**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

June 24, 2026

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Pursuant to M.R. Civ. P. 80(C)(g), Petitioners the Penobscot Nation (the "Nation") and Conservation Law Foundation ("CLF") (altogether "Petitioners") submit this Reply Brief in response to Respondent Maine Department of Environmental Protection's ("DEP", "MEDEP", "Department", or "the State") and Party-in-Interest NEWSME Landfill Operations, LLC's ("Casella")[1] briefs, both filed on June 10, 2026. Petitioners' arguments that the approval contravenes the State's Solid Waste Management Hierarchy remain fully preserved, and nothing in MEDEP's or Casella's latest briefs warrants a different conclusion. This reply, however, centers on environmental justice, because the Second PBD continues to perpetuate environmental injustice against the Penobscot Nation—an issue that lies at the core of the statute and that is not addressed, and cannot be remedied, in the currently ongoing licensing process. Once again, Petitioners request this Court reverse MEDEP's Second PBD approval and find that the PBD application does not satisfy 38 M.R.S. § 1310-AA(3)(B), (E) of the PBD statute.[2]

## I. ARGUMENT

DEP's Second PBD presents a decision affected by errors of law, unsupported by substantial evidence on the whole record, and reflective of an abuse of discretion and arbitrary and capricious decision-making in contravention of the Court's order. Second Petitioners' Brief at 19–33. In their opposition briefs, the State and Casella attempt to strip the governing legal standards of meaningful review, rely on false premises, and repeatedly misconstrue Petitioners' arguments while asserting—inaccurately—that Petitioners raise unpreserved issues.

[1] There is a legal distinction between NEWSME and Casella, but for ease of reference and consistency with the Second PBD approval, this Reply Brief refers to the Applicant as "Casella."
[2] Petitioners continue to assert all preexisting arguments and requests for relief made in Petitioners' prior filings.

### A. Appropriate Standard of Review.

The State and Casella attempt to strip 5 M.R.S. § 11007(4)(C) of meaningful review such that the applicable legal standards are essentially a rubber stamp. Second Respondent's Brief at 14–15; Second Casella Brief at 11–12. The law requires deference only to agency decisions that are within the bounds of reason and supported by substantial, competent evidence. *Lippitt v. Bd. of Certification for Geologists & Soil Scientists*, 2014 ME 42, ¶ 16, 88 A.3d 154, 159; *Carryl v. Dep't of Corr.*, 2019 ME 114, ¶ 8, 212 A.3d 336, 339.

The court will find an agency has abused its discretion if 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,* 2014 ME 42, ¶ 16, 88 A.3d at 159. An agency exceeds the bounds of its discretion when it fails to inquire into an issue necessary to make a reasoned decision, or address evidence necessary to make a reasoned decision. *Zegel v. Bd. of Soc. Worker Licensure,* 2004 ME 31, ¶ 19, 843 A.2d 18, 23.

An agency acts arbitrarily or capriciously when its decision is willful and unreasoning, failing to consider or disregarding the facts or circumstances before it. *Cent. Me. Power Co. v. Waterville Urb. Renewal Auth.*, 281 A.2d 233, 242 (Me. 1971); *Help-U-Sell, Inc. v. Maine Real Est. Comm'n*, 611 A.2d 981, 984 (Me. 1992) (affirming arbitrary and capricious standard in *Cent. Me. Power Co*.). Arbitrary or capricious action occurs when it can be said that such action is unreasonable, has no rational factual basis justifying the conclusion or lacks substantial support in the evidence. *Carl L. Cutler Co. v. State Purchasing Agent*, 472 A.2d 913, 916 (Me. 1984); *Fams. United of Washington Cnty., Inc. v. Maine Dep't of Hum. Servs.*, No. CIV.A. AP-01-68, 2002 WL 1978906, at *3 (Me. Super. Ct. June 20, 2002). Relatedly, when an agency's findings are based on speculation, the agency has committed an error of law. *Uliano v. Bd. of Env't Prot*., 2005 ME 88, 876 A.2d 16, 21 n.6.

