STATE OF MAINE

PENOBSCOT, ss. **SUPERIOR COURT**

THE PENOBSCOT NATION
and
CONSERVATION LAW FOUNDATION,
Petitioners,

v.

MAINE DEPARTMENT OF
ENVIRONMENTAL PROTECTION
Respondent.

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

Civil Action No. PENSC-APP-2024-00014

May 11, 2026

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Pursuant to M.R. Civ. P. 80C(g), Petitioners the Penobscot Nation ("the Nation") and Conservation Law Foundation ("CLF") (altogether "Petitioners") respectfully submit this supplemental brief regarding Respondent Maine Department of Environmental Protection's ("DEP", "MEDEP", "Department", or "Respondent") revised public benefit determination ("Second PBD") approving, with conditions, the proposed expansion of the Juniper Ridge Landfill ("JRL").

I. INTRODUCTION

Petitioners file this brief because MEDEP has once again approved a PBD for the expansion of the JRL—an expansion that would perpetuate environmental injustice against the Penobscot Nation and contravene the State's Solid Waste Management Hierarchy. The Penobscot Nation has long suffered disproportionate environmental harm, and JRL's pollution exacerbates this cumulative burden: the landfill has poisoned the Nation's river, compromised their air quality, and degraded their traditions, culture and identity. They now assert their statutory right to protection from the disparate harm of environmental pollution from waste management decisions and seek a denial of the proposed landfill expansion. 38 M.R.S. § 1310-AA(3)(E).

In this case, Petitioners assert that Respondent violated the PBD statute, 38 M.R.S. § 1310-AA(3), by issuing the Second PBD Approval for the proposed expansion of JRL. First and foremost, the proposed expansion is inconsistent with ensuring environmental justice for the Penobscot Nation, and secondly the expansion runs contrary to the Solid Waste Management Hierarchy. In issuing the Second PBD Approval, MEDEP has misapplied the environmental justice standard, acted arbitrarily and capriciously, abused its discretion, made findings unsupported by substantial evidence, disobeyed the Court's remand instructions, and failed to complete sufficient fact-finding to permit meaningful judicial review. DEP's decision, if upheld,

contravenes the substantive legal protections afforded by the environmental justice standard in the PBD statute, the Solid Waste Management Hierarchy, and this Court's remand order. This case asks whether expanding a polluting landfill is compatible with environmental justice where a tribe—whose identity and wellbeing are tied to natural resources—has already been disproportionately burdened by decades of pollution. The evidence in the record irrefutably supports only one reasonable conclusion: an expansion of JRL is inconsistent with ensuring environmental justice for the Penobscot Nation.

In the words of Chief Francis:

> "Our people are riverine based. Our culture relies on wild foods, and when our traditional food sources are contaminated, we are forced to choose between being true to our traditions while risking the health of our tribe or moving away from our centuries-old culture**.** It is a denial of environmental justice to put our people in the position of choosing between exercising our cultural rights and caring for our health and wellbeing."[1]

A. A Positive PBD Must Fulfill Four Requirements.

Respondent is responsible for overseeing the application process for licenses for expanded solid waste disposal facilities. 38 M.R.S. § 1310-N. Prior to submitting a license application to expand a solid waste disposal facility, an applicant must apply to the MEDEP Commissioner for a determination of public benefit. 38 M.R.S. § 1310-AA; 06-096 C.M.R. ch. 400 § 5. The MEDEP Commissioner then determines whether the proposed facility would provide "a substantial public benefit." *Id.* For the decision on an application for a determination of public benefit, the MEDEP Commissioner can "issue a full or partial approval of an application, with or without conditions." 38 M.R.S. § 1310-AA(7)(A); 06-096 C.M.R. ch. 400 § 5(H)(1). Once the MEDEP Commissioner

[1] Petition for Review Ex. A, ¶ 13.

issues a full or partial approval for the PBD, an applicant can apply for a license to expand the solid waste disposal facility. 38 M.R.S. § 1310-AA(1), (7); 06-096 C.M.R. ch. 401 § 2.[2]

For a PBD for state-owned solid waste disposal facilities, the MEDEP Commissioner must analyze an application for determination of public benefit under four requirements. 38 M.R.S. § 1310-AA(3); 06-096 C.M.R. ch. 400 § 5(E). The Commissioner will find that a proposed facility provides a substantial public benefit if the facility fulfills the following four requirements: (1) meets the immediate (within the next 3 years), short-term (within the next 5 years) or long-term (within the next 10 years) waste capacity needs of the State, considering local and regional needs; (2) is consistent with the State Waste Plan and promotes the Solid Waste Management 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 facility or expansion is proposed. *Id.* The PBD statute and regulation define 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" and "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)(E); 06-096 C.M.R. ch. 400 § 1(TT-1).

In applying this standard here, the Court has determined the environmental justice standard requires the Department to "consider the cumulative environmental burdens borne by the Penobscot Nation, including the existence and condition of other landfills near it, and whether

[2] As explained in Section I.B. below, DEP received Casella's application for an expansion permit on November 21, 2025 and has granted an administrative hearing for it, though the hearing date remains unscheduled. Letter from Dominique DiSpirito, DEP to Jackie Elliot, Update RE MEDEP Public Hearing for JRL Phase II Expansion Application (Dec. 31, 2025) (on file with DEP). The licensing process is therefore running concurrent with this appeal.

these environmental burdens and the Penobscot Nation's intimate relationship with the Penobscot River permit a finding that the proposal fulfils environmental justice." *The Penobscot Nation and Conservation Law Foundation v. Maine Department of Environmental Protection and NEWSME Landfill Operations, LLC*, Order on 80C Appeal, NO. PENSC-APP-2024-00014 at 16. (Me. Super. Ct. Jan. 7, 2026) [hereinafter Order on 80C Appeal]. The statute does not give more weight to any one of the four requirements, and thus they are all weighted equally. 38 M.R.S. § 1310-AA(3). Accordingly, issues of environmental justice can be legally determinative of whether a proposed project will be approved. Order on 80C Appeal at 16. The PBD statute is the only law in Maine that currently has an environmental justice requirement. R. 3152.

B. Petitioners Seek a Reversal of the PBD Approval.

Petitioners request this Court rule that MEDEP's Second PBD Approval is affected by error of law, arbitrary or capricious, and unsupported by substantial evidence on the whole record.[3] As such, Petitioners request this Court reverse MEDEP's Second PBD Approval and find that the Application does not satisfy the criteria of the PBD statute and regulations.

In the alternative, should this Court choose not to reverse or modify the Commissioner's decision, Petitioners request that the Court remand the case for MEDEP to reopen the PBD process and seek additional public input, issue new findings of fact and conclusions of law based on those proceedings, and take any further action the Court deems necessary.

II. BACKGROUND & PROCEDURAL HISTORY

A. Factual Background.[4]

[3] This supplemental briefing is limited to the issues identified by the Court for further Department fact-finding and evaluation in the remand order; Petitioners continue to assert all preexisting arguments made in Petitioners' prior filings.

[4] Petitioners recognize the Court and parties are familiar with this matter, so we focus on recent developments or the background that is particularly pertinent to the specific issues addressed on remand. A fuller description of the factual background can be found in our Petition for Review (Nov. 12, 2024) and Petitioner's Brief (Jan. 21, 2025).

1. The Penobscot Nation's Sustenance Fishing Rights and Cumulative Environmental Burden.

The Penobscot are a riverine people whose culture and traditions are inextricably tied to the Penobscot River watershed. R. 2487. Hunting, fishing, trapping, and gathering are central to sustaining both the wellbeing of the community and the preservation of cultural knowledge and language. *Id*. As the U.S. Environmental Protection Agency ("EPA") and the Penobscot Nation have affirmed, when contamination makes it unsafe to fish and gather traditional foods, the ability to maintain and pass on these cultural practices is threatened, placing the continued exercise of the Nation's sustenance fishing rights—and thus the Nation's very identity—in jeopardy. R. 2497. Petition for Review Ex. A, ¶ 12-14.

