGS's PBD application with conditions (in addition to the Department's standard conditions), including conditions that will be included in any eventual license if the proposed expansion is approved by the Department. R. 21-27.

The Department determined that the JRL expansion will provide a substantial public benefit based on its conclusions, in relevant part, that the expansion proposal (1) is needed to meet the State's capacity needs for solid waste disposal, (2) is consistent with the State Plan and promotes the Hierarchy, and (3) is not inconsistent with ensuring environmental justice for the community in which the expansion is proposed. R. 22-23. On November 12, 2024, Petitioners filed their Petition for Review of the Department's conditioned approval of the PBD pursuant to the Maine Administrative Procedure Act ("MAPA"), 5 M.R.S. §§ 11001-11008, and Maine Rule of Civil Procedure 80C ("Rule 80C"), arguing that the Department's determination was affected by errors of law and not supported by the record with respect to the second and third elements listed above. Petitioners do not contest the Department's other conclusions, including its conclusion that the proposed expansion of JRL is needed to meet the State's capacity needs for solid waste disposal.

[7] JRL was required to apply for a PBD due to a proposed "change in [its] disposal capacity" pursuant to 38 M.R.S. § 1310-AA(1-B)(B). *See also* 06-096 C.M.R. ch. 400, § 5(C)(2), R. 2241.

STANDARD OF REVIEW

In an appeal from an agency decision pursuant to Rule 80C and MAPA, this Court reviews the agency's decision "for 'legal errors, abuse of discretion, or unsupported factual findings.'" *Forest Ecology Network v. Land Use Regul. Comm'n*, 2012 ME 36, ¶ 28, 39 A.3d 74 (quoting *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 17, 953 A.2d 378); 5 M.R.S. § 11007(4).[8] This review is "deferential and limited." *Passadumkeag Mountain Friends v. Bd. of Env't Prot.*, 2014 ME 116, ¶ 12, 102 A.3d 1181 (quoting *Friends of Lincoln Lakes v. Bd. of Env't Prot.*, 2010 ME 18, ¶ 12, 989 A.2d 1128).

"When a dispute involves an agency's interpretation of a statute it administers," the agency's interpretation "is entitled to great deference" so long as it is reasonable. *FPL Energy Me. Hydro LLC v. Dep't of Env't Prot.*, 2007 ME 97, ¶ 11, 926 A.2d 1197 (internal quotation marks omitted). An agency's interpretation of a statute it administers will only be overturned if "the statute plainly compels a contrary result." *Passadumkeag Mountain Friends*, 2014 ME 116, ¶ 12, 102 A.3d 1181.

The Court "must affirm" the agency's factual conclusions "if they are supported by substantial evidence in the record, even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency." *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 13, 989 A.2d 1128. The "substantial evidence" standard "does not involve any weighing of the merits of evidence" but merely requires the Court "to determine whether there is any competent evidence in the record to support a finding." Id. at ¶ 14. Agency findings will only be vacated if there is "no competent evidence in the record to support a decision." *Id.* As the parties seeking to vacate the

[8] For purposes of this appeal, the Department does not dispute that the October 2, 2024, public benefit determination constitutes an appealable final agency action under MAPA.

agency's decision, Petitioners bear the burden of persuasion. *Somerset Cnty. v. Dep't of Corr.*, 2016 ME 33, ¶ 14, 133 A.3d 1006.

ARGUMENT

I. The Department's Conclusion that the Expansion Proposal Is Consistent with the State Plan and Promotes the State Solid Waste Management Hierarchy Is Not Affected by Error of Law and Is Supported by Competent Record Evidence.

The PBD statute provides that the Department "shall find that the propos[al] . . . provides a substantial public benefit if the applicant demonstrates to the [Department] that [the proposal] . . . 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) (emphasis added). Petitioners contend that the Department "erroneously interpreted the plain language of the statute when it issued a positive determination" because, Petitioners contend, the proposal is not "compatible" with the State Plan and does not "further" the Hierarchy. *See* Petitioners' Brief ("Pet'rs' Br.") at 16-17. But the Petitioners' attempt to manufacture a statutory interpretation dispute is futile. They provide no support for substituting the statute's language ("consistent with" and "promotes") with other words ("compatible" and "furthers"): the statute speaks for itself. Ultimately what the Petitioners dispute is whether, as a factual matter, the record supports a determination that the proposal is consistent with the State Plan and promotes the Hierarchy. And even accepting the Petitioners' attempt to rewrite the statute with approximate synonyms, the record supports that the expansion proposal is consistent/compatible with the State Plan and promotes/furthers the Hierarchy. *See Friends of Lincoln Lakes*, 2018 ME 18, ¶¶ 13-14, 989 A.2d 1128.