In reviewing if an agency decision is supported by substantial evidence, the court considers the whole 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." *Int'l Paper Co. v. Bd. of Env't Prot.*, 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054. Substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion. *Osprey Fam. Tr. v. Town of Owls Head,* 2016 ME 89, ¶ 9, 141 A.3d 1114, 1117. A court does not weigh evidence, including determining credibility or choosing between experts. *Friends of Lamoine v. Town of Lamoine*, 2020 ME 70, ¶ 21, 234 A.3d 214, 222-23. A court, however, reviews the competency of the evidence relied on, which ultimately turns on the reasonableness of that reliance. *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 20, 989 A.2d 1128, 1136. In addition to being an error of law, if the agency's fact-finding relies on speculation, it is unsupported by substantial evidence. *Mick Land Dev., Inc. v. Town of S. Berwick*, 2026 ME 53, ¶ 24; *Hannum v. Bd. of Env't Prot*., 2003 ME 123, ¶ 16, 832 A.2d 765, 769-70.[3]

### B. Petitioners Have Consistently Argued that an Expansion is Fundamentally Inconsistent with Ensuring Environmental Justice for the Penobscot Nation, Regardless of Conditions.

Petitioners have always maintained that any expansion of Juniper Ridge Landfill ("JRL") is incompatible with ensuring environmental justice for the Penobscot Nation, and Petitioners' argument for stronger conditions—including for a stronger per- and polyfluoroalkyl substances ("PFAS") treatment condition—has always been an argument explicitly made *in the alternative*: this was asserted in Petitioners' initial pleading, the Petition for Review, in Petitioners' initial brief,

[3] Note that in both *Uliano v. Bd. of Env't Prot.* and *Hannum v. Bd. of Env't Prot.*, the Law Court rejected the Board's cumulative-impact analyses—holding in *Hannum* that the assessment was unsupported by evidence in the record, and in *Uliano* that it rested on improper speculation and was legally erroneous.

at oral argument, and in Petitioners' second brief. Pet. for Review ¶¶ 39, 119–120; First Petitioners' Brief at 4–5, 22, 26–28, 37; Oral Argument at 9:08 (July 18, 2025).[4]

At this juncture in the appeal, continuing to focus on Petitioners' central argument is both appropriate and within the parameters of the scheduling order. *See* Order on Parties' Joint Motion for Scheduling Order. Furthermore, despite faulting Petitioners for not focusing on better conditions in this round of briefing, it is the *State* that has repeatedly argued that any conditions can be revisited and strengthened at the licensing stage.[5] First Respondent's Brief at 14–16. What unequivocally *cannot* be achieved at the licensing stage is a full accounting of the environmental injustice of this expansion, where the only reasonable outcome is a denial of the PBD application.

### C. DEP's Failure to Consider Tribal Sustenance Fishing in its Analysis was a Legal Error.

DEP's Second PBD wholly fails to consider sustenance fishing practices or rights of the Penobscot Nation, a legal and cultural aspect that makes JRL's pollution of the River uniquely unjust. The Department's complete failure to consider this critical factor in their attempted environmental justice analysis is an abuse of discretion, arbitrary and capricious decision-making, resulting in a Second PBD that is unsupported by substantial evidence and in contravention of the Court's 80C Order. *See* Order on 80C Appeal at 16. The State now claims, without citation to any supporting evidence, that pouring over 21 million gallons of toxics-filled fluid into the River does not affect river segments 1.6 miles upstream. 2d Resp't's Br. 16; R. 3157.

[4] "If MEDEP had done the analysis that the statute requires, the only reasonable conclusion would have been that the expansion could not meet the letter, purpose and spirit of the environmental justice criterion." 1st Pet'rs' Br. 25; *See also* Oral Argument at 9:08 (July 18, 2025), citing Attorney St. Pierre ("There are no conditions, essentially, that could ensure environmental justice".).

[5] Petitioners continue to take serious issue with this undermining of the PBD statute, as it requires both consistency with the Solid Waste Management Hierarchy and ensuring environmental justice at the PBD stage. 38 M.R.S. § 1310-AA(3)(B), (E).

First, this finding is unsupported by substantial evidence and reflects an error of law because it is based on speculation. Fact-finding based on speculation is both unsupported by substantial evidence and an error of law. *Hannum*, 2003 ME 123, ¶ 16, 832 A.2d 765 at 770; *Uliano*, 2005 ME 88, 876 A.2d 16 at 21 n.6. Here, DEP offers no support for its new contention that, because the stretches of the Penobscot River designated for sustenance fishing are located upstream of Nine Dragons, those segments "are likely not affected by Nine Dragons' discharges." 2d Resp't's Br. 16. That contention is purely speculative and has no supporting citation because there is no competent record evidence to rely on.[6] *Id.*; R. 3155. If the Department now asserts that the 26,531,525 gallons of JRL's leachate discharged annually into the River do not add to the cumulative burden experienced by the Nation, the Second PBD was the place to state—and support—such a startling finding.[7] R.0971. Its failure to do so confirms that the agency's position rests on post hoc speculation rather than record-based fact finding.

