**STATE OF MAINE**

**PENOBSCOT, ss.** **SUPERIOR COURT**

THE PENOBSCOT NATION
and
CONSERVATION LAW FOUNDATION,
*Petitioners,*

v.

MAINE DEPARTMENT OF
ENVIRONMENTAL PROTECTION
*Respondent.*

REPLY BRIEF FOR PETITIONERS
Pursuant to M.R. Civ. P. 80C

Civil Action No. PENSC-APP-2024-00014

March 13, 2025

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Pursuant to M.R. Civ. P. 80(C)(g), Petitioners the Penobscot Nation and Conservation Law Foundation ("CLF") (altogether "Petitioners") submit this Reply Brief in response to Respondent Maine Department of Environmental Protection's ("MEDEP") and Party-in-Interest NEWSME Landfill Operations, LLC's ("Casella")[1] briefs, both filed on February 20, 2025. Petitioners brought this appeal because MEDEP's final agency action, a public benefit determination ("PBD") for the proposed expansion of the Juniper Ridge Landfill ("JRL"), entitled, an Approval with Conditions Public Benefit Determination ("PBD Approval"), would perpetuate environmental injustice against the Penobscot Nation and contravene the State's Solid Waste Management Hierarchy ("Hierarchy") and State Waste Management and Recycling Plan ("Waste Plan"). Nothing in either MEDEP's or Casella's briefs alters that conclusion.

## I. ARGUMENT

### A. The PBD Process is a Legally Distinct, Rigorous Process, Not Merely a "Threshold Determination."

MEDEP and Casella repeatedly try to diminish the PBD as a "threshold" process, framing the licensing application as the "substantive" stage. Resp't's Br. 4, 14. However, the PBD is the only stage in the entire approval process where environmental justice impacts must explicitly be considered and addressed by MEDEP. *See* Resp't's Br. 4; 38 M.R.S. § 1310-AA(1); 38 M.R.S. § 1310-N; 06-096 C.M.R ch. 400 § 4; R. 2193–2286. The environmental justice criterion, added to the PBD statute with broad public and legislative support, is absent from licensing considerations. Pet'rs' Br. 2. Portraying licensing as the more "substantive" stage utterly devalues this criterion.

In addition, the fact that the licensing stage requires conformity with the Hierarchy does not, as MEDEP argues, weaken the criterion that it also must conform during the PBD process. Resp't's Br. 4. The requisite that the licensing application *also* promote the Hierarchy underscores

[1] There is a legal distinction between NEWSME and Casella, but for ease of reference and consistency with the PBD Approval, this Reply Brief refers to the Applicant as "Casella."

how critical conformity with the Hierarchy is at *each stage* of the landfill approval process. MEDEP's attempts to undermine the PBD's significance call into question the rigor with which it has scrutinized the PBD Application's conformity with the PBD statute.

### B. MEDEP's Conclusion that the Proposed Expansion is Consistent with the Waste Plan and Promotes the Hierarchy was Affected by an Error of Law, a Misapplication of Law to the Facts, and Unsupported by Substantial Evidence.

"[A] misapplication of the law to the facts will constitute reversible error, and if an agency fails to make adequate findings of fact, the Court may remand for findings that would permit meaningful judicial review." *Nancy W. Bayley, Inc. v. Maine Emp. Sec. Comm'n*, 472 A.2d 1374, 1377 (Me. 1984); *Sinclair Builders, Inc. v. Unemployment Ins. Comm'n*, 2013 ME 76, ¶ 10, 73 A.3d 1061. Moreover, while a court reviews findings of fact for clear error, the law permits a review of factual conclusions based on inference. *Sargent v. Raymond F. Sargent, Inc.*, 295 A.2d 35, 38 (Me. 1972). The "reasoning process by which [an agency] may reach [its] legal conclusion[s]" is "likewise subject to appellate review." *Harlow v. Agway, Inc.*, 327 A.2d 856, 858 (Me. 1974).

JRL's management practices do not meet the legal requirement that the proposed expansion promote the Hierarchy. MEDEP is correct that Petitioners make a factual argument—no reasonable mind would accept the Record as adequate to support a finding that the PBD Application is consistent with the Waste Plan and promotes the Hierarchy. Resp't's Br. 10; Pet'rs' Br. 20–22. But Petitioners also assert that MEDEP misapplied the law to the facts, the statute and its implementing regulations compelled a contrary result, and MEDEP reached unreasonable conclusions based on factual inferences that are subject to judicial review. Pet'rs' Br. 20–21.