The Penobscot Nation's sustenance fishing rights on the Penobscot River are undisputed;[5] they are reserved through historical treaties with Massachusetts and Maine and reaffirmed through the Maine Indian Land Claims Settlement Act of 1980. R. 2497. Contamination of the Penobscot River ecosystem currently prevents these rights from being fully realized. R. 3162; Petition for Review, Ex. A, ¶ 12-14.

The ecosystems supporting fish and other resources traditionally relied upon by the Penobscot Nation are contaminated by known pollutants discharged to air, water, and land, resulting in elevated levels of mercury, dioxins, furans, and polychlorinated biphenyls (PCBs), in fish and other aquatic species. R. 2503–2504, 2510, 3154, 3162. The Maine Center for Disease Control and Prevention ("Maine CDC") has declared it unsafe to eat any fish species from the Penobscot River more than once or twice a month, based on testing for PCBs, dioxins, and DDT. R.

[5] "There is no serious dispute about whether the Settlement Acts give the Nation sustenance fishing rights in the Main Stem. They do." *Penobscot Nation v. Frey*, 3 F.4th 484, 507 (1st Cir. 2021).

0018**.** These risks are compounded by mercury contamination; Maine has statewide do-not-eat advisories for almost all inland fish, due to mercury contamination. R.1253. These advisories remain in effect today. In partnership with the EPA, the Agency for Toxic Substances and Disease Registry found that the Penobscot tribal members who eat fish and snapping turtle at the ingestion levels reflective of their traditions and culture may be exposed to harmful levels of mercury, dioxins/furans, dioxin-like PCBs, and other PCBs. R. 2495–2496. These chemicals can cause cancer and other health effects, particularly for children and pregnant women. R. 1253, 3162. Many tribal members are unable to engage in traditional fishing, foraging, and hunting practices without fear of harmful health effects. R. 3162; Petition for Review, Ex. A, ¶ 12-14.

The Penobscot Nation has been unduly burdened by environmental pollution, especially waste pollution, for decades. EPA data confirm that the Penobscot Nation is among the most heavily burdened communities in Maine, with EPA's Environmental Justice Screening and Mapping Tool showing that the Nation's environmental burdens surpass those of more than 95 percent of communities statewide for numerous indicators. R. 3153–3154. Most relevant here are hazardous waste proximity, wastewater discharges, and toxic air releases. *Id***.** These environmental disparities are mirrored in the Penobscot Nation's health disparities—Penobscot members have some of the highest lung and cervical cancer rates in the State of Maine. R. 2493.

JRL's leachate is highly contaminated with a multitude of toxics and pours out from Nine Dragons wastewater treatment plant ("WTTP") into the Penobscot River. One overwhelming concern for the Penobscot Nation is the ongoing influx of per- and polyfluoroalkyl substances ("PFAS") pouring into the River from JRL's leachate, via the Nine Dragons WWTP. In 2023, 26,531,525 gallons of JRL's landfill leachate were hauled to Nine Dragons, processed, and expelled into the Penobscot River. R. 3157**.** The proposed expansion, at 61 acres, would increase

the size of JRL by half of its current acreage. R. 3134. The volume of leachate generated and sent to Nine Dragons and into the Penobscot River would also thereby greatly increase, although in their Second PBD Approval, the Department provides no estimate of how great the leachate increase from a 61-acre expansion would be. R. 3157.

PFAS are a group of nearly 15,000 synthetic chemicals that all share a carbon-fluorine bond. There are significant adverse health effects associated with PFAS exposure, including liver damage, thyroid disease, decreased fertility, high cholesterol, obesity, endocrine system disruption, hormone suppression, and various types of cancer. Pet'rs' Br. 7; R. 2629. PFAS are called "forever chemicals" because they are practically indestructible in nature. R. 2631. The solubility and non-biodegradability of PFAS in leachate is a grave concern because PFAS are readily mobile in water and are extremely resistant to conventional forms of treatment. *Id.* Due to their strong carbon-fluorine bonds, PFAS can persist in the environment for thousands of years and have a propensity to bioaccumulate in living organisms. *Id.* Put simply, PFAS build up, so even tiny amounts in water can concentrate in fish and in people's bodies over time.

Not only do WWTPs like Nine Dragons not remove PFAS, studies have shown that the treatment processes employed by WWTPs can convert PFAS precursors into more PFAS. R. 2629. In practice, this means that landfill leachate can contain molecules that are not caught in standard PFAS testing but that then turn into persistent PFAS compounds during processing at the WWTP. *Id.* The EPA has assessed landfill leachate as a significant source of PFAS in the environment. R. 2625.

Sampling of the leachate at JRL shows it contains very elevated levels of PFAS. According to the leachate study the Department commissioned, "Study to Assess Treatment Alternatives for Reducing PFAS in Leachate from State Owned Landfills" ("Leachate Treatment Study"), which

DEP used to supplement the record unilaterally in their Second PBD, the highest-concentrated PFAS at Juniper Ridge Landfill are short-chain PFAS—led by perfluorohexanoic acid ("PFHxA") at 1,683 parts per trillion (ppt) and perfluorobutanesulfonic acid ("PFBS") at 1,668 ppt. R. 2645**.** JRL's leachate was tested for Maine's six regulated PFAS compounds in October 2023 and the Sum of Six was found to be 2,920 ppt. R. 3157. For context, that concentration is 146 times higher than Maine's drinking water standards for the Sum of Six, which are 20 ppt.[6] These chemicals travel through the leachate, into Nine Dragons, and out into the Penobscot River. 2023 testing showed a high of 311 ppt of the Sum of Six PFAS coming from Nine Dragons' pipe. R. 3155.

The Leachate Treatment Study also shows that Maine's other active State-owned landfill, Dolby Landfill, produces leachate with high concentrations of PFAS. Dolby's leachate showed PFAS(6) concentrations ranging from 351 to a maximum of 4,426 ppt. R. 2619. Leachate generated at the Dolby Landfill is sent to the East Millinocket WWTP and discharged to the Penobscot River; all measured PFAS(6) concentrations vastly exceeded Maine's interim drinking water standard of 20 ppt. R. 2618-2619. The Second PBD Approval explains leachate volumes from Dolby have been reduced from an average of approximately 74.2 million gallons per year to approximately 22 million gallons per year as of 2025, following landfill closure and cover upgrades. R. 3161. The Second PBD Approval does not address how the ongoing leachate discharges from the Dolby Landfill to the Penobscot River contribute to the Nation's cumulative burden from waste pollution. *Id.*

Maine has not adopted numeric surface water quality standards for PFAS, even though it has established fish-tissue action levels demonstrating that PFAS in surface waters pose significant

[6] Maine's "Sum of Six" standard refers to the combined concentration of six regulated PFAS compounds, which together may not exceed 20 parts per trillion in drinking water. In the absence of state surface water standards for PFAS, the drinking water standards are the most relevant state reference to use; the Leachate Treatment Study also referenced drinking water standards in their own leachate analyses. R. 2625.

human health risks through bioaccumulation. R. 3155. As a result, the Department currently assesses PFAS contamination only after the chemicals have already entered ecological and human exposure pathways. Because PFAS bioaccumulate, as long as they are poured into the Penobscot River, there is a substantial risk that their concentration in the River and its aquatic life will increase. *Id*.