Moreover, the State's reasoning is arbitrary and an abuse of discretion because it rests on two false premises: 1) JRL's leachate, flowing from Nine Dragons, is the only effect the landfill has on the River; and 2) fish in the Penobscot River do not swim upstream. Agency action is arbitrary and capricious, and an abuse of discretion, where the agency's decision has no rational factual basis or exceeds the bounds of reason. *Cent. Me. Power Co.*, 281 A.2d at 242; *Lippitt,* 2014 ME 42, ¶ 16, 88 A.3d at 159.

There is ample record evidence that a landfill's PFAS disperse atmospherically, and that fish swim upstream. R. 1506; Pet. for Review ¶¶ 17, 105; R. 1683, 2498, 2504, 2556. The State's

[6] The only evidence the Second PBD directly cites for the "minimal" impact from JRL's leachate is a hydrogeologist's report that looked, *exclusively*, at the impact of the leachate coming *directly* from JRL–in other words, whether or not JRL was leaking. R. 0836, 3156. This is an entirely separate issue from the effluent leaving Nine Dragons.

[7] This new finding also runs entirely contrary to DEP's own pronouncement that the agency is conditioning an expansion on installation of a PFAS-treatment system "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.

failure to address this evidence, and its reliance on contrary assumptions, renders its conclusion arbitrary and capricious.

**1. State's Claim of PFOS Testing Irrelevance is Contrary to Second PBD.**

The State now argues that the perfluorooctane sulfonate ("PFOS") testing is irrelevant to any potential contamination from JRL's leachate. 2d Resp't's Br. 15–17. That assertion begs the question why DEP highlighted this new evidence in the Second PBD in the first place—specifically in the paragraph *directly after* its discussion of contaminated effluent flowing from Nine Dragon's outfall into the River. R. 3155. DEP clearly tried to present the PFOS testing as counterevidence to contamination from JRL's leachate leaving Nine Dragons, which is why Casella likewise relied on those results to minimize the risk of Nine Dragons' discharge in its own brief. 2d Cas. Br. 22–23. DEP's attempt to now recast that same evidence as irrelevant, without any explanation for the shift, underscores the arbitrary and post hoc nature of the State's position.

**2. DEP Falsely Asserts JRL's Leachate is Sole Source of Expansion's Impacts.**

DEP's assertion that landfill leachate is "perhaps the sole source of direct environmental impact from the proposed expansion on the Penobscot River" is arbitrary and capricious because it ignores substantial, uncontroverted record evidence of alternate pathways for PFAS and other toxics. 2d Resp't's Br. 14. An agency abuses its discretion where it fails to inquire into an issue or address evidence necessary to make a reasoned decision and acts arbitrarily if it reaches a conclusion unfounded on a rational factual basis. *Zegel,* 2004 ME 31, ¶ 19, 843 A.2d 18 at 23; *Lippitt*, 2014 ME 42, ¶ 16, 88 A.3d at 159; *Cent. Me. Power Co*., 281 A.2d at 242.

Consideration of the extensive evidence that JRL's PFAS pollution transcends its leachate—particularly through landfill gas—was necessary for a reasoned decision. Because landfills emit PFAS (and other toxics) through multiple pathways, and because JRL sits upriver of Indian Island and the Nation's sustenance fishing stretches, it is unreasonable to conclude that

JRL's pollution does not affect the Nation merely because Nine Dragon's outfall pipe is 1.6 miles downriver.[8] The record reflects, and Petitioners have repeatedly raised, that landfill gas can account for a substantial—indeed, comparable or greater—share of PFAS releases relative to leachate. R. 1487, 1500, 1506–1513; Pet. for Review ¶¶ 105. DEP's failure to consider this evidence—particularly given that the Penobscot Nation is in the 99th percentile in Maine for the toxic releases to air EJ index—renders its decision arbitrary and capricious and an abuse of discretion. R. 1266, 3153–3154.

### 3. State's Sustenance Fishing Argument Overlooks that Some Fish Swim Upstream.

DEP's argument—that sustenance fishing consumption rates are irrelevant because Nine Dragons sits 1.6 miles downstream of sustenance fishing areas—is arbitrary and capricious and an abuse of discretion. An agency exceeds its discretion when it fails to address evidence or inquire into an issue that is necessary to make a reasoned decision; an agency acts arbitrarily when it reaches conclusions unfounded on a rational factual basis. *Zegel*, 2004 ME 31, ¶ 19, 843 A.2d at 23; *Cent. Me. Power Co.*, 281 A.2d at 242.