#### 1. Conditions for Conformity with the Hierarchy are Suitable at the PBD Stage.

MEDEP suggests true conformity with the Hierarchy will be achieved at the licensing stage. Resp't's Br. 4, 14. As stated, the PBD statute's language is in the present tense and thus the

statutory duty is to ensure that the PBD Application conform with the Hierarchy now. Instead, MEDEP claims that "waste reduction options will be considered by the Department during the lengthy period when it has an actual licensing application in hand." *Id.* at 16.

In fact, the last time MEDEP found that a proposed expansion of JRL did *not* comply with the Hierarchy was during a prior PBD proceeding, when Casella sought to expand JRL by 21 million acres.[2] R. 0390. In that PBD, the Commissioner found that JRL's massive import of construction and demolition debris ("CDD") was at odds with the Hierarchy, stating, "[T]he applicant does not adequately demonstrate that the proposed expansion advances the State's waste reduction, reuse and recycling goals." R. 0414. Specifically, in 2012, the Commissioner found that JRL's influx of oversized bulky waste ("OBW"), a sub-stream of CDD, ran counter to the Hierarchy and thus required conditions to resolve this.[3] The OBW buried at JRL had increased because a Maine processing facility was receiving out-of-state CDD and shipping it to JRL as "in-state" waste. R. 0414. The Commissioner deemed it "necessary and appropriate to establish a limit on the tonnage of OBW disposed in the expansion." R. 0409. The exact limit would be decided during licensing, but the imposition of such a limit and *how* it would be calculated was added to the PBD to comply with the Hierarchy. R. 0409. The 2012 PBD also required third-party audits of the "nature and volume" of "processing residues" (OBW) brought into JRL. R. 0400, 0409. Clearly, MEDEP had longstanding concerns over the nature and volume of Casella's CDD landfilling practices—well before the sludge increase—and deemed the PBD the fitting venue to address them.[4]

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[2] MEDEP found this was over twice the expansion needed and only approved 9.35 million yards. R. 0002.

[3] MEDEP defined OBW as a sub-stream of CDD, explaining "CDD includes oversized bulky waste . . . from incinerators and processing facilities." R. 0421.

[4] "The Commissioner finds that while landfilling may be an unavoidable management option for some CDD, it should be employed only when all other options are unavailable and there is demonstrated need for use of that landfill capacity." R. 0414.

In the 2012 PBD, the Commissioner did not find that the stream of OBW was beyond Casella's control (Cas. Br. 15); nor did she find that it was "legally inappropriate" to place a condition in the PBD (the OBW limit) that could be further specified at the licensing stage. Resp't's Br. 14; Cas. Br. 26. Both MEDEP and Casella make much of the Waste Plan's determination that the expansion would extend capacity and thus the proposal necessarily conforms with the Waste Plan and Hierarchy. Resp't's Br. 4, 11; Cas. Br. 16. But, as MEDEP said in 2012, "using the State Plan's recognition that an expansion of Juniper Ridge Landfill is contemplated as justification for a positive determination of public benefit is inconsistent with . . . the waste management hierarchy." R. 0412; Resp't's Br. 12.

Accordingly, the simple conditions Petitioners requested—a cap on CDD fines, annual fill rate, and sludge drying—are all well within the type of condition that MEDEP has previously included in a PBD to conform the proposal with the Hierarchy. The technology and design of sludge dewatering can be determined at the licensing stage.

**2. <u>Promotion of the Hierarchy Requires a Cap on CDD Fines and a Max Fill Rate.</u>**

MEDEP argues that "there is no competent record evidence that JRL is using CDD fines inappropriately or excessively." Resp't's Br. 14. MEDEP apparently deems it appropriate that in 2022 the tonnage of CDD fines sent to JRL by the primary processing facility almost doubled the entire waste stream said facility had received from Maine. R. 1383. Petitioners find it likewise inappropriate and excessive that in 2023, approximately 10% of the landfill filled up with CDD fines. R. 0964. Just as in 2012 when the "nature and volume" of OBW had to be limited and audited, so too should the "nature and volume" of CDD fines be limited and audited. Casella argues that Petitioners express a policy position that waste generated out-of-state should not be deemed in-state waste (Cas. Br. 3, n.3); this argument is irrelevant. To *reiterate*: when LD 1639 closed the out-of-state waste loophole, it did not apply to pulverized CDD (known as CDD fines), when they

are used as landfill cover—these fines are still *primarily sourced from out-of-state*. Pet'rs' Br. 9–10; R. 1382–83. MEDEP has the authority and duty to ensure that the state-owned landfill stops being filled with out-of-state waste.