PFAS treatment technologies are rapidly developing in response to a global shift in understanding of the dangers of these chemicals. R. 2670. None of these technologies is a panacea. *Id.* Only a limited number of PFAS treatment technologies are commercially available and demonstrated to reduce PFAS, while many others remain in development and lack sufficient data on their applicability and scalability—particularly for large-scale treatment of wastewater and leachate, like that at JRL. *Id.* Leachate is an especially complex medium, consisting of a mixture of organic, inorganic, and other constituents that may require pretreatment before PFAS can be effectively removed. *Id*. JRL's leachate is opaque and murky because it has especially high levels of solids and organic matter, making PFAS removal more difficult and uncertain. R. 2641; R. 2658 (photo comparing leachate samples from JRL and Dolby where JRL leachate is almost black and Dolby leachate samples are light orange and yellow); R. 2670.

Complicating solutions further, most commercially demonstrated technologies do not destroy PFAS; they simply transfer and concentrate them into a separate media or waste side stream that must then be managed as waste. R. 2620, R. 2667. Even for emerging "destruction" technologies like Electrochemical Advanced Oxidation Process (EAOP), there is a risk of incomplete destruction of some PFAS and the potential creation of toxic byproducts. R. 2678–2679**.** More affordable treatment technologies, like foam fractionation, are poor at capturing short-chain PFAS, which predominate in JRL's leachate. R. 2630.

More generally, landfill leachate can contain other toxics, such as dioxins, furan, and PCBs. Petition for Review 14. The impact of JRL's leachate on these toxics, which have already led to fish consumption advisories, has not been studied. *Id.* Landfills are innately polluting entities, and the pollution an expansion of Juniper Ridge Landfill will cause to the surrounding water, air and land can, at best, be dampened—not negated.

Data in the record shows that JRL's leachate contains extraordinary levels of PFAS, and that short-chain PFAS, which treatment systems struggle to capture, dominate in the leachate. R. 2645. The record also shows that the effluent from Nine Dragons that contains JRL's leachate, while diluted, still contains unsafe levels of PFAS. R. 3155. PFAS treatment systems are a necessary part of modernizing landfills nationwide—but they do not eradicate the pollution caused by leachate flowing into our waters. R. 2620. Who bears the brunt of that pollution goes straight to the heart of this case.

2. Sustenance Fishing Consumption Rates for Penobscot Nation.

The EPA Penobscot Report, "The Penobscot River and Environmental Contaminants: Assessment of Tribal Exposure Through Sustenance Lifeways", with which DEP supplemented the record for the Second PBD, was undertaken to address a recognized gap in federal risk assessment methodology: EPA lacked exposure assumptions that accurately reflected the **s**ustenance lifeways of the Penobscot Nation, whose culture and diet are uniquely tied to the Penobscot River.[7] R. 2487–2488. The study was designed to evaluate whether contaminant concentrations in fish, eel, snapping turtle, waterfowl, and plants used by tribal members were high enough to pose health concerns when consumed at sustenance levels, using culturally specific

[7] In issuing their Second PBD Approval, DEP unilaterally supplemented the record, without seeking further public comment. One of the pieces of evidence DEP added in their second analysis was the August 2015 U.S. EPA Region 1 Regionally Applied Research Effort, "The Penobscot River and Environmental Contaminants: Assessment of Tribal Exposure Through Sustenance Lifeways [hereinafter EPA Penobscot Report]. R. 2483.

exposure pathways rather than general-population assumptions. *Id*. To do so, EPA relied on the Wabanaki Traditional Cultural Lifeways Exposure Scenario, developed through ethnographic, nutritional, ecological, and historical literature and consultations with tribal elders, to reconstruct a diet representing full traditional use rather than pollution-suppressed consumption. *Id.* The EPA identified a 286 grams-per-day (g/day) fish consumption rate as most closely aligned with Penobscot sustenance fishing practices and used throughout the risk assessment. R. 2556. Applying this rate had profound implications: when evaluated at 286 g/day, multiple fish species in the Penobscot River were associated with cancer and non-cancer risks exceeding EPA's levels of concern, demonstrating that risk conclusions are highly sensitive to assumed consumption rates and that lower default consumption rates materially understate risk to tribal members. R. 2495.

In parallel, Maine's approach to tribal fish consumption assumptions evolved through a regulatory dispute with EPA. *Maine v. Wheeler*, No. 1:14-cv-00264-JDL, 2018 WL 6304402, at *1 (D. Me. Dec. 3, 2018). For many years, Maine applied a 32 g/day fish consumption rate to waters used by tribes, reflecting general recreational consumption rather than sustenance fishing. In 2015, EPA disapproved Maine's water quality standards to the extent they relied on this consumption rate for tribal waters, concluding that the standards were not protective of tribal sustenance fishing.[8] *Maine v. McCarthy*, No. 1:14-cv-00264-JDL, 2016 WL 6833935, at *1 (D. Me. Nov. 18, 2016). Ultimately, the Maine Legislature resolved the issue with the passage of L.D. 1775, An Act to Protect Sustenance Fishing, codified at 38 M.R.S. § 466-A, in 2019. This law, following negotiations with the Wabanaki Nations and the EPA, established a new Sustenance

[8] Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466, 92472 (Dec. 19, 2016). ("EPA disapproved many of Maine's [human health criteria] for toxic pollutants based on EPA's conclusion that they do not adequately protect the health of tribal sustenance fishers in waters in Indian lands. EPA concluded that the disapproved HHC did not support the designated use of sustenance fishing in such waters because they were not based on the higher, unsuppressed fish consumption rates that reflect the tribes' sustenance fishing practices.").

Fishing Designated Use ("SFDU") and required Maine DEP to set human-health water quality criteria using a 200 g/day fish consumption rate. 38 M.R.S. § 466-A(1). EPA subsequently approved Maine's SFDU framework, including the 200 g/day rate.[9]

The 200 g/day rate adopted by Maine reflects a compromise informed by the Wabanaki Exposure Scenario. Both the EPA Penobscot Report and the SFDU statute thus rest on the same core factual premise: general-population fish consumption rates dramatically understate exposure and health risk for the Penobscot Nation.

Importantly, the statute governing Maine's SFDU, 38 M.R.S. § 466-A, applies solely to the establishment of water-column human-health criteria and does not govern fish consumption advisories or fish tissue action levels;[10] these remain public-health tools administered separately by Maine CDC. Nevertheless, the consumption rates underlying both the EPA Penobscot Report and the SFDU law are the product of rigorous, peer-reviewed analyses and legislative findings, and together they underscore a fundamental truth that is relevant yet ignored in the Second PBD: assumptions of 32 g/day of fish consumption are demonstrably inaccurate for evaluating health risks to the Penobscot Nation.

3. The Penobscot River's Designation for Sustenance Fishing.

Finally, Maine's SFDU applies only to specifically identified waters, most notably multiple segments of the Penobscot River's main stem and East Branch, which the tribes identified as having particular significance for sustenance fishing and which the Legislature designated

[9] U.S. Env't. Prot. Agency, Review and Approval of Maine Water Quality Standards (Fishing Designated Use) (Nov. 6, 2019) https://www.epa.gov/sites/default/files/2019-11/documents/review-approval-maine-fishing-letter-2019.pdf.
[10] Fish Tissue Action Levels ("FTALs") are concentrations of a contaminant, in this case perfluorooctane sulfonic acid ("PFOS"), in fish tissue below which there should be negligible risk of adverse health effects at a set fish consumption rate.

accordingly. 38 M.R.S. § 467(7)(A). No portion of the Kennebec River carries a sustenance fishing designation, as no tribal reservation sits on the Kennebec River. 38 M.R.S. § 467(4)(A).