DEP's position is predicated on a world in which fish do not swim upstream. Once again, however, the record is replete with evidence that some fish do swim upstream, including in the Penobscot River. For instance, the American eel, as catalogued in the 2015 EPA Study,[9] is catadromous, meaning it spawns in the ocean and then swims upriver into the Penobscot River. R. 2556. The Penobscot River is also noted for ongoing restoration of the largest remaining Atlantic salmon run in the United States, who, for generations "have fought their way upstream to spawn".

[8] Moreover, the PFOS testing that the State relies on in its Second PBD was based on samples from the Penobscot River itself and from Birch Stream and Pushaw Stream, two tributaries that flow *down* into River waters that *are* designated for sustenance fishing. R. 3130.

[9] August 2015 U.S. EPA Region 1 Regionally Applied Research Effort, "The Penobscot River and Environmental Contaminants: Assessment of Tribal Exposure Through Sustenance Lifeways."

R. 1683, 2498. Moreover, small-mouth bass, the one species DEP tested for PFOS, do not need to swim "over long stretches of the river" to traverse 1.6 miles. 2d Resp't's Br. 16. The fact that small-mouth bass are non-anadromous simply means they spawn in freshwater, it does not mean they do not swim 1.6 miles upstream. R. 2557. Maine's Department of Marine Resources would have the exact data on how many of each species of fish, including small-mouth bass, are regularly found traveling upstream via the Milford Fishway—which marks the lowest boundary point of the section of the Penobscot River that *is* designated for sustenance fishing. As a sister agency, Maine DEP had access to this data and chose not to inquire. In short, fish can and do swim upstream, creating an exposure pathway, and the fact that Nine Dragons sits 1.6 miles downriver of sustenance fishing segments is not a rational factual basis for utterly ignoring sustenance fishing in the Department's analysis. The agency's failure to address sustenance fishing rights and sustenance fishing consumption levels when assessing risk for the Nation rendered their environmental justice analysis arbitrary and legally erroneous.

#### 4. DEP's Failure to Consider Sustenance Fishing Rights in Landfill Tallying was a Legal Error.

Relatedly, the agency's failure to consider sustenance fishing rights in their landfill tallying was arbitrary, an abuse of discretion, and resulted in a decision unsupported by substantial evidence. Agency action exceeds its discretion where it fails to inquire into or consider a factor necessary for a reasoned analysis, or reaches an unreasonable decision, considering the facts and circumstances of the case and law. *Zegel*, 2004 ME 31, ¶ 19, 843 A.2d at 23; *Lippitt*, 2014 ME 42, ¶ 16, 88 A.3d at 159. An agency acts arbitrarily when no rational factual basis justifies its conclusion. *Cent. Me. Power Co*., 281 A.2d at 242. A decision is unsupported by substantial evidence when, after reviewing the entire record, the decisionmaker could not fairly and reasonably find the facts as it did. *Int'l Paper Co.,* 1999 ME 135, ¶ 29, 737 A.2d at 1054.

Here, the State relies on the fact that there are 32 more landfills on the Kennebec River than the Penobscot, while entirely failing to account for the Penobscot River's designation for sustenance fishing. R. 3155. The cumulative burden of landfill pollution on a River cannot be reasonably assessed without considering a Federally recognized Tribe's unique sustenance rights along that river. That omission blatantly disregards a fact necessary for a reasoned decision. It is especially arbitrary considering this Court's explicit instruction that DEP account for the Nation's "intimate relationship" with the River. Order on 80C Appeal at 16. DEP's failure to incorporate sustenance fishing rights into its analysis thus contravenes governing law and the Court's order.

In sum, DEP's failure to meaningfully consider sustenance fishing rights and consumption rates throughout the entire Second PBD is a core defect, rendering the decision arbitrary, an abuse of discretion, and unsupported by substantial evidence.

### D. DEP's Failure to Consider Disparate Health Data in Environmental Justice Analysis was a Legal Error.

DEP's failure to consider the Penobscot Nation's health disparities in its attempted environmental justice analysis was an abuse of discretion and was arbitrary and capricious, resulting in a decision unsupported by substantial evidence. Agency action exceeds its discretion where it fails to inquire into or address a factor key to a reasoned analysis, or reaches an unreasonable decision, considering the facts and circumstances of the case and law. *Zegel*, 2004 ME 31, ¶ 19, 843 A.2d at 23; *Lippitt*, 2014 ME 42, ¶ 16, 88 A.3d at 159. An agency acts arbitrarily when it reaches a conclusion unfounded on a rational factual basis. *Cent. Me. Power Co*., 281 A.2d at 242. A decision is unsupported by substantial evidence when, after reviewing the entire record, the decisionmaker could not fairly and reasonably find the facts as it did. *Int'l Paper Co.,* 1999 ME 135, ¶ 29, 737 A.2d 1047 at 1054.