Petitioners have also outlined Casella's repeated legislative and administrative efforts to bury more CDD and OBW at JRL over the years, including OBW from out-of-state. R. 1381–83. If Casella has control to seek increased importation of CDD/OBW, they have control to limit it as well. MEDEP argues that unless legislatively resolved, "JRL may legally accept" residue from a processing facility that "accepts waste from out-of-state." R. 0011. It is entirely unclear why the State, as owner of the landfill, cannot fix this themselves during this expansion process. A cap on CDD fines and a max fill rate would address these practices that encourage landfilling.

Notably, on February 14, 2025, the Government Oversight Committee voted for the Office of Program Evaluation and Government Accountability to investigate the management of JRL.[5] Topics to investigate included how the State is doing in its goals to eliminate out-of-state waste, efforts to reduce sludge volume, whether Casella is adhering to the Hierarchy, and how the State can exercise more control over the state-owned landfill.[6]

MEDEP must place conditions on JRL that prevent the landfill from filling up unnecessarily with untreated sludge and the related influx of CDD sought to stabilize the sludge. As of now, MEDEP has not placed a single condition on the landfill that will rectify this. Dewatering the sludge is the necessary condition to align the expansion with the Hierarchy as

[5] A court may sua sponte take judicial notice of facts if a fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." M.R. Evid. 201(b)(2); *Deutsche Bank Nat. Tr. Co. v. Wilk*, 2013 ME 79, ¶15, 76 A.3d 363, 368.

[6] *Government Oversight Committee*, ME STATE LEGISLATURE at 12:01:24PM-12:10:00PM, 1:47:17PM (Feb. 14, 2025, 9:30 AM) (132d Legis. 2025), https://mainelegislature.org/audio/#220?event=93400&startDate=2025-02-14T09:30:00-05:00 (voting 10-1 for an investigation with the scope to be determined later).

required by the PBD statute, as is placing a limit on the amount of waste being landfilled at JRL, the largest waste stream of which is CDD. Pet'rs Br. 8. MEDEP's failure to do this was an error of law, a misapplication of the law to the facts, and unsupported by substantial evidence.

**3. <u>Reducing Waste Volume to the "Maximum Extent Practicable" Requires Dewatering the Sludge; MEDEP's Reasoning is Unsupported by Substantial Evidence, Arbitrary and Capricious, and a Misapplication of the Law to the Facts.</u>**

The volume of waste entering JRL has not been reduced to the "maximum extent practicable." Contrary to MEDEP's assertion that this standard applies only at the licensing stage, the PBD Approval itself explicitly relied on this regulation when analyzing whether the proposed expansion was consistent with the Hierarchy. Under Section 6 of the PBD Approval, "Consistency with State Waste Management Plan and Hierarchy," MEDEP wrote: "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." R. 0014. Indeed, Casella emphasizes the PBD Approval's use of this standard, as well, "Accordingly, MEDEP required Casella to satisfy the following standard: [citing the aforementioned standard]." Cas. Br. 11.

However, Casella maintains that this standard does not require looking solely to the management of the waste entering JRL, citing that the rule includes looking at "*all*" "reusing, recycling, composting and/or processing programs." Cas. Br. 18. Casella has both fabricated the word "*all*" in the rules and conveniently left out the rest of the rule: programs "*that the waste is or will be subject to*." 06-096 C.M.R. ch. 400, § 4(N)(2)(a) (emphasis added). This rule, which specifies what adherence to the Hierarchy entails, requires looking to the recycling programs that directly affect the waste entering JRL. MEDEP misapplied the regulation by considering Casella's recycling programs at "the facilities it owns . . . and, to a lesser extent, facilities it operates," when justifying the proposal's adherence to the Hierarchy. R. 0014.