More than being merely "consistent" or "compatible" with the State Plan, the record supports that the expansion proposal is an indispensable component of that plan. At the outset, the State Plan notes that the factors informing solid waste management in Maine "are complicated and

intertwined with geography, transportation and logistics, business and economics, and policy." R. 101. Against this complicated backdrop, the State Plan specifically states that "[t]he expansion of [JRL] will be necessary to ensure there is adequate [waste disposal] capacity for the entire State of Maine over the next 10 years." R. 101. While the State Plan acknowledges that a comprehensive approach to Maine's solid waste management needs will include a variety of methods that may ultimately "prevent the need for landfilling," the State Plan plainly concludes that "[t]he loss of JRL as a disposal facility would create catastrophic capacity issues as it receives over 50% of all material landfilled in Maine annually." R. 101, 139. In other words, maintaining JRL's capacity is presently a critical piece of Maine's solid waste management system, in concert with approaches other than landfilling. *See, e.g.*, R. 139 ("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.").

The compatibility of the State Plan and the expansion proposal is further articulated in BGS's PBD application. BGS describes several factors that make the JRL expansion an indispensable component of Maine's solid waste management system, including reduced or inconsistent operations at other waste facilities, the statutory ban on new commercial landfills, and the critical need for landfill capacity "for sludge disposal until a new solution is identified to manage sludge containing PFAS." R. 41-42; 55-59. As noted above, JRL takes nearly 90% of the State's sewage sludge, material for which there is currently no other safe and reliable disposal option. *See* R. 165, 915, 920-22.

The record also supports that the expansion proposal "promotes" or "furthers" the Solid Waste Management Hierarchy. The Hierarchy "sets forth an integrated approach to the

management of solid waste generated in and imported to the State" with "[r]eduction of waste generated at the source" as the highest priority and "land disposal of waste" as the lowest. 38 M.R.S. § 2101(1); 06-096 C.M.R. ch. 400, § 4(N)(1), R. 2239. Thus, although land disposal is the lowest priority, the Hierarchy recognizes a role for land disposal and in no way precludes landfilling from playing a role in Maine's "integrated" solid waste management system.[9] And in fact, as noted above, the State Plan, which is guided by the Hierarchy, *see* 38 M.R.S. § 2101(1), recognizes the critical importance of increasing capacity at JRL to maintaining Maine's entire solid waste management system.

Further, and more specifically, the expansion proposal "promotes" or "furthers" the Hierarchy by supporting the functioning of non-landfill waste management facilities. JRL provides "disposal capacity for the variety of residues generated during the operation of material processing, recycling, and WTE facilities as well as bypass MSW that would otherwise accumulate during facility maintenance shutdowns" and "a location for material that cannot be safely used as feed for WTE facilities or composted, such as sludge containing PFAS." R. 74, 78. Although sludge disposal gets all the headlines, JRL is primarily a destination for a wide variety of materials that cannot be handled at other waste management facilities. *See* R. 51-52. In short, landfilling may be the lowest priority in the Hierarchy, but the expansion proposal supports the entire integrated waste management system and enables "higher" priorities, such as recycling, waste processing, and waste reduction, to be implemented.[10]

[9] Although "integrated" in the solid waste context is not defined by statute or rule, one common definition of "integrated" is "with various parts or aspects linked or coordinated," *New Oxford American Dictionary* at 903 (3d ed. 2010), underscoring that Maine's "integrated approach" links and coordinates multiple solid waste management strategies.

[10] Although the Petitioners belittle the existing and planned recycling and waste reduction initiatives of NEWSME's parent company outside JRL, they do not demonstrate that it was inappropriate for the Department to consider these efforts as part of its determination that the JRL expansion complements, and does not undercut, efforts to process waste in accordance with the Hierarchy.