First, DEP falsely asserts that Petitioners raise a novel issue in flagging DEP's failure to address Penobscot Nation's health disparities. 2d Resp't's Br. 18; *See* 1st Pet'rs' Br. 27 (citing Pet. for Review Ex. A, at 1). Petitioners' past briefing squarely raised this defect; this was "sufficient to alert" the agency to the argument, and to preserve that question for review. *Forest Ecology Network v. Land Use Regul. Comm'n*, 2012 ME 36, ¶ 26, 39 A.3d 74, 83–84.

Nor can DEP defend that omission on the merits. DEP's and Casella's position—that health disparities are irrelevant absent a direct causal link to JRL's pollution—reflects a fundamental misunderstanding of environmental justice, which requires consideration of cumulative burdens and community vulnerability, including existing health disparities. 2d Resp't's Br. 18; 2d Cas. Br. 18. Environmental justice evaluates cumulative environmental burdens through the "lens of human health and health equity."[10] For that reason, Petitioners need not establish the cause of the Nation's cervical and lung cancer rates for those disparities to be relevant. R. 2493. To the contrary, such disparities make the community more sensitive to additional environmental burdens and must be accounted for; accordingly, the EPA included such disparities in their own study of the Nation's environmental burdens. 2d Pet'rs' Br. 24; R. 2493. Moreover, DEP also failed to address that the Penobscot Nation is in the 99$^{th}$ percentile for asthma-related health indicators in the entire country, which is particularly relevant given that, based on environmental justice indicators, the Tribe is also in the 99$^{th}$ percentile for toxic releases in air. R. 1266, 1268.

Ignoring all these health disparities undermines both the purpose of a cumulative burden analysis and the statutory goal to avoid the creation or perpetuation of a sacrifice zone. 38 M.R.S. § 1310-AA(3)(E). DEP did not improperly weigh this evidence; it failed to meaningfully consider

[10] *Agency for Toxic Substances and Disease Registry*, Place and Health – Geospatial Research, Analysis, and Services Program (GRASP), Environmental Justice Index (Dec. 2, 2024) https://www.atsdr.cdc.gov/place-health/php/eji/index.html.

it at all. Because the environmental justice inquiry required evaluating cumulative burden through the lens of community vulnerability, DEP's failure to consider these disparities rendered its analysis arbitrary, an abuse of discretion, and unsupported by substantial evidence.

Casella attempts to argue that conducting an environmental justice analysis prohibits the consideration of the Penobscot Nation's particular circumstances, i.e. their elevated health risks and specific use of the River. 2d Cas. Br. 26–27. However, applying a general-population standard to a population with significantly higher exposure and vulnerability does not violate equal protection; it's common sense and ensures an agency's decision is grounded in reality, recognizing a community's actual exposure to, and legally recognized uses of, the affected, contaminated resource.

### E. DEP's Failure to Consider Most Relevant PFAS Compounds was a Legal Error.

DEP's failure to consider the PFAS compounds most prevalent in JRL's leachate renders its analysis arbitrary and capricious and an abuse of discretion, culminating in a decision unsupported by substantial evidence. An agency abuses its discretion when it unreasonably fails to address evidence bearing directly on the issue before it, or when its finding exceeds the bounds of reason. *Zegel*, 2004 ME 31, ¶ 19, 843 A.2d at 23; *Lippitt*, 2014 ME 42, ¶ 16, 88 A.3d at 159. An agency acts arbitrarily when its conclusion has no rational factual basis. *Cent. Me. Power Co*., 281 A.2d at 242. An agency's conclusions must be supported by evidence that a reasonable mind would rely on as sufficient support for said conclusions. *Osprey Fam. Tr.*, 2016 ME 89, ¶ 9, 141 A.3d at 1117.