Furthermore, sludge dewatering is a "practicable," not merely "promising option." Resp't's Br. 14. Both MEDEP and Casella depict sludge dewatering as an unproven technology, when in fact such systems are routinely employed nationwide. MEDEP contends that it would be "putting the cart before the horse" to require sludge dewatering at the PBD stage, saying it is not yet known "what specific design BGS" will propose for the expansion. *Id.* at 15. But MEDEP does not have to choose which of the many possible technologies Casella must implement to dry the sludge; it simply must mandate that it be dried prior to landfilling and thus reduced to the maximum extent practicable. Not drying the sludge only increases sludge volume and means thousands of tons of CDD/OBW is buried to "balance" that sludge. MEDEP recognized this in its Waste Plan and the ongoing legislative battles over out-of-state waste exemplify this. R. 0136, 1381–83. The PBD Approval does nothing to fix this ongoing assault on the Hierarchy.

Ironically, the PBD Approval mandates leachate treatment for per- and polyfluoroalkyl substances ("PFAS"), which is an emerging, far less proven technology. MEDEP does not specify which technology will remove PFAS, yet has still mandated their removal. So too could it mandate Casella reduce the sludge to its maximum extent practicable—by dewatering it. MEDEP provides no evidence for its conclusory statement that mandating sludge dewatering could "result in an imposition of a condition that is inconsistent with other technical aspects of the proposal." Resp't's Br. 14. It's conclusion that sludge dewatering is not a "practicable" way to maximize reducing the sludge volume is based on the inference that it is "unproven" and too early procedurally to require it; this reasoning is unsound and subject to judicial review. *Harlow*, 327 A.2d 856, 858.

Even if "maximum extent practicable" did not apply until the licensing stage (contrary to MEDEP's own application of this standard in the PBD), JRL's mismanagement continues to squander landfill capacity and thus runs counter to the Hierarchy. The PBD Approval has no

conditions to fix the continued influx of CDD ostensibly balancing untreated sludge, and the Approval thus contravened the Waste Plan and Hierarchy and is legally erroneous.

### C. MEDEP's Conclusion that the Proposed Expansion is Consistent with Ensuring Environmental Justice was Affected by an Error of Law, Unsupported by Substantial Evidence, and Arbitrary and Capricious.

A misconception of applicable law is a legal matter constituting a reversible error of law. *Bayley*, 472 A.2d at 1377. Moreover, a court will not defer to an agency's interpretation of a statute or legal doctrine when that statute or doctrine is beyond that agency's expertise. *Guilford Transp. Indus. v. Pub. Utilities Comm'n*, 2000 ME 31, ¶ 11 n.4, 746 A.2d 910. MEDEP misconceived the required statutory analysis, and thus misapplied the environmental justice criterion to the facts, by not comparing the Penobscot Nation's environmental burdens to the state at large, or to any comparison group. Notably, because MEDEP has no history nor expertise in application of the environmental justice provision, (this is the first instance where MEDEP has had to analyze impacts on environmental justice under the law), its interpretation is due no deference.

MEDEP argues that the classes listed in the PBD statute simply define the boundaries of who should be considered when looking at what communities a proposed expansion would impact; thus, the mere consideration of the pollution burdening the Penobscot Nation satisfied the required analysis. Resp't's Br. 18–19. The statute, however, requires more. Because the environmental justice standard is defined, in part, as "equal protection" from the implementation of waste management decisions, the law requires consideration of whether a group is *unequally* protected—or, conversely, disproportionately burdened. Any other interpretation would impermissibly render "equal protection" a surplusage. *Kimball v. Land Use Regul. Comm'n*, 2000 ME 20, ¶ 26, 745 A.2d 387, 394. In fact, MEDEP recognizes that the law requires consideration of the *equality* of a group's protection, stating, "[P]utting this all together and stated simply, a proposal must not be inconsistent with the proposition that all people should be treated *equally* [emphasis added] when

it comes to the development of waste management projects." Resp't's Br. 19. While it is more appropriate to use the statute's words, "right" over "proposition," and "must" over "should," Petitioners agree with MEDEP that the PBD statute requires equal protection from the pollution of waste management decisions.