Petitioners make much of the State Plan's statement that, "[t]he current trajectory of sludge and CDD disposal [at JRL] encourages the expansion and use of landfilling." Pet'rs' Br. at 11, quoting R. 136. But rather than being an indictment of JRL expansion, the State Plan's statement in context is a recognition of the challenges posed by sludge disposal, challenges that will not simply go away if JRL is not expanded. *See* R. 135-136 ("The discovery of PFAS in municipal WWTP sludges and other sludge-derived products banned from land application in Maine have made JRL the landfill of choice for final disposition of this material, which has had a significant impact in recent years on its capacity."). And the current challenges regarding sludge disposal are entirely separate from the ongoing need for JRL to function as a destination for materials that cannot be otherwise processed at recycling and waste management facilities. *See* R. 74, 78, 134-135.

Finally, the Petitioners contend that the PBD is at odds with the State Plan and the Hierarchy because it does not require certain conditions: (1) the implementation of sludge dewatering technology at JRL; (2) an annual cap on the amount of CDD fines that JRL can accept; and (3) an annual maximum fill rate at JRL. Pet'rs' Br. at 20. But there are several problems with this contention. First, other than the conclusory assertion that a maximum fill rate is required because JRL needs to expand to meet future capacity needs, the Petitioners do not point to any record evidence supporting their contention that a cap on the waste JRL accepts each year is required by the State Plan or the Hierarchy. To the contrary, as outlined above, the State Plan explicitly notes how the expansion proposal currently is essential to the functioning of Maine's integrated solid waste management system. *See* R. 101, 139. Second, the Petitioners do not point to a single piece of record evidence demonstrating that CDD *fines*—as opposed to general CDD used for sludge bulking—which constitute 9% of the waste received at JRL, R. 8, are used

excessively at JRL, have meaningfully contributed to the need for expansion, or render the expansion proposal inconsistent with the State Plan and the Hierarchy.[11]

Third, the Petitioners' contention that the PBD had to require the implementation of specific sludge management technology, namely a sludge dryer, at JRL is misguided. There is no dispute that sludge dewatering technologies exist as a promising option for reducing sludge volumes, and that a private waste facility, Waste Management's Maine Regional Conversion Facility in Norridgewock, is planning to install a sludge dryer. See R. 15, 136. But these facts do not mean it would be appropriate for the Department to require the installation of *this specific technology for sludge management* (a sludge dryer) *at JRL at this specific point in the regulatory process*.

As explained above, the PBD is a threshold determination, made on a short 60-day timeframe,[12] that a proposal is consistent with capacity need and not fundamentally inconsistent with, among other things, the State Plan, the Hierarchy, and environmental justice. The threshold determination that a proposal will confer a substantial public benefit is a prelude to the substantive licensing process, in which the Department rigorously assesses all technical aspects of a license application on a timeline which may take 540 days or longer. *See* footnote 5 supra. Requiring a specific technology or sludge management modality during the threshold PBD process would not only be legally inappropriate but could well result in imposition of a condition that is inconsistent with other technical aspects of the proposal, impracticable, or inferior to other technologies that

[11] Petitioners generally allege a lack of oversight regarding the use of CDD fines for shaping, grading, or alternative daily cover at JRL. *See* Pet'rs' Br. at 9; R. 1382-83. But there is no competent record evidence that JRL is using CDD fines inappropriately or excessively. To the contrary, the PBD itself notes the Department's conclusion that "JRL's daily cover, as a percentage of the total waste received, appears reasonable in comparison to similar landfills in Maine." R. 11.

[12] Although the Department requested and was granted a 30-day extension, the default timeline in the statute and by rule is 60 days. 38 M.R.S. § 1310-AA(2); 06-096 C.M.R. ch. 400, § 5(G), R. 2243.

emerge during the licensing process. Without even knowing what specific design BGS is going to propose in its license application, the Department would be putting the cart before the horse by restricting what BGS may propose.

Rather than making the premature and unsupported decision to require a specific sludge management strategy, the Department, exercising its informed discretion and expertise, determined it was appropriate to condition the PBD on NEWSME evaluating and submitting to the Department an annual report on "the availability and capacity of regional facilities in Maine to reduce the volume of municipal wastewater treatment plan sludge prior to landfilling at JRL [including] recommendations to further reduce the volume of sludge prior to landfilling." R. 15. This will allow NEWSME and the Department to assess going forward what sludge management strategies may be practicable, including assessing the promising, but essentially unproven in Maine, option of sludge drying. *See* R. 136 (the State Plan's statement that "if successful" the proposed sludge dryer at the Norridgewock facility "could serve as a model or prototype for other facilities").