Despite the Court's directive that DEP account for the Penobscot Nation's "intimate relationship with the Penobscot River" in their environmental justice assessment, the Department's Second PBD Approval does not address the Penobscot Nation's sustenance fishing rights, the Penobscot River's designation for sustenance fishing, or the State's and EPA's findings that higher consumption rates are necessary to accurately assess risk to the Penobscot Nation. R. 3132–3174; Order on 80C Appeal at 16.

B. <u>Procedural History.</u>

JRL is owned by the Maine Department of Administrative and Financial Services' Bureau of General Services ("BGS") and is operated by NEWSME Landfill Operations, LLC, whose parent company is Casella Waste Systems (altogether "the Applicant"). R. 0041, 0043.

In June 2024, the Applicant filed with DEP an application for a determination of public benefit to expand JRL by 61 acres, or 50% of their current acreage. R. 0032. On October 2, 2024, DEP Commissioner Loyzim issued an Approval with Conditions Public Benefits Determination ("First PBD Approval"). R. 0001-0030. Subsequently, on November 12, 2024, Petitioners initiated an appeal of the First PBD Approval in Penobscot County, Superior Court. Petition for Review, *The Penobscot Nation and Conservation Law Foundation v. Maine Department of Environmental Protection and NEWSME Landfill Operations, LLC*, NO. PENSC-APP-2024-00014 (Nov. 12, 2024).

After briefing and argument before the Court, on January 7, 2026, the Court remanded the case to DEP and ordered DEP to conduct further fact-finding and issue a revised public benefit determination. Order on 80C Appeal at 16. The Court ordered DEP to make detailed findings on the necessity and practicability of requiring sludge drying. The Court also found that DEP "recited

but did not analyze the Penobscot Nation's intimate relationship with the Penobscot River and surrounding region, evaluate how that particular characteristic might bear on environmental justice, or meaningfully assess how that interest was burdened before BGS's application was presented." *Id.* at 15. Accordingly, the Court ordered DEP to consider the cumulative environmental burdens borne by the Penobscot Nation, including the existence and condition of other landfills near it, and whether these environmental burdens and the Penobscot Nation's intimate relationship with the Penobscot River permit a finding that the proposal fulfills environmental justice. Finally, the Department had to reevaluate whether the proposed expansion of JRL—with the original conditions or additional ones—met the criteria for a determination of public benefit. Order on 80C Appeal at 16. On March 23, 2026, DEP issued the Second PBD Approval. R. 3132–3174. The Court retains jurisdiction over the matter. Order on 80C Appeal at 16.

DEP is currently reviewing the expansion permit application for JRL, while the Court reviews the Second PBD Approval. On November 14, 2024, two days after filing their Petition for Review, Petitioners filed an Application for a Stay of the First PBD Approval pending the resolution of the appeal in Court.[11] On December 20, 2024, DEP denied Petitioners' Application for a Stay.[12] Because of this, as the appeal continued in Court, the Applicant continued to prepare their Application for Landfill Expansion ("Expansion Application"). The Applicant submitted their Expansion Application on November 21, 2025, and DEP deemed the Application complete and accepted it for processing on December 9, 2025.[13] When less than a month later the Court

[11] Letter from Alexandra Enríquez St. Pierre, CLF and Nora Bosworth, CLF to Commissioner Melanie Loyzim, DEP, Re: Case # PENSC-APP-2024-00014 The Penobscot Nation and Conservation Law Foundation Application for a Stay (Nov. 14, 2024) (on file with DEP).

[12] Letter from Commissioner Melanie Loyzim, DEP to Alexandra Enríquez St. Pierre, CLF and Nora Bosworth, CLF, Letter to Conservation Law Foundation Regarding Request for Stay of JRL PBD (Dec. 20, 2024) [hereinafter DEP Denial of Stay Request].

[13] Me. Dep't of Env't Prot., Bureau of Remediation and Waste Mgmt., Juniper Ridge Landfill,

issued their Order on 80C Appeal invalidating the First PBD Approval, BGS and DEP paused the application process until the Second PBD Approval was issued.[14] On March 23, 2026, when DEP filed their Second PBD Approval with the Court, R. 3132–3174, DEP resumed review of the Expansion Application for JRL. Upon the public's request, DEP has already granted the public an administrative hearing on the Expansion Application but has not yet scheduled the hearing.[15] The licensing process is thus running concurrently with this PBD appeal. On April 1, 2026, the Court approved a scheduling order for Petitioners, Respondents, and Intervenors. *Penobscot Nation v. Me. Dep't of Env't Prot.*, No. PENSC-APP-2024-00014 (Me. Super. Ct. Apr. 1, 2026) (scheduling order).

C. MEDEP's Second PBD is Another Approval with Largely Unchanged Conditions.

In the Second PBD Approval, DEP once again found that the proposed expansion met the first and third standards of determination which are not at issue here. R.0022–0023. For the second standard, DEP found that the proposed expansion is consistent with the State Waste Plan and promotes the Solid Waste Management Hierarchy, with conditions—in the revised PBD, DEP expressly found that Casella's sludge management practices were not consistent with promoting the hierarchy absent additional constraints. R. 3148–3150. DEP therefore imposed a new condition providing that, if the expansion is licensed, Casella must comply with license conditions establishing annual caps, and a schedule to achieve those caps, on the amounts of municipal wastewater treatment plant sludge and construction and demolition debris ("CDD") that may be

https://www.maine.gov/dep/waste/juniperridge/index.html (last visited May 11, 2026); Letter from Dominique DiSpirito, DEP to Lane Gould, BGS, Application for Landfill Expansion Juniper Ridge Landfill Old Town, ME (Dec. 9, 2025) (on file with DEP).

[14] Letter from Dominique DiSpirito, DEP to Lane Gould, BGS, RE: Request to Pause Processing of JRL Phase II Expansion Application (HQH-D4D1-RJBBR) (Feb. 2, 2026) (on file with DEP).

[15] Letter from Dominique DiSpirito, DEP to Jackie Elliot, Update RE MEDEP Public Hearing for JRL Phase II Expansion Application (Dec. 31, 2025) (on file with DEP).

disposed of in the expansion area, with the stated intent of significantly reducing sludge disposal by 2030. R. 3150-3151. In addition, DEP carried forward several reporting and programmatic requirements from the First PBD. Specifically, DEP again provided that if a license is issued for the construction and operation of the expansion, Casella must: (i) continue to expand deployment of its mobile recycling app and report annually where the app has been deployed; (ii) include in each landfill annual report a discussion of its work to encourage and assist towns to engage in all possible recycling and diversion activities, with the revised PBD emphasizing a more detailed annual summary; and (iii) submit an annual evaluation regarding the availability and capacity of infrastructure to reduce the volume of municipal wastewater treatment plant sludge prior to landfilling. R. 3150.

For the fourth standard regarding environmental justice, DEP again found that the proposed expansion is not inconsistent with ensuring environmental justice for the community in which the expansion is proposed, provided Casella satisfies certain conditions. The conditions DEP relied upon under this standard in the revised PBD are the same conditions imposed in the October 2024 PBD and were carried forward without modification. As in the First PBD, DEP stated that if a license is issued for the construction and operation of the expansion, Casella must design and install a Department-approved system for the treatment of landfill leachate for PFAS prior to expansion operations and submit an implementation schedule for Department review and approval. DEP also again required Casella 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 review of historical air quality data, odor complaint history, field investigation, and recommended actions. In addition, DEP again required Casella 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 identify fugitive landfill gas emissions and to make repairs as necessary. Finally, DEP again required Casella to establish a Department-approved system to inform the public about significant landfill events in near real time, such as through a website or other means.