Commonsense dictates that it is impossible to consider whether a group is *equally* protected from the pollution of waste management decisions without comparing said group to another group—for instance, the state at large. The PBD statute defines which groups should be considered when inquiring into whether certain people are equally protected in waste management decisions. As an example, under the statute it would be inappropriate to consider whether left-handed people in the state have been unequally protected from such pollution; however, it is appropriate—and *required*—to consider whether a group distinguished by ancestry, national origin, or ethnicity has been ***unequally*** protected. The required analysis was whether and to what extent the proposed expansion would exacerbate the Penobscot Nation's unequal protection from pollution. Pet'rs' Br. 24. By failing to conduct this analysis, MEDEP violated the text and spirit of the statute. *Id.* at 23.

*Bayley* is instructive. In *Bayley*, the court found that the agency failed to address oral testimony supporting a joint venture, despite caselaw allowing joint ventures without written agreements. *Bayley*, 472 A.2d at 1375. Instead, the agency cited only the lack of written evidence. Because the court could not determine if the agency considered this crucial evidence, it held that the agency failed to employ the required legal standard. *Id*. at 1378.

Here, the Court similarly cannot determine from the PBD Approval if MEDEP considered the Tribe's *unequal* protection from waste management pollution. MEDEP concedes it simply "recognized that the Penobscot Nation has been burdened by environmental pollution." Resp't's Br. 18. If the statute only mandated such an inquiry, it would be meaningless—everyone is

impacted by some level of pollution. Nowhere does MEDEP explicitly address if the Penobscot Nation bears disproportionate environmental harm compared to the rest of Maine or any relevant group. The Penobscot Nation was "entitled to full consideration of this threshold question" and the agency failed to employ the required legal standard. *Bayley*, 472 A.2d at 1379.

MEDEP asserts that "it is entirely unclear how cataloguing the Penobscot Nation's various distinguishing characteristics would have changed the Department's analysis in any way." Resp't's Br. 19. This is a mischaracterization of Petitioners' argument. MEDEP's reasoning lacked a required step—determining whether the Tribe, in isolation, is *unequally* protected from environmental pollution. Pet'rs' Br. 24. Petitioners establish that MEDEP applied the incorrect legal standard by not assessing if the Penobscot Nation is unequally protected from pollution as compared to the state at large, or to any comparison group.

MEDEP's failure to address that 74 landfills already line the Penobscot River and that *all* state-owned landfills have been built adjacent to Penobscot Nation territory is testament to its larger failed analysis—determining how the Penobscot Nation has been *unequally* burdened by waste pollution as compared to the rest of the state, or to any comparison group. MEDEP entirely overlooked this egregious evidence of unequal protection from waste pollution in its determination.

Casella takes quite a different position, stating the PBD statute does not require contemplating whether a certain group "bears an unfair share of environmental pollution"; however, the PBD statute requires just that. Cas. Br. 22; Resp't's Br. 17. MEDEP failed to determine this, and that failure likely changed the outcome of their decision and constitutes both a misapplication of the law, and reversible error. *Bayley*, 472 A.2d at 1379.

Casella argues that for "equal protection" in the PBD statute to have effect, it must confer constitutional equal protection. Cas. Br. 21–22. In fact, the statute neither explicitly nor implicitly

adopts the constitutional equal protection analysis, nor did MEDEP interpret it that way. *See* Resp't's Br. 17. If "equal protection" just referenced preexisting constitutional rights, it would be surplusage. *Kimball*, 2000 ME 20, ¶ 26, 745 A.2d 387. Casella also claims that the environmental justice criterion cannot confer a "heightened environmental standard not otherwise imposed by law," citing *City of Brockton v. Energy Facilities Siting Bd* (Cas. Br. 22). The case is inapplicable in at least two ways. First, *Brockton* concerns an environmental justice *policy*—not a statute—that explicitly disclaims the creation of "any right […] substantive or procedural, enforceable at law or equity." 469 Mass. 196, 203, 14 N.E.3d 167, 173 (2014). Here, an enumerated, substantive criterion was added to the PBD statute. Second, *Brockton*'s policy applied only *if* a proposed facility exceeded certain regulatory thresholds, which the project did not. *Id.* at 174. Here, while MEDEP misapplied the environmental justice criterion, it rightly avoided reading constitutional equal protection into it. Casella's interpretation lacks textual support, impermissibly assumes "equal protection" is surplusage, and contravenes MEDEP's own understanding of the law.

### D. The Condition Mandating PFAS-Treatment of JRL's Leachate is Too Vague to Fulfill the Environmental Justice Criterion and is Thus Arbitrary and Capricious.