While the Petitioners may disagree, the record also supports the Department's decision not to mandate specific sludge management technology as a necessary condition of the PBD because it reduces waste to the "maximum extent practicable." As described above, "maximum extent practicable" is, by statute and regulation, a consideration in the licensing process but is not explicitly included in the PBD statute or regulations. *Compare* 38 M.R.S. § 1310-AA and 06-096 C.M.R. ch. 400, § 5, R. 2240-43, *with* 38 M.R.S. § 1310-N(1)(C) and 06-096 C.M.R. ch. 400, § 4(N)(1)-(2), R. 2239-40. But to the extent the Department considered the "maximum extent practicable" in terms of sludge reduction during the threshold PBD process, it would be premature

to conclude that implementation at JRL of a promising, though essentially unproven, technology is "practicable" rather than merely conceivable.

The premature nature of concluding at the PBD stage that a specific sludge reduction technology is "practicable" for use at JRL is especially evident considering the Department's own regulations describing the meaning of "maximum extent practicable" in the licensing process. Pursuant to these regulations, reducing waste to the "'maximum extent practicable' prior to disposal means handling the greatest amount of waste possible through means as high on the solid waste management hierarchy as possible . . .*without causing unreasonable increases in facility operating costs or unreasonable impacts on other aspects of the facility's operation.*" 06-096 C.M.R. ch. 400, § (4)(N)(2), R. 2240 (emphasis added). The regulations further provide that determining the "'maximum extent practicable' includes consideration of the availability and cost of technologies and services, transportation and handling logistics, and overall costs that may be associated with various waste handling methods." *Id.* These highly technical, fact-specific considerations are most appropriate for the lengthy, technical licensing process, which will include ample opportunity for public comment, and which will be guided by the Hierarchy considerations.

In sum, although the specific measures for which the Petitioners advocate may well be considered during the licensing process, they have not demonstrated that the Department should have required these measures as part of the threshold PBD. And perhaps more to the point of the Petitioners' concerns, waste reduction options will be considered by the Department during the lengthy period when it has an actual licensing application in hand.

For these reasons, the Department's consideration of the expansion proposal's compatibility with the State Plan and the Hierarchy was not affected by any legal error and was

supported by competent record evidence. *See Friends of Lincoln Lakes*, 2018 ME 18, ¶¶ 13-14, 989 A.2d 1128.

II. The Department Did Not Err as a Matter of Law in Analyzing the Environmental Justice Criterion.

As the Petitioners concede, the Department acknowledged the impact of environmental pollution on the Penobscot Nation. *See* Pet'rs' Br. at 23. Nevertheless, the Petitioners contend that the Department erred as a matter of law by "failing to consider whether the Penobscot Nation is also distinguished by the classes the [PBD] statute names, including ancestry, ethnicity, and national origin." Pet'rs' Br. at 23-24. Far from demonstrating a legal error, this contention that the Department did not use specific words in describing the Penobscot Nation lacks substance.

The Department may only issue a positive PBD if a proposal "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). The PBD statute defines environmental justice as "the right to be protected from environmental pollution and to live in and enjoy a clean and healthful environment regardless of ancestry, class, disability, ethnicity, income, national origin or religion." *Id.* Finally, the statute provides that environmental justice "includes the equal protection and meaningful involvement of all people with respect to the development, implementation and enforcement of waste management laws, rules, regulations and licensing decisions." *Id.* Putting this all together and stated simply, a proposal must not be inconsistent with the proposition that all people should be treated equally when it comes to the development of waste management projects regardless of their personal characteristics. This plain meaning—equal treatment regardless of personal characteristics—is consistent with well-established federal definitions of environmental justice. *See*, *e.g.*, 40 C.F.R. § 1508.1(m) ("Environmental justice means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or

disability, in agency decision-making and other Federal activities that affect human health and the environment . . . .").