III. STANDARD OF REVIEW

In reviewing a final agency action, this Court may "[r]everse or modify the decision if the administrative findings, inferences, conclusions or decisions are: (1) [i]n violation of constitutional or statutory provisions; (2) [i]n excess of the statutory authority of the agency; (3) [m]ade upon unlawful procedure; (4) [a]ffected by bias or error of law; (5) [u]nsupported by substantial evidence on the whole record; or (6) [a]rbitrary or capricious or characterized by abuse of discretion." 5 M.R.S. § 11007(4)(C).

A misapplication of the law to the facts will constitute reversible error. *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.

An abuse of discretion may be found where an appellant demonstrates that the decisionmaker "exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law." *Lippitt v. Bd. of Certification for Geologists & Soil Scientists*, 2014 ME 42, ¶ 16, 88 A.3d 154. This definition establishes both a uniform standard (reasonable choices available) and requires consideration of case-specific factors. Abuse of discretion and arbitrary or capricious are closely related concepts, both requiring that agency action be "wilful and unreasoning and without consideration of facts or circumstances" before a court will set aside an administrative decision. *AngleZ Behav. Health Services v. Dep't of Health & Hum. Services*, 2020 ME 26, ¶ 23, 226 A.3d 762.

A court may also find that an agency's decision is unsupported by substantial evidence. *Richard v. Sec'y of State*, 2018 ME 122, ¶ 21, 192 A.3d 611. Courts examine the entire record to determine whether, based on all the testimony and exhibits before it, the agency could fairly and reasonably find the facts as it did. *Doane v. Dep't of Health & Hum. Services*, 2021 ME 28, ¶ 38, 250 A.3d 1101. This whole-record approach requires the reviewing court to consider all evidence presented to the agency. *Id.* While highly deferential to the agency's findings, the substantial evidence review ultimately comes down to a question of reasonableness—agency findings are to be upheld on judicial review if there is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Sanford Highway Unit of Loc. 481, Council No. 74, Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Town of Sanford*, 411 A.2d 1010, 1014 (Me. 1980).

When an agency merely recites evidence or makes conclusory or summary findings that do not explain the basis for the decision, the agency has failed to make factual findings sufficient for meaningful judicial review and thus the decision must be remanded. *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2001 ME 16, ¶ 19, 769 A.2d 834. In some cases, the subsidiary facts may be obvious or easily inferred from the record and the general factual findings, and a remand would be unnecessary. *Id.* A remand is needed, however, when the Court is unable to determine or infer the subsidiary facts from the broader conclusions. *Id.*

Lastly, an agency's failure to comply with a court's remand order is itself a legal error meriting the agency's decision be set aside. When a reviewing court remands an administrative decision with instructions, the agency is bound to comply with the court's mandate. 5 M.R.S. § 11007(4)(B). Maine law expressly authorizes the Superior Court to remand for further proceedings, findings, or to direct specific agency action. *Id*. Courts can retain jurisdiction on

remand to ensure meaningful compliance. *Sanborn v. Town of Eliot,* 425 A.2d 629, 631 (Me. 1981). Under Maine's administrative review framework, failure to comply with a remand directive warrants that the agency decision be vacated or once again remanded. Persuasive authority is similarly clear that remand orders must be specifically adhered to. *Matey v. Est. of Dember,* 856 A.2d 511, 516 (Conn. App. Ct. 2004).

IV. ARGUMENT

A. Core Analytical Defects Underlie DEP's Environmental Justice Analysis.

The Second PBD misrepresents new evidence, omits material evidence from its findings, selectively cites scientific studies while ignoring their central analytical premises, refuses to address entire categories of well-documented contaminants, and substitutes comparative landfill counting for a cumulative burden analysis. Taken together, these defects demonstrate that the Department did not perform the required environmental justice analysis. The legal standards at issue stem from the same core analytical failures. Accordingly, those failures are addressed first, followed by application of each standard.

1. DEP's PFOS Analysis Ignores Sustenance Exposure Levels.

DEP included the EPA Penobscot Report while ignoring its central analytical premise: **that accurate risk assessment for the Penobscot Nation requires assessing exposure from sustenance-level consumption of fish and wildlife**. R. 2512. The EPA conducted this intensive study precisely because general population assumptions systematically understate risk to tribal communities.[16] *Id.* Specifically, the study intends to provide "a scientific basis for the Penobscot

[16] "The traditional methodology for health risk assessment used by the EPA is based on the use of exposure assumptions (e.g. exposure duration, food ingestion rate, body weight, etc.) that represent the entire American population, either as a central tendency exposure (e.g. average, median) or as a reasonable maximum exposure (e.g. 95% upper confidence limit). Therefore, the EPA did not have means for assisting Federally Recognized Indian Tribes with developing Environmental and Health Protection Policies in Indian Country to protect tribal members who live according to their unique Native American traditions. This study provides a scientific basis for the Penobscot Indian

Indian Nation for developing environmental and health protection policies that will protect tribal members who live according to their unique culture and tradition." *Id.*

In the Department's revised analysis of the cumulative environmental burdens borne by the Penobscot Nation, the Second PBD Approval underscores recent testing from 2025 that showed that PFOS levels in fish tissue sampled in the Penobscot River were below Maine's fish tissue action level of 3.5 nanograms-per-gram (ng/g). R. 3155. Fish Tissue Action Levels ("FTALs") are concentrations of a contaminant, in this case perfluorooctane sulfonic acid ("PFOS"), in fish tissue below which there should be negligible risk of adverse health effects at a set fish consumption rate. The Department relies on the 2025 PFOS testing in their determination that an expansion of JRL will not worsen the cumulative environmental burdens on the Penobscot Nation.

The "negligible risk" the Department purports to have found, however, does not apply to the Penobscot Nation—it applies to the general population. R. 3155. Maine CDC's 3.5 ng/g PFOS level is tied to eating one 8-ounce fish meal per week—about 32 g/day.[17] As explained in Section I.B., this amount is based on the general population and is drastically lower than the amount that reflects the fish consumption rate of a population whose culture and identity is centered on fishing. For this reason, Maine law sets a very different consumption rate—200 g/day—when evaluating health impacts to tribal sustenance fishing, for water quality criteria.[18] Maine CDC's FTAL for PFOS was not designed to account for sustenance fishing. R. 3155. The agency's reliance on the FTAL, without adjusting the fish consumption rate to reflect that of the Penobscot Nation, is

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Nation for developing environmental and health protection policies that will protect tribal members who live according to their unique culture and tradition." R. 2152.

[17] "FTALs are concentrations of a contaminant, in this case perfluorooctane sulfonic acid (PFOS), in fish tissue below which there should be negligible risk of adverse health effects at a set fish consumption rate (e.g., one 8-ounce (oz) meal week, one 8-oz meal per month)." Me. Ctr. for Disease Control and Prevention, Scientific Brief: 2025 PFOS Fish Consumption Advisory (June 26, 2025) [hereinafter Maine CDC Scientific Brief].