An agency action is arbitrary or capricious if it is willful, unreasonable, and disregards facts or circumstances. *Gordon v. Maine Comm'n on Pub. Def. Servs.*, 2024 ME 59, ¶ 11, 320 A.3d 449, 454. MEDEP states in the PBD Approval that the PFAS-treatment condition was needed to ensure environmental justice, but sets a condition that fails to achieve that goal, contradicting its own legal reasoning—an arbitrary and capricious action. Pet'rs' Br. 33. As written, the PFAS-treatment condition is unreasonably vague and cannot ensure that the final system will protect the Penobscot Nation, other neighbors, and the Penobscot River from further toxic "forever chemicals." If this Court opts to remand the case to MEDEP or alter the provision, the condition must be strengthened to be effective and informed by impacted communities.

The parameters that Petitioners seek to place on the PFAS-treatment condition to ensure environmental justice are neither "specific, technical suggestions," nor require scientific insights or "fact-intensive considerations"; neither are they are "premature." Resp't's Br. 23. Petitioners seek to make the PFAS-treatment condition effective, safe, and transparent by adding requirements to the condition so the public will know—at this stage of the process—what level of protection they will have.

First, Petitioners seek success criteria for the chosen system and a mandate that it remove the broadest spectrum of PFAS reasonably removable. This would *not* be the first time MEDEP included a PBD condition with some specificity, to become *more* specific at the licensing stage. In the 2012 PBD of JRL's last expansion, MEDEP stated it would limit OBW in the eventual license and the limit would be based on the results of "demonstrations that waste processing facilities that generate residue will recycle all waste to the maximum extent practicable, but in no case at a rate less than 50%." R. 0409. The PBD condition thus announced a future (unspecified) limit and set its parameters. So too should the PFAS-treatment condition establish its parameters.

MEDEP falsely asserts that Petitioners seek that MEDEP apply drinking water standards to the PFAS treatment system. Resp't's Br. 23. Instead, Petitioners reference EPA drinking water standards to show that a common short-chain PFAS, PFBS,[7] is now regulated by the EPA, is highly toxic, dominates in landfill leachate, and would not be removed by foam fractionation. Pet'rs' Br. 29, 31. Petitioners highlight foam fractionation's shortcomings because it is the technology recommended by the State-commissioned study for leachate treatment guidance, and the same technology now used by Casella at their Vermont landfill.[8] R. 1486, 1494–95; Pet'rs' Br. 31.

[7] Perfluorobutanesulfonic Acid

[8] As it happens, in the study commissioned by the State to assess PFAS-treatment options, the study's engineers used Maine's Interim Drinking Water Standards as success criteria when assessing treatment

Petitioners also seek that the PFAS-treatment condition require air monitoring of the toxics released by the system Casella selects. Pet'rs' Br. 31. A lack of such monitoring would continue to endanger the air that the Penobscot Nation breathes and further the unequal burden they bear from waste management pollution. Again, the *method* to monitor air discharges can be decided during the licensing process, yet the *general requirement* for monitoring should be imposed now.

Lastly, Petitioners seek that the PFAS-treatment condition ensure transparency and meaningful public involvement in the treatment system's review and selection, as the PBD criterion requires. 38 M.R.S. § 1310-AA(3)(E). MEDEP does not address why such a requirement is premature at the PBD stage, perhaps because it is not. The only public information on the plan is an "implementation schedule" that gives zero detail on what system will be proposed, and with no opportunity for public input. Pet'rs' Br. 14. If the expansion proceeds, the PFAS-treatment condition must state that Casella can neither begin constructing nor operating the system before the system's plan has undergone notice and comment, full agency review, and final approval.

In sum, Petitioners seek, should the Court decline to reverse the approval, high-level safeguards guaranteeing the treatment's efficacy, opportunity for public involvement, and agency oversight. MEDEP's assertions that such requirements are premature, too specific, or too technical at this juncture are meritless. MEDEP found that the PBD criterion required installing a PFAS-treatment system; the condition is unreasonably vague and fails to ensure environmental justice.