Yet again, the State misconstrues Petitioners' argument to rebut a strawman version of it; Petitioners did not contend that it was unreasonable to examine PFOS levels in fish in the Penobscot River. 2d Resp't's Br. 18; 2d Cas. Br. 17–18. Rather, Petitioners argued, and maintain,

that it is unreasonable to not address the PFAS compounds that actually predominate in JRL's leachate: PFHxA, PFBS, PFBA, PFPeA, or PFHpA. 2d Pet'rs' Br. 24. Clearly, these are testable compounds, because they were found in JRL's leachate. *Id.* These are also short-chain compounds, which leachate treatment technology can struggle to capture. 1st Pet'rs' Br. 29. The Second PBD contains no meaningful discussion of those compounds' presence or bioaccumulation in the River. *Id*; R. 3155.

Notably, Petitioners could not have raised this exact issue in their initial briefing since the Department had not relied on the PFOS evidence until unilaterally supplementing the record for the Second PBD, choosing to neither conduct additional hearings nor open the decision for public comment. By ignoring the compounds most common in JRL's leachate, DEP failed to engage with the record in a reasoned manner, rendering its analysis arbitrary and an abuse of discretion.[11]

### F. DEP's Failure to Consider Toxics Beyond PFAS was a Legal Error.

DEP's failure to consider the full range of toxic contaminants in landfill leachate and gas renders its analysis arbitrary and capricious and an abuse of discretion, resulting in a decision unsupported by substantial evidence. An agency exceeds the bounds of its discretion where it fails to address evidence or inquire into an issue that is necessary to make a reasoned decision or unreasonably fails to consider facts and circumstances. *Zegel*, 2004 ME 31, ¶ 19, 843 A.2d at 23; *Lippitt*, 2014 ME 42, ¶ 16, 88 A.3d at 159. An agency acts arbitrarily when its conclusion has no rational factual basis. *Cent. Me. Power Co*., 281 A.2d at 242. A decision is unsupported by substantial evidence when, on the basis of all the testimony and exhibits before it, the agency could

[11] Nor is it adequate to respond, as Casella does, that PFAS levels in the Penobscot River have not yet reached "alarming levels" 2d Cas. Br. 7. First, the PFAS that *predominate* in JRL's leachate—PFHxA, PFBS, PFBA, PFPeA, or PFHpA—may have already reached alarming levels. Second, the current PFOS rates already pose a health risk to the tribe. Lastly, PFAS bioaccumulate; by the time levels are deemed "alarming" meaningful remediation will no longer be possible. 2d Pet'rs' Br. 7, 21, 24.

not fairly and reasonably find the facts as it did. *Int'l Paper Co.*, 1999 ME 135, ¶ 29, 737 A.2d at 1054.

Once again, the State falsely asserts that Petitioners are debuting a new argument in identifying that landfill leachate contains toxics beyond PFAS, and that the agency was required to consider the risk of those toxics entering the Penobscot River and the food system the Nation relies on. 2d Resp't's Br. 19. Petitioners have repeatedly raised the presence of both legacy and non-legacy toxics in landfill leachate and gas, including specifically dioxins, furan, and PCBs, as well as VOCs such as toluene, ethylbenzene, xylenes, and benzene, supported by expert evidence and record citations. 2d Pet'rs' Br. 25; *See also* Pet. for Review ¶ 35 (Sang-Yee Ham et al., 70 CHEMOSPHERE (2008)); *See* R. 1393 (CLF and Penobscot Nation Comment Letter (July 31, 2024)); *See* R. 1484–1485 (CLF and Penobscot Nation Comment Letter (Sept. 27, 2024)); Pet. for Review ¶ 100; 1st Pet'rs' Br. 30; *See also* R. 1381 (CLF and Penobscot Nation Comment Letter (July 31, 2024)); Pet. for Review ¶ 42; 1st Pet'rs' Br. 8–9.

Petitioners further emphasized—both in briefing and at oral argument—that even with PFAS controls, other toxics in the increased leachate would continue to enter the Penobscot River, and that treatment technologies themselves may introduce additional risks, including air emissions of PFAS, SVOCs, and VOCs. *See* Oral Argument at 10:50; 1st Pet'rs' Br. 30; R. 1495.

In their briefing, the State and Casella attempt to portray municipal solid waste leachate as a relatively simple liquid, comprised largely of PFAS and a waning set of industrial legacy toxics; this is contrary to the record. 2d Resp't's Br. 19; 2d Cas. Br. 21–22. The record demonstrates that landfill leachate is a complex, constantly shifting mixture of contaminants, including legacy industrial pollutants, VOCs (such as benzene, toluene, ethylbenzene, and xylenes), and SVOCs such as phthalate acid esters, contaminants which are associated with microplastics in the waste

stream. 1st Pet'rs' Br. 30; R. 1495. DEP's own consultants acknowledged that "treating landfill leachates containing PFAS is a challenging proposition" due to the "complex matrix" of "organic, inorganic, and other constituents." R. 2641, 2670.