[18] 38 M.R.S. § 466-A(1).

misguided. *Id.* The EPA, through the EPA Penobscot Report that DEP cites yet largely ignores, sets a still higher consumption rate for the Penobscot Nation, at 286 g/day.[19] The report clarifies that this rate was chosen "because it appeared to be the diet most closely aligned with the Penobscot Indian Nation's cultural lifestyles." R. 2556**.** This rate was the product of extensive, Nation-specific research aimed at correcting systematic underestimation of tribal exposure. *Id.*

Applying either of those rates changes the analysis entirely. If the Department had considered the tribe's sustenance consumption rate, the test results—which are still severely limited in additional ways, as outlined below—would *not* be deemed safe. The highest fish tissue PFOS concentration found in the Department's testing was 2.641 ng/g. R. 3130. Using Maine's legally designated sustenance fishing level of 200 g/day, the highest PFOS concentration in the tested fish is almost *five times higher* than what would be consistent with Maine CDC's own health-protective assumptions.[20] Alternatively, using EPA's 286 g/day sustenance rate which was specifically tailored to reflect the Penobscot Nation's cultural and traditional way of life, the highest PFOS reading in the 2025 test results would be almost seven times higher than Maine's own health-protective levels.[21] In relaying the 2025 PFOS test results without contextualizing them within either the State's own sustenance consumption rate or the EPA's, the Department has utterly

[19] "The team chose to use the inland non-anadromous diet described in the Wabanaki Exposure Scenario because it appeared to be the diet most closely aligned with the Penobscot Indian Nation's cultural lifestyles." R. 2556.

[20] Maine CDC's PFOS Fish Tissue Action Level (FTAL) of 3.5 ng/g is tied to a consumption rate of one 8-ounce fish meal per week, equivalent to 32.4 g/day. Scaling that benchmark to Maine's statutory sustenance fishing rate of 200 g/day (38 M.R.S. § 466-A) yields an equivalent health-protective fish tissue concentration of approximately 0.57 ng/g (3.5 × 32.4 ÷ 200). The highest PFOS concentration reported in the fish tissue data relied upon by the Department (2.641 ng/g) exceeds that level by a factor of approximately 4.6.

[21] Maine CDC's PFOS Fish Tissue Action Level (FTAL) of 3.5 ng/g corresponds to a consumption rate of one 8-ounce fish meal per week, equivalent to 32.4 g/day. Applying the same risk assumptions at a consumption rate of 286 g/day yields an equivalent health-protective fish tissue concentration of approximately 0.40 ng/g (3.5 × 32.4 ÷ 286). The highest PFOS concentration reported in the fish tissue data relied upon by the Department (2.641 ng/g) exceeds that level by a factor of approximately 6.7.

ignored the unique circumstances of the Penobscot Nation, most notably the tribe's vital entwinement with the Penobscot River.

The Department may counter that Maine CDC's FTAL for PFOS has not been adjusted to reflect sustenance fishing consumption levels, and thus there were no other metrics to use. But the Maine CDC Scientific Brief explaining the FTAL for PFOS explicitly states, "The fish consumption rate can be varied to compute an FTAL for different fish meal consumption frequencies, assuming a meal size of 8-oz, and expressed as a daily average consumption rate in grams per day."[22] The tools to apply an accurate FTAL to the Penobscot Nation were in plain sight. DEP was tasked with assessing the cumulative burden for the Nation, accounting for the Nation's unique relationship with the River. As part and parcel of this mandate, DEP had to consider the relevant level of fish consumption for an Indigenous community that traditionally subsists on the River; nothing precluded DEP from using the PFOS test results to consider risk for the Nation themselves, where Maine's own subsistence consumption rate is the product of years of study and scientific assessments. *See* Section I.B. The amount of fish that the Penobscot Nation is expected to consume to maintain their traditional way of life and thus their identity did not require guesswork—it is set in law, after the EPA found Maine's general consumption levels guiding health criteria to be grossly inaccurate for the Wabanaki tribes. *Id.* DEP, as the agency tasked with assessing the cumulative burden of pollution on the Penobscot and their unique relationship with the River, had the means and duty to accurately assess the implications of the 2025 PFOS results for the Nation.

The Department's reliance on PFOS testing without applying the Nation's sustenance consumption rates—either those proscribed in Maine law or those estimated in the EPA Penobscot

[22] Maine CDC Scientific Brief at 2.

Report—is internally inconsistent and scientifically and legally indefensible. The Department cannot reasonably consider an EPA study whose purpose is to correct underestimation of tribal exposure while declining to engage with the very exposure framework that gives the study meaning.

2. Second PBD Substitutes Landfill Comparison for Cumulative Burden Analysis.

The Department's refusal to fully consider the Penobscot Nation's unique relationship with the Penobscot River in their cumulative burden analysis is further evinced by the Second PBD Approval's complete failure to recognize that much of the Penobscot River is legally designated for sustenance fishing for the Penobscot people. 38 M.R.S. § 467(7)(A)-(B). DEP's comparison of the landfills on the Kennebec River to the 93 on the Penobscot River once again fails to account for the Nation's unique relationship to the Penobscot River; in this case, the fact that multiple sections of the Penobscot are designated for sustenance fishing. *Id.* There are no such designations for the Kennebec River because there are no tribal reservations subsisting—or attempting to subsist—off the Kennebec. 38 M.R.S. § 467(4)(A). The landfill comparison also overlooks the cumulative burden of wastewater discharges, which EPA data shows the Penobscot Nation has more exposure to than 95% of the rest of the state. The impact of the leachate from the State-owned Dolby Landfill that also ultimately pours into the Penobscot River, for instance, is not reflected in a simple landfill count. R.2618-2619. The Department's reliance on generalized comparisons, without evaluating how the Nation's specific circumstances alter the environmental justice analysis, fails to satisfy both the statute and this Court's remand directive.

3. DEP Entirely Omits Consideration of Penobscot Nation's Disparate Cancer Rates.

Moreover, and just as arbitrarily, the Department utterly ignores the health disparity that the same EPA Penobscot Report finds for members of the Penobscot Nation. Specifically, "the PIN's rates for lung and cervical cancer are some of the highest in the State of Maine." R. 2493. This profoundly unfortunate fact is all the more impactful when coupled with the fact that most relevant wildlife the EPA studied around the Penobscot River was found to pose a cancer risk to the tribe. R. 2505. The above omissions are further indication that the Department did not conduct an accurate environmental justice assessment nor properly apply the environmental justice statutory criterion.

4. PFOS Testing is Incomplete.

The Second PBD relies on 2025 fish tissue testing that measured only PFOS, despite DEP's own record showing that PFAS is a class of over 15,000 synthetics chemicals constituting thousands and thousands of compounds, and that Juniper Ridge's leachate is dominated by *other* PFAS compounds, particularly short-chain PFAS. *See* Section I.A.; Petr's' Br. 8; R. 2645. According to the leachate study the Department commissioned, the highest-concentration PFAS at JRL are short-chain compounds—led by PFHxA at 1,683 nanograms-per-liter (ng/L) and PFBS at 1,668 ng/L—followed by PFBA, PFPeA, and PFHpA. R. 2645. Short-chain PFAS, such as PFBS, are most likely to be mobile, bioavailable, and persistent in the aquatic food web downstream of wastewater discharges. Petr's' Br. 29. It is not scientifically reasonable to conclude that PFAS risk is minimal when the testing regime excludes the majority of PFAS *known* to be present in JRL's leachate; particularly when applying the proper consumptions levels shows that *even just* the PFOS levels are, in fact, unsafe for the Penobscot Nation when practicing their sustenance fishing rights.

5. The Department's Analysis Omits Dioxins, PCBs, and the Legacy Toxics Central to Existing Advisories.

The Department's analysis of the harms the expansion would cause to the Penobscot Nation ignores dioxins, PCBs, and other persistent toxics that form the basis of longstanding Penobscot River fish consumption advisories. "Maine has established safe eating guidelines for fish from the Penobscot River below Lincoln of no more than one to two meals per month of any fish species based on testing for PCBs, dioxins, and DDT." R. 3154. These contaminants are acknowledged in the EPA and Maine CDC analyses, have been found in landfill leachate, and there is no indication in the record that they are removed by conventional wastewater treatment. Petition for Review 14. DEP references these advisories in the Second PBD and subsequently fails to address the associated toxics when examining the harms the expansion will bring to the Penobscot Nation. R. 3154. The agency makes no effort to consider whether such toxics are in the leachate, whether the effluent leaving Nine Dragons contains such toxics, and to what extent the leachate thereby increases the very poisons known to have made the fish inedible for a tribe whose way of life and identity depends on sustenance fishing.