In its PBD, the Department specifically described how the Penobscot Nation, part of the community in which JRL is located, has been burdened by environmental pollution: (1) "[b]ased on [the U.S. Environmental Protection Agency ("EPA")]'s Environmental Justice Screening and Mapping Tool," the Penobscot Indian Island Reservation and trust lands are "part of a block group identified as a Designated Disadvantaged Community according to EPA Justice 40 criteria . . . and EPA Inflation Reduction Act Data 2.0 criteria"; (2) "[b]ased on environmental justice indicators, the block group that includes Indian Island is above the 95th percentile when compared to state data for several indexes including wastewater discharge, hazardous waste proximity, underground storage tanks, and toxic releases to air"; and (3) "for the block group that includes JRL, there are 2 environmental justice indexes (toxic release to air and wastewater discharge) that are in the 50th to 80th percentile range when compared to state data." R. 17-18. The Department further noted the current licensed discharges, including ongoing discharge of treated landfill leachate from JRL, to the Penobscot River, which "is considered the heart of the Penobscot culture and is relied on for food, drinking, water, transportation, and other cultural facets." R. 18. Finally, the Department recognized that seven segments of the mainstem of the Penobscot River in the vicinity of the Penobscot Nation are listed as impaired for aquatic life and are subject to safe eating guidelines recommending limited consumption of fish based on contamination by PCBs, dioxin, and DDT. R. 18. Thus, the Department explicitly recognized that the Penobscot Nation has been burdened by environmental pollution.

Petitioners accurately observe that the Department's analysis did not specifically state that the Penobscot Nation is "distinguished [from the general population of Maine] by ancestry,

ethnicity, and national origin." Pet'rs' Br. at 25. But the statute does not require that the Department specifically mention every way in which an environmental justice community is distinguished from the general population. Rather, the common sense understanding of the PBD statute's inclusion of "ancestry, class, disability, ethnicity, income, national origin or religion" in the definition of environmental justice is that the Department must consider all these distinguishing characteristics when determining *whether a project implicates environmental justice vis-à-vis a specific community*. For example, it would be error for the Department to overlook a project's impacts on a community because it failed to recognize that the community was distinguished by a characteristic such as ethnicity, ancestry, or national origin. Here, by contrast, the Department clearly recognized the Penobscot Nation's status as a community that is distinguished from the general population and that has been burdened by environmental pollution. It is entirely unclear how cataloguing the Penobscot Nation's various distinguishing characteristics would have changed the Department's analysis in any way. Nor do the Petitioners elucidate this point beyond their conclusory assertion that mentioning the Penobscot's Nation's "ancestry, ethnicity and national origin" would have led to a different conclusion by the Department regarding the environmental justice criterion.[13] *See* Pet'rs' Br. at 25.

For these reasons, the Department's interpretation that the PBD statute did not require it to list every distinguishing characteristic of the Penobscot Nation was reasonable. *See FPL Energy Me. Hydro LLC*, 2007 ME 97, ¶ 11, 926 A.2d 1197. And, regardless, the Department's interpretation did not in any way affect the outcome of the environmental justice analysis.

[13] Petitioners' suggestion that the Department did not give "equal weight" to the environmental justice criterion, *see* Pet'rs' Br. at 23, is also entirely conclusory and unsupported by anything beyond the Petitioners' disagreement with the Department's conclusion on the environmental justice criterion.

III. The Department's Determination that the Proposal Is Not Inconsistent with Ensuring Environmental Justice for the Host Community Is Supported by Competent Record Evidence.

As to the Department's substantive conclusion regarding the environmental justice criterion, the record supports that the proposal is not inconsistent with ensuring environmental justice for the host community. Specifically, the PBD describes, and the record supports, that if the proposed expansion is approved, it will be conditioned and its potential impacts reasonably limited in order to protect the host community from environmental pollution related to the expansion. In fact, the PBD addresses each and every concern that Petitioners raise regarding impacts on the host community.