Similarly, the record reflects that landfill gas contains additional toxics, including VOCs, PFAS, polycyclic aromatic hydrocarbons ("PAHs"), and methylmercury. R. 1495. These risks are particularly significant given that the Penobscot Nation is in the 99th percentile in Maine for the toxic releases to air EJ index; this means that these exposure levels combined with demographic vulnerability are higher for the Penobscot Nation than nearly all communities in the state. Moreover, the Penobscot Nation has some of the highest lung cancer rates in the State, and EPA's EJScreen data show that Indian Island is in the 99th percentile nationally for asthma-related health indicators. R. 1266, 1268, 2493.

The State's assertion that Petitioners failed to raise this issue before the remand is false and the agency's failure to meaningfully engage with this well-documented record evidence underscores the inadequacy of its environmental justice analysis. 2d Resp't's Br. 19. By ignoring the broader suite of contaminants and pathways at issue, DEP failed to evaluate the true scope of the cumulative environmental burden on the Nation, rendering its decision arbitrary, an abuse of discretion and unsupported by substantial evidence.

### G. Petitioners Do Not Seek to Apply a Zero Impact Standard.

DEP and Casella mischaracterize Petitioners' environmental justice argument as imposing a "zero impact" standard. 2d Resp't's Br. 20; 2d Cas. Br. 27. But the environmental justice criterion does not require the elimination of all impacts; it requires that an agency meaningfully assess whether a proposed project is compatible with ensuring environmental justice in light of the affected community's existing burdens.

Here, Petitioners' argument is that the Penobscot Nation has already been subjected to such disproportionate environmental harms—particularly from waste management pollution—that expanding the State's largest landfill is incompatible with ensuring environmental justice for a community whose identity and sustenance are inextricably tied to the Penobscot River. That conclusion is not based on any one single fact, nor does it demand the elimination of all impacts. Rather, it reflects the only fair and reasonable conclusion after considering all the evidence in the entire record, including the scale of the expansion, the nature of the landfill's leachate and its emissions, and the Nation's existing environmental and health burdens and unique environmental vulnerabilities.

The State's assertion that accepting Petitioners' argument would mean "no project would ever pass that test" ignores the uniquely severe factual circumstances presented here. 2d Resp't's Br. 20. This case involves the continued concentration of the State's waste and associated pollution in what the record reflects is among the most overburdened environmental justice communities in Maine—in the 99$^{th}$ percentile for toxic releases to air and wastewater discharge and the 98$^{th}$ for proximity to hazardous waste. R. 1266, 1268. The environmental justice standard does not prohibit all development, but it does prohibit projects that perpetuate or exacerbate extreme and disproportionate burdens on a vulnerable community. Order on 80C Appeal at 16.

Nor can Maine's waste capacity constraints alter that legal requirement. 2d Cas. Br. 5. However serious those constraints may be, they cannot rewrite the statutory environmental justice standard or justify a finding that an expansion, with these facts and circumstances, is consistent with ensuring environmental justice.

By reframing Petitioners' argument as a demand for "zero impact," DEP and Casella avoid confronting the actual issue: whether this expansion, in light of the Nation's existing cumulative

burdens, can be reconciled with the statutory requirement to ensure environmental justice. Where, as here, the record compels a contrary conclusion, the Court must set aside the agency's decision. *Osprey Fam. Tr.*, 2016 ME 89, ¶ 10, 141 A.3d at 1117. The record compels the conclusion that the expansion is inconsistent with ensuring environmental justice for the Penobscot Nation.

**H. MEPDES Permit Inadequately Addresses Toxics in Leachate beyond PFAS.**

The State asserts that the Nine Dragons' MEPDES permit addresses "legacy toxics," including dioxins, mercury, PCBs, and furans. 2d Resp't's Br. 19. But the State and Casella overstate the permit's protective value; it does not substitute for a meaningful analysis of the harms posed by non-PFAS toxics in JRL's leachate.

First, the permit does not directly regulate leachate. Rather, it governs overall facility effluent, which combines multiple wastewater streams, including process wastewater (which includes landfill leachate and stormwater), sanitary wastewater, and other wastewaters from the pulp and papermaking process. R. 740. Indeed, the most recent permit eliminated federal limitations and monitoring requirements specific to landfill leachate on the ground that it is a "minor waste stream" and that applicable leachate regulations do not apply to indirect dischargers. R. 738 ¶ 6. The permit therefore provides, at most, indirect and intermittent detection mechanisms—such as periodic scans and limited toxicity testing—but no leachate-specific monitoring or effluent limits designed to detect and mitigate increases in contaminants attributable to JRL leachate. R. 731–805.