### E. MEDEP's Interpretation of "Meaningful Involvement" is an Error of Law.

MEDEP and Casella misconstrue what "meaningful involvement" requires. This is the first time MEDEP is interpreting the environmental justice standard, but the outreach measures MEDEP used to satisfy the "meaningful involvement" provision are the same ones it used in the

technologies, as there were no effluent standards. Thus, relying on drinking water standards in the absence of effluent standards is not as inappropriate as MEDEP portrays. Resp't's Br. 23; R. 1416.

past. *See, e.g.*, Resp't's Br. 25 (offering MEDEP's "usual practice and guidance" as proof of meaningful involvement). MEDEP must abide by the new, higher threshold for meaningful involvement, or the provision would be meaningless. *Kimball*, 2000 ME 20, ¶ 26, 745 A.2d 387.

MEDEP and Casella's argument that because MEDEP expanded the timeline on request, MEDEP's involvement was "meaningful" and thereby reasonable, fails. Petitioners maintain that each extension came too late, as each was granted close to the original deadline, and the extensions were too short to provide meaningful involvement. Pet'rs' Br. 35. As shown below, MEDEP had to do more than formalistically and technically comply with the law. MEDEP and Casella also allege that: (1) Petitioners were not harmed because Petitioners could participate in the process; and (2) MEDEP considered public comments during the PBD process because it summarized the comments in the PBD Approval. Resp't's Br. 25–27; Cas. Br. 28–30. What these arguments ignore is the harm caused by the fact that MEDEP did not have time to adequately consider all public comments received, as evidenced by the short timelines. Meaningful invovlement must include the meaningful consideration of the comments received.

MEDEP and Casella try to use MEDEP's sending two letters to the Penobscot Nation as evidence that MEDEP was "meaningful" in their engagement; however, it is misleading to portray these actions as "meaningful" since they are legally required by, although insufficient to satisfy, the Tribal-State Collaboration Act. *See* 5 M.R.S. §§ 11051 et seq.; R. 31, 1277; Resp't's Br. 26; Cas. Br. 29. The law requires agencies to implement a policy [9] that promotes effective communication and collaboration, positive government-to-government relations, and cultural

[9] *Tribal Collaboration Policy*, ME DEP'T ENV'T PROT. (Dec. 2022), https://www.maine.gov/dep/publications/reports/index.html#:~:text=Department%20Reports%20*%201/7/2025%20Implementation%20of%20the,2/2/2025%20Annual%20Product%20Stewardship%20Report%202025%20[PDF] (follow "Implementation of the Tribal-State Collaboration Act Pursuant to P.L. 2021 Chapter 681 [PDF]" hyperlink; scroll to PDF page 4 for MEDEP's Tribal Collaboration Policy) [hereinafter Policy].

competency when agencies interact with tribes. 5 M.R.S. § 11053(1)(A)–(D). MEDEP's policy states that "[d]ecisions about whether and *how to engage in collaboration should not be formalistic*, but should be driven by common sense and good judgement. The goal is to *increase and improve communication with the Tribes, rather than technical compliance with the Act* for its own sake." Policy at PDF pg. 4 (emphasis added). The law also requires MEDEP to give tribes written notice of a contemplated action that will "substantially and uniquely" affect a tribe and initiate a collaboration process with the tribe. 5 M.R.S. § 11053(1)(D)(1); Policy at PDF pg. 5. Therefore, the law *required* MEDEP to send letters to the Penobscot Nation regarding the expansion. There is also no evidence in the Record that shows MEDEP engaged in anything more than "formalistic" communication. MEDEP's actions did not surpass "technical compliance."[10]

MEDEP erroneously interpreted the "meaningful involvement" provision in the PBD statute, which clearly required, at a minimum, more evidence that MEDEP carefully considered comments in the PBD process and thus is an error of law.

## II. CONCLUSION

For the foregoing reasons, Petitioners request this Court rule that the PBD Approval is affected by errors of law, unsupported by substantial evidence on the whole record, and/or arbitrary or capricious. Petitioners request this Court reverse the PBD Approval and find that the PBD Application does not satisfy the criteria of the PBD statute and regulations. In the alternative, Petitioners request this Court require MEDEP to modify the PBD Approval as laid out in their Petition and Brief.

[10] NEWSME also points to four public meetings it will host as part of the licensing process. Cas. Br. 28. It is irrational for NEWSME to point to meetings taking place *after* the PBD Approval as opportunities for public engagement or meaningful involvement *during* the PBD process. *Id.*

Date: March 13, 2025

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served via the Court's e-filing system on March 13, 2025 to the attorneys for Maine Department of Environmental Protection and NEWSME Landfill Operations, LLC.

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