6. The Department Unreasonably Presents a PFAS Treatment Condition as a Panacea to the Nation's Cumulative Harm.

Reliance on a PFAS treatment condition to absolve the expansion of its disparate impact on the Penobscot Nation is willfully unreasonable.

First, the science suggests that PFAS compounds will increase over time in the River, even with a PFAS treatment system. This is because, as detailed in Section I.A., these systems are not a cure-all for a class of over 15,000 chemicals pouring into the Penobscot River; they are merely a necessary mitigation measure. Despite all this, DEP purports that the solution to the contamination caused by JRL's leachate is a PFAS treatment system condition. They ignore the record's evidence that shows that PFAS treatment technologies do not eliminate PFAS but instead

transfer contaminants into other media, and that their effectiveness—especially for massive amounts of complex leachate like that of JRL—is limited and uncertain. R. 2641, 2658, 2670.

Secondly, the condition does nothing to address other potential contaminants in JRL's leachate. The EPA Penobscot Report found that "[d]ioxin has often been identified as one of the most potent human carcinogens" with a cancer slope factor higher than 770 chemicals evaluated. R. 2506. The same report also found that the Penobscot Nation has the highest rates of cervical and lung cancer in the state. R. 2493. An environmental justice determination cannot rest on a mitigation measure that fails to address a vast array of relevant contaminants, particularly where the Penobscot Nation experiences elevated rates of cervical and lung cancer, a fact that is both documented in the EPA Penobscot Report and entirely omitted in the Second PBD Approval.

Lastly, the Department attempts to frame the PFAS-treatment condition as a monumental concession in response to the environmental justice standard; DEP underscores that "[t]his is the first time the Department has ever required a landfill to design, install and operate a PFAS treatment system for its leachate" and that they are partly imposing this "unprecedented" condition "in consideration of the Penobscot Nation's deep spiritual connection to the Penobscot River as well as cumulative environmental burdens borne by the Penobscot Nation from impacts from unlined historic landfills within the Penobscot River watershed." R. 3165. Scientific understanding of PFAS is constantly developing, and in response, regulations are slowly catching up, nationwide.

What DEP presents as a unique concession will in reality now be standard practice going forward—L.D. 2070, an emergency bill aimed at waste management issues, mandates that no new or expanded state landfill can receive a public benefit determination approval without a PFAS treatment system in place for the landfill's leachate; the bill was signed into law by the Governor

on April 13, 2026.[23] 38 M.R.S. §1310-AA, (1-B)(C). PFAS treatment systems at landfills for landfill leachate are sensible and critical mitigation measures. But a sensible and critical mitigation measure does not erase a landfill's burden on a neighboring tribal reservation, including the impact on wastewater discharges. R. 2641, 2658, 2670. A PFAS treatment system cannot resolve the environmental injustice this expansion would perpetuate on the Penobscot Nation.

B. The Department's Conclusion that the Proposed Expansion is Not Inconsistent with Ensuring Environmental Justice for the Penobscot Nation is Legally Erroneous, Arbitrary and Capricious, Unsupported by Substantial Evidence, and Contravenes the Court's Orders.

The Department's Second PBD Approval suffers from core analytical failures that render the decision arbitrary, capricious, affected by errors of law, unsupported by substantial evidence, and inadequate for meaningful judicial review. The Department failed to evaluate environmental justice as required by the statute and this Court's remand order: assessing the cumulative environmental burdens borne by the Penobscot Nation and the Nation's intimate relationship with the Penobscot River.

1. The Second PBD is Affected by Error of Law.

The Second PBD is affected by error of law because the Department misapplied the environmental justice criterion in 38 M.R.S. § 1310-AA(3)(E) and failed to apply the legal framework mandated by both the statute and this Court's remand order.

The PBD statute requires the Department to determine whether a proposed expansion is "not inconsistent with ensuring environmental justice for the community in which the facility or expansion is proposed." *Id.* Environmental justice is defined as the right to be protected from environmental pollution regardless of ancestry and includes equal protection in waste management decisions. *Id.*; 06-096 C.M.R. ch. 400 § 1(TT-1). In its remand order, this Court made clear that

[23] L.D. 2070 (132nd Legis. 2026).

applying this criterion to the Juniper Ridge Landfill requires consideration of the cumulative environmental burdens borne by the Penobscot Nation and the Nation's intimate relationship with the Penobscot River. Order on 80C Appeal at 15-16.

Rather than applying that framework, the Department again framed its analysis around generalized comparisons and mitigation conditions. The Second PBD treats general-population PFOS fish tissue thresholds as legally sufficient for evaluating risk to a tribal sustenance fishing community, substitutes comparative landfill tallying for a community-specific cumulative burden analysis, and treats the imposition of conditions as a substitute for ensuring environmental justice. That framing fundamentally misunderstands what the environmental justice criterion requires as a matter of law—to consider the cumulative environmental burdens borne by the Penobscot Nation, including the existence and condition of other landfills near it, and whether these environmental burdens and the Penobscot Nation's intimate relationship with the Penobscot River permit a finding that the proposal fulfills environmental justice. Order on 80C Appeal at 16. The Department failed to accurately assess the cumulative environmental burdens on the Nation and to account for their entwinement with the River and therefore misapplied 38 M.R.S. §1310-AA(3)(E).

2. <u>The Second PBD is Arbitrary and Capricious and an Abuse of Discretion.</u>

The Department's decision is arbitrary, capricious, and an abuse of discretion because it reflects unreasoned decision-making, internal inconsistency, and a refusal to engage with the obvious implications of the evidence before it. An agency abuses its discretion when it exceeds the bounds of reasonable choices available, considering the governing law and the facts of the case. *Lippitt v. Bd. of Certification for Geologists & Soil Scientists*, 2014 ME 42, ¶ 16, 88 A.3d 154.

The Department's conclusion that an expansion is consistent with environmental justice exceeds the bounds of reasonable choices available given the facts of this case.

The Department's environmental justice finding does not rationally follow from the evidence it relies on. The Department relies on PFOS testing while ignoring the exposure assumptions necessary to interpret those results, cites the EPA study while disregarding its central premise, and concludes that risks are minimal while relying on incomplete testing. An environmental justice analysis that narrows its wastewater discharge focus to PFAS—while excluding known carcinogens with well-documented exposure pathways—fails both scientifically and legally. An environmental justice analysis that willfully misrepresents testing for a single PFAS compound—PFOS—is still more flawed. For these same reasons, combined with technological limitations around PFAS removal and destruction, depending on a PFAS treatment system to resolve JRL's role in the cumulative environmental burden on the Penobscot Nation, is entirely unreasonable, arbitrary and capricious, an abuse of discretion, and unjust.

3. The Second PBD is Unsupported by Substantial Evidence on the Whole Record.

The Second PBD Approval is unsupported by substantial evidence because the record, when viewed in its entirety, compels a contrary conclusion to the Department's finding that the expansion would be consistent with ensuring environmental justice for the Penobscot Nation. Substantial evidence review requires consideration of the entire record, not just evidence that supports the agency's preferred outcome. *Richard v. Sec'y of State*, 2018 ME 122, ¶ 21, 192 A.3d 611. When the evidence before the agency compels a contrary finding, it is the duty of the court to set aside the agency's decision. *Osprey Fam. Tr. v. Town of Owls Head*, 2016 ME 89, ¶ 10, 141 A.3d 1114; *Gagnon's Case*, 144 Me. 131, 133, 65 A.2d 6, 8 (1949).