In their Petition, the Petitioners raise concerns about odors and air quality issues from existing JRL operations. *See* Petitioners' 80C Petition ("80C Petition") at 7-8. The PBD describes a host of measures that are being taken, or will be taken in the future, to address odors and air quality concerns at JRL: (1) daily odor surveys around the active waste areas; (2) a variety of measures under NEWSME's Odor Control Plan and Odor Complaint Management and Response Plan, including the placement of daily cover, minimizing the active waste area, use of an odor neutralizer spray at the working face and on waste within incoming waste loads, the use of a perimeter odor misting system during warmer months, the installation of lateral gas collection pipes to control fugitive landfill gas emissions, the installation of vertical landfill gas extraction wells, and the off-site removal or onsite combustion of landfill gases; (3) continuous hydrogen sulfide monitoring with stationary monitors and a system to real-time report hydrogen sulfide emission events; (4) a sulfur removal system to remove total reduced sulfur compounds, primarily hydrogen sulfide, from landfill gas prior to flaring; (5) quarterly methane emission surface scans on the landfill intermediate cover; (6) ongoing improvements to ensure the effectiveness of the

intermediate cover and active gas collection and control system; (7) installation of a dedicated hazardous air pollutant sampler to collect 24-hour samples and the installation of a particulate matter sensor near the facility's entrance in Old Town; and (8) monitoring of landfill gas within manholes and groundwater monitoring wells, and at underdrain, leak detection, and leachate collection locations. R. 19-20. The PBD further noted that in 2023, the most recent year for which there were complete data, there were no known exceedances of the Department's acute ambient air guidelines, including for hydrogen sulfide. R. 20.

But further going beyond existing odor and air quality controls at JRL, the PBD placed several conditions on any eventual license for the expansion, including: (1) requiring NEWSME to "pay[] for all applicable costs associated with a third-party odor consultant, working on behalf of the Department, to complete an odor analysis of the landfill and surrounding area, including evaluation of historical air quality sampling results, odor complaint history, field investigation, and recommended actions, to be submitted to the Department for review" and (2) requiring NEWSME to "conduct[] two additional surface scans per year during periods of low barometric pressure, if possible, of the landfill intermediate cover using a Department-approved method, to determine if there are fugitive landfill gas emission and conduct[] repairs of the cover material accordingly." R. 21-22. The conditions in the PBD are an acknowledgment by the Department of the importance of addressing and minimizing odor and air quality impacts on the surrounding community.

In their Petition, the Petitioners raise concerns about community notification of events such as landfill fires. 80C Petition at 7-8. The PBD describes measures that are currently being taken, such as NEWSME's maintenance of a website that provides monthly reports on landfill operations and complaints, but further conditions any future expansion license on NEWSME "establish[ing]

a system to inform the public about significant events in *near real time* such as through a website or other means as approved by the Department." R. 22 (emphasis added). Thus, the Department acknowledges the importance of ensuring going forward the type of real time information that the Petitioners suggest should have been available during prior events like landfill fires. *See* 80C Petition at 8.

Finally, in their Petition, the Petitioners raise concerns about the ongoing and future disposal of landfill leachate from JRL. *See* 80C Petition at 9-10. JRL's leachate is transported to the Nine Dragons (ND OTM, LLC) wastewater treatment facility in Old Town, where it is treated and eventually discharged to the Penobscot River. R. 18, 1392. The Department does not seek to dismiss or ignore the challenges posed by the disposal of JRL's leachate, which includes PFAS. But currently, there is no practicable alternative to disposing of leachate through Nine Dragons, and Petitioners do not suggest otherwise. Recognizing this difficult reality as well as the importance of taking all practicable measures to reduce the discharge of PFAS to the Penobscot River, the PBD conditions any expansion license on NEWSME's design and installation of a "Department-approved system for the treatment of landfill leachate for PFAS prior to expansion operations" and requires that NEWSME "submit[] an implementation schedule with tasks to the Department for review and approval to meet this timeframe . . . within 90 days of issuance of [the] public benefit determination."[14] R. 21. Thus, the PBD explicitly concluded that the expansion proposal satisfies the environmental justice criterion only if a Department-approved system is implemented to treat the landfill leachate for PFAS before disposal.

[14] As noted by the Petitioners, NEWSME submitted this implementation schedule for Department review on December 27, 2024. *See* Pet'rs' Br. at 14 & n.2.