Second, even apart from that structural limitation, the permit fails to address large categories of contaminants present in landfill leachate, including microplastics, pharmaceuticals, and endocrine disruptors such as BPA and plasticizers. And where the permit does include parameter-specific requirements for certain toxics, those provisions are narrow, fragmented, and largely monitoring-only. For example, dioxin and furan monitoring applies only to Outfall 100,

associated with the bleach plant, while PCB monitoring is tied to Outfall 001, associated with pulp production, and it is unclear whether either one applies to wastewater streams containing leachate. R. 743, 746, 769. Even if they do, those provisions impose no limits or mitigation requirements and therefore do nothing to reduce or control toxic discharges associated with leachate.

The Nine Dragons' permit thus provides only partial, indirect, and incomplete oversight of non-PFAS toxics in landfill leachate. It does not relieve the Department of its obligation to analyze—and mitigate—the impacts of those contaminants in conducting its environmental justice review. DEP's reliance on the permit as a substitute for such analysis—again, a post hoc rationalization for not assessing the multitude of toxics from JRL—was therefore unreasonable and renders its decision arbitrary and capricious.

## I. Casella's Claim that An Expansion is Necessary to Decrease PFAS in the Environment is False.

Casella states that if they are not permitted to expand JRL, they will not build a leachate treatment system and will therefore send more PFAS pollution into the Penobscot River. 2d Cas. Br. 23. In other words, Casella, a contractor operating a state asset, maintains there are only two potential outcomes: expansion with PFAS treatment, or no expansion and no PFAS treatment. *Id*. The ethical implications of this stance aside, this is a false dichotomy. There are numerous methods through which the State could still order PFAS treatment of JRL's leachate regardless of any expansion.

First, the State could modify Nine Dragons' existing wastewater discharge permit to impose PFAS effluent limits or require pretreatment of leachate before discharge.[12] R. 0762. Second, JRL operates under an existing solid waste license that DEP has authority to reopen or

[12] Under Maine law and the terms of Nine Dragons' MEPDES permit, the State has clear authority to require PFAS treatment of leachate or impose PFAS effluent limits. 38 M.R.S. § 414-A.

amend to add leachate treatment requirements and additional environmental controls based on emerging information about the risk of PFAS in leachate.[13] Third, Casella's contract with the State, their operating services agreement, is up for renewal in 2034, and DEP could work with the Bureau of General Services to amend the terms to require PFAS treatment of the leachate. R. 0922. Fourth, given the ongoing state regulation of forever chemicals, including L.D. 2070,[14] it is entirely plausible that the legislature will require PFAS treatment systems at all active state-owned landfills soon. The argument that Mainers, and specifically the Penobscot Nation, will only get pollution control if they accept more pollution, is a coercive tactic unfounded in both the law and reality.[15]

Lastly, Casella's argument that the expansion will actually *lessen* pollution once again overlooks the extensive toxics found in leachate beyond PFAS, ignores that increased leachate will mean more PFAS compounds that a treatment system may struggle to capture, and disregards the ample evidence that landfill gas is an equally hazardous vector for PFAS (and *other* toxics) as leachate. (*See* Sections C(2), E, F above).

## II. CONCLUSION

For the foregoing reasons, Petitioners request this Court rule that the Second PBD 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 Second PBD and find that the PBD Application does not satisfy the criteria of the PBD statute and regulations.

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[13] The Maine Board of Environmental Protection (the Board), at the request of the Commissioner of the DEP and after notice and opportunity for hearing, may modify any license in whole or in part, or issue an order prescribing necessary corrective action, whenever certain criteria are met, including when the licensed activity "poses a threat to human health or the environment," or when there has been a "change in any condition or circumstance" that requires modification of the license. 38 M.R.S. § 342(11-B)(C), (E) (as incorporated by 38 M.R.S. § 341-D(3) (2026)). *See also* 06-096 C.M.R. ch. 2, § 27(3).

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

[15] Once again, Casella ignores the toxics in leachate beyond PFAS and makes no attempt to address the increase in those toxics from greater amounts of leachate post-expansion.

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: June 24, 2026

Respectfully submitted,

THE PENOBSCOT NATION
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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 June 24, 2026 to the attorneys of record for Maine Department of Environmental Protection and NEWSME Landfill Operations, LLC.

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