The record contains undisputed evidence of disproportionate environmental burdens borne by the Penobscot Nation, including elevated wastewater discharge exposure, toxic air emissions, legacy contamination of the Penobscot River, and some of the highest cervical and lung cancer rates in the State of Maine. R. 2493, 3153–3154. The record contains extensive evidence that JRL's leachate is highly contaminated with PFAS, that these PFAS flow from Nine Dragons WWTP into the Penobscot River, and that such compounds pose a wide array of serious health risks. Pet'rs' Br. 7; R. 2629, 3157. The record contains extensive evidence that a PFAS treatment system will not serve to eradicate the disparate harm that an expansion of JRL will cause the Penobscot Nation, only to dampen it. R. 2620, 2630, 2667–2679. Viewed as a whole, the record compels the conclusion that an expansion of JRL is inconsistent with ensuring environmental justice for the Penobscot Nation. The Second PBD therefore fails substantial evidence review.

4. <u>DEP's Failure to Comply with this Court's Remand Order is an Independent Error of Law.</u>

The Second PBD is invalid because the Department failed to comply with this Court's mandate: to "consider the cumulative environmental burdens borne by the Penobscot Nation, including the existence and condition of other landfills near it, and whether these environmental burdens and the Penobscot Nation's intimate relationship with the Penobscot River permit a finding that the proposal fulfills environmental justice." Order on 80C Appeal at 16. Failure to comply with a remand directive is itself legal error warranting vacatur or remand. *Sanborn v. Town of Eliot*, 425 A.2d 629, 631 (Me. 1981); *Matey v. Est. of Dember,* 85 Conn. App. 198, 205, 856 A.2d 511, 516 (2004).

The Court found that in the First PBD "the Department recited but did not analyze the Penobscot Nation's intimate relationship with the Penobscot River and surrounding region, evaluate how that particular characteristic might bear on environment [sic] justice,

or meaningfully assess how that interest was burdened before BGS's application was presented." Order on 80C Appeal at 15 (emphasis added). Once again, the Department has presented a PBD that either recites or cites critical information from documents and then fails to analyze, draw logical conclusions, or draw any conclusions at all. The Department's reliance on the 2025 PFOS testing to minimize the harm to Penobscot Nation contravenes the Court's directive to consider the cumulative environmental burdens borne by the Penobscot Nation and the Nation's intimate relationship with the Penobscot River. The Department's comparison of landfill tallies between the Penobscot and Kennebec Rivers, without addressing sustenance fishing rights, is also a contravention of this Court's directive to evaluate how the Nation's relationship with the Penobscot River may bear on environmental justice, and thus an error of law. In sum, the Department's conclusion that the expansion will ensure environmental justice for the Penobscot Nation is unsupported by substantial evidence on the record, an abuse of discretion, and arbitrary and capricious.

5. <u>In the Alternative, The Second PBD Lacks Findings Necessary for Meaningful Judicial Review.</u>

Substantive defects aside, the Second PBD must be remanded because it lacks findings sufficient to permit meaningful judicial review. When an agency recites evidence or does not show the subsidiary factors underpinning its own conclusions, remand is required. *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2001 ME 16, ¶ 19, 769 A.2d 834.

The agency fails to explain how cumulative environmental burdens were evaluated, why sustenance-level exposure assumptions were not applied, and why significant categories of contaminants were omitted. The agency fails to address the Penobscot Nation having the highest rates of cervical and lung cancer in the state, and thus it is unclear whether health disparities affected their attempted environmental justice analysis. R. 2493. DEP does not address whether

the leachate going into the Penobscot contributes to the dioxins, PCBs, and mercury that already inform the rigid do-not-eat advisories. DEP does not address, in their landfill tallying, how the Penobscot River's waste pollution uniquely conflicts with the Penobscot Nation's sustenance fishing rights. R. 2487-2488. DEP does not address how the leachate from the State-owned Dolby Landfill that routinely pours into the River contributes to the Nation's disparate impact from waste pollution. R. 2618-2619. The absence of the above analyses once again precludes meaningful judicial review.

C. DEP's Finding that the Expansion Would Promote the Solid Waste Management Hierarchy Fails to Adhere to the Court's Remand Instruction and Does Not Permit Meaningful Judicial Review.

Regarding the Solid Waste Management Hierarchy argument, the Department was required to make detailed findings on the necessity and practicability of requiring sludge-drying. Order on 80C Appeal at 16. They did not. In this revised decision, unlike in the First PBD, the Department found that Casella's practices of burying 90% of the state's sludge and then bulking that sludge with massive amounts of CDD *does* run contrary to the Solid Waste Management Hierarchy. R. 3148. However, the Department determined that because of the promise of multiple facilities coming online in the future that would reduce the volume of JRL's sludge, it was not necessary to require Casella to implement such technology themselves. R. 3148–3149. Specifically, the Second PBD notes that in Spring of 2026, a dryer at Crossroads Landfill Facility is set to come online, which could theoretically handle 80% of the state's sludge. *Id*. There is zero legal commitment on Casella's part, however, to send the sludge they currently bury to this Crossroads facility, if it does in fact come online. The Department chose not to add such a commitment to their condition and chose not to address the lack of any such commitment in their Second PBD Approval. *Id*. Perhaps DEP assumes that by setting annual limits on sludge and CDD at JRL, they can force alternative

disposal arrangements for the sludge and its related CDD. Their reasoning is unclear, because their findings on the practicability of sludge drying at JRL were not sufficiently specific.

Equally important, the Department fails to acknowledge in their fact-finding a reality that Casella stated plainly at oral argument: the uncertainty that any such facility will be successful in becoming fully operational.[24] The operation of the Crossroads dryer is not a sure thing, due to economic and operational challenges such facilities routinely encounter.[25] Indeed, at oral argument when DEP was asked by the Court why the State did not at least mandate that *when* some viable technology to reduce the volume of the sludge *does* come online, Casella will send their sludge there, the State replied, "That is something that can certainly happen".[26]

In the end, it did not happen, and the Second PBD entirely omits any discussion of this possibility as well. It is therefore entirely unclear from the decision whether the Department actually considered Casella's lack of any binding commitment to send their sludge to any such external drying facility (or otherwise), and whether DEP considered the economic and practical uncertainty of any such facility successfully coming online. These omissions require, at least, another remand so that the Court can understand how the agency reached their conclusion and thereby provide effective judicial review. *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2001 ME 16, ¶ 19, 769 A.2d 834.

V. CONCLUSION

For the foregoing reasons, Petitioners request this Court rule that MEDEP's Second PBD Approval is affected by errors of law, unsupported by substantial evidence on the whole record, and/or arbitrary or capricious. As such, Petitioners request this Court reverse MEDEP's Second

[24] As Casella stated, "It takes years to permit and design these facilities. The [dryer] that is proposed at the Crossroads Landfill […] isn't supposed to be operational until the end of this year, but that's not a sure thing. Look at what's going on in Hamden and Orrington. It's hard to make these facilities run well and run economically. And so we don't know." Oral Argument at 1:35:00, July 18, 2025.
[25] *Id.*
[26] Oral Argument at 01:48:30.

PBD Approval and find that the PBD Application does not satisfy the criteria of the PBD statute and regulations.

In the alternative, should this Court choose not to reverse or modify the Commissioner's decision, Petitioners request that the Court remand the case for MEDEP to reopen the PBD process and seek additional public input, issue new findings of fact and conclusions of law based on those proceedings, and take any further action the Court deems necessary.

Date: May 11, 2026

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 May 11, 2026 to the attorneys of record for Maine Department of Environmental Protection and NEWSME Landfill Operations, LLC.

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