Although the Petitioners acknowledge that the PBD's leachate treatment condition is a "step in the right direction," Pet'rs' Br. at 30, they take issue with the condition's degree of specificity and perceived stringency.[15] But, similarly to the Petitioners' focus on sludge drying, their specific, technical suggestions for leachate treatment are misplaced and premature. The leachate treatment condition in the PBD recognizes that a Department-approved leachate treatment plan is necessary. But the relatively short PBD process does not allow for the fact-intensive considerations that will ultimately inform the specific parameters and design of a leachate treatment strategy. Rather, the licensing process is the time for the Department to consider what specific treatment modalities, metrics, and enforcement mechanisms may be appropriate. And, as with the sludge dryer issue, the Petitioners would likely not be satisfied with the results if the Department were to mandate a certain treatment program today rather than incorporating scientific, technical, and regulatory developments that may arise during the multi-year licensing process. For example, there are currently no state standards for PFAS in wastewater effluent or landfill leachate. *See* R. 19 n.7. The Petitioners suggest that the Department look to federal drinking water standards, *see* Pet'rs' Br. at 29, 31, but fail to explain why it would be appropriate to apply a standard for *drinkable water* to *wastewater effluent*. In short, it would not have been practicable or responsible for the Department to have set specific leachate treatment levels during the PBD process. The Department appropriately imposed a condition that will allow for the development

[15] Although the Petitioners suggest that leachate migration to soil, groundwater, or surface water from the landfill site is a concern and mentions a discrete leachate spill event, *see* 80C Petition at 10, the record supports that leachate leaks or spills are not a significant issue at JRL, *see* R. 19 (noting that "[g]roundwater, surface water, porewater, underdrain and leak detection monitoring results continue to show minimal evidence of impact from landfill leachate"). The PBD also notes JRL's robust environmental monitoring plan, which includes "50 groundwater monitoring wells, 5 surface water monitoring locations, 5 pore-water monitoring locations, 2 stormwater monitoring location, 13 underdrain monitoring locations, 7 leak detection monitoring location, and 1 leachate monitoring location." R. 19.

of an efficacious and technically feasible leachate treatment plan as part of the expansion licensing process (or other licensing process as may be required for the leachate treatment system).[16]

For these reasons, the Department's conclusion that the expansion proposal, as conditioned, is not inconsistent with ensuring environmental justice for the host community was supported by competent record evidence and should stand. *See Friends of Lincoln Lakes*, 2018 ME 18, ¶¶ 13-14, 989 A.2d 1128.

IV. The Department Did Not Err as a Matter of Law in Providing Opportunity for Meaningful Public Involvement during the PBD Review Process.

The PBD statute states, "'Environmental justice' includes the equal protection and *meaningful involvement of all people* with respect to the development, implementation and enforcement of waste management laws, rules, regulations and licensing decisions." 38 M.R.S. § 1310-AA(3) (emphasis added). The Petitioners assert that the Department did not provide for "meaningful public involvement" and thus erred as a matter of law because the Department did not allow sufficient time for public comment and review. *See* Pet'rs' Br. at 33. But the Petitioners' legal argument reduces to a conclusory allegation that the Department violated the statute because the Petitioners do not consider the opportunities for public involvement to have been sufficient. Contrary to their assertions, the Department exceeded the legal requirements for public involvement in the PBD process, made an extra effort to reach out to the Penobscot Nation, local town leaders and other interested parties, and considered all the information it received in reaching its decision.

The PBD statute requires the Department to accept written public comments during the 60-day processing period for a PBD application. 38 M.R.S. § 1310-AA(2); 06-096 C.M.R. ch. 400,

[16] Petitioners' discussion of foam fractionation—in which they speculate that NEWSME will eventually choose to treat its leachate with foam fractionation and then attacks foam fractionation as insufficiently protective—is another example of why their focus on the specifics of leachate treatment is premature. *See* Pet'rs' Br. at 28-30.

§ 5(F)(1), R. 2242. It also requires "a public meeting" in the project's vicinity to take public comment. *Id.* The Department substantially exceeded these legal requirements.

The Department accepted written comments from the public throughout the course of processing the PBD application and held an in-person public meeting in Orono where public comments were accepted (thereby satisfying the PBD statute's basic requirements). R. 5. But above and beyond these requirements, the Department also held a virtual public meeting at which public comments were accepted remotely, and the Department posted recordings and transcripts of the public meetings, as well as all public comments, on its website.[17] R. 5-6. As the record reflects, the Department received numerous comments from across the State, from individuals and from people representing organizations, including CLF and the Penobscot Nation. R. 6, 1514-2192. The Department's summary of the comments in the PBD demonstrates that the Department gave them careful consideration. R. 6.

Although the PBD statute and regulations do not require it, the Department also followed its usual practice and guidance for other types of decisions by making a draft PBD available on its website for public review for five days.[18] R. 6-7, 1442-1472, 2378-79. In response to a request from CLF, the Department extended the time for comment on the draft PBD by one week. R. 7, 1475, 2380. Comments on the draft PBD were received, reviewed, and considered by the Department, and changes were made to the draft before the final PBD was issued. R. 1-30, 1442-1467. Again, the Department's summary of the comments provided on the draft PBD demonstrates that the Department carefully considered all the comments it received. R. 7.

[17] *See* https://www.maine.gov/dep/waste/juniperridge/index.html.

[18] Petitioners CLF and the Penobscot Nation were included on the Department's list of interested persons and received direct email notice of events in the proceedings. *See, e.g.,* R. 1279, 1290, 1375, 1468, 1475.

Accordingly, the Department properly found that public comments were accepted and considered as required by law. R. 6.

CLF made several requests to the Department throughout the process to expand opportunities for public participation, and the Department complied with each one as follows:

- CLF requested that the public be allowed to provide virtual comments at a public meeting. R. 1287-88. The Department arranged for a virtual public meeting during which comments were accepted remotely. R. 5.

- CLF requested that the Department extend the processing time for the application. R. 1398-1402. The Department in turn requested an extension from NEWSME, and with NEWSME's consent, extended the processing time by 30 days beyond the 60 days directed by law. R. 1431-32, 2373-77.

- CLF requested a two-week extension of the public comment period on the draft PBD from September 20 to October 4, 2024, and an extension of the deadline to issue the final PBD from September 23 to October 18, 2024. R. 1469-70. After receiving partial consent from NEWSME, the Department partially granted CLF's request by extending the public comment period on the draft PBD to September 27 and the deadline to issue the final PBD to October 2. R. 1473-75, 2380.

Regarding the Penobscot Nation, the Department's tribal liaison, Bill Sheehan, sent two letters to the Nation seeking to engage the Nation's leaders in a listening session to hear their potential concerns about the PBD and the expansion proposal. Mr. Sheehan sent the first letter to the Nation on March 5, 2024, before the PBD application had even been submitted. R. 31. Mr. Sheehan sent the second letter on June 24, 2024, shortly after the Department received the PBD application. R. 1277. The Penobscot Nation did not respond to the Department's offer to hold a listening session. The Penobscot Nation did join in written comments that CLF submitted to the Department, which the Department considered. R. 1376, 1433, 1479. The Penobscot Nation was also kept fully informed about events in the PBD proceedings by direct email notices. *See* footnote 18 supra.

Notwithstanding the Department's extension of the PBD decision timeline from the statutorily directed 60 days to 90 days, the addition of a second public meeting, its acceptance of oral comments both in person and through a virtual meeting, its extension of time for submission of written comments, its provision of direct notices to Petitioners and other interested parties, and its nearly complete acquiescence to CLF's procedural requests, Petitioners argue that the Department did not provide enough opportunities for meaningful public involvement in the PBD process. Pet'rs' Br. at 33-37. However, the record is clear that the Department took every reasonable step to provide opportunities for public comment while honoring the relatively brief nature of the PBD process as indicated by the statutory 60-day default deadline. Further, the Department responded quickly and appropriately to CLF's requests for additional time for public comment and review. Petitioners point to no evidence indicating that members of the public who attempted to participate were somehow prevented from doing so. Nor do they provide any support for their contention that the Department did not actually consider the public comments it received. *See* Pet'rs' Br. at 36. The PBD expressly describes the content of the public comments received both before the draft PBD was published (R. 6) and during the period after the draft PBD was published and before the final PBD was issued (R. 7). The Department could not have summarized the public comments that were submitted if it had not reviewed them.

In sum, the Department committed no error of law in conducting the PBD proceedings, and the record contains substantial evidence to support that the Department not only met but exceeded the legal requirements for public participation in the PBD process and facilitated the meaningful involvement by members of the public, including Petitioners.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court affirm the Department's public benefit determination and deny the Petition for Review.

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Respectfully submitted,

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