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November 14, 2024

Via Email: Melanie.Loyzim@maine.gov

Commissioner Melanie Loyzim
Maine Department of Environmental Protection
17 State House Station 32 Blossom Lane
Augusta, Maine 04333

**Re: Case # PENSC-APP-2024-00014
The Penobscot Nation and Conservation Law Foundation Application for a Stay**

Dear Commissioner Loyzim:

Enclosed for your consideration is the Penobscot Nation and Conservation Law Foundation's Application for a Stay, pursuant to 5 M.R.S. § 11004, related to the above-referenced case filed in Penobscot County Superior Court on November 12, 2024.

Thank you for your assistance.

THE PENOBSCOT NATION,
CONSERVATION LAW FOUNDATION

By its attorneys,

A handwritten signature in blue ink that reads "Alexandra St. Pierre".

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STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Case # PENS-APP-2024-00014

In re: The Penobscot Nation and Conservation Law Foundation Appeal

PETITIONERS' APPLICATION FOR A STAY PUBLIC BENEFIT DETERMINATION

Pursuant to 5 M.R.S. § 11004, Plaintiffs the Penobscot Nation and Conservation Law Foundation, Inc. ("CLF") respectfully request that Maine Department of Environmental Protection ("MEDEP") stay the Approval with Conditions Public Benefit Determination ("PBD Approval") pending the resolution of Plaintiffs' appeal of MEDEP's PBD Approval for the expansion of the Juniper Ridge Landfill ("JRL"). Plaintiffs' appeal commenced in Penobscot County Superior Court, November 12, 2024, under Civil Action # PENS-APP-2024-00014. This application rests on the following grounds.

I. Introduction

Plaintiffs the Penobscot Nation and CLF request the stay of MEDEP's PBD Approval for the expansion of JRL, which MEDEP issued on October 2, 2024. JRL is owned by the Maine Department of Administrative and Financial Services' Bureau of General Services and is operated by NEWSME Landfill Operations, LLC, whose parent company is Casella Waste Systems (altogether "the Applicant"). *Juniper Ridge Landfill*, ME DEP'T OF ENV'T PROT., <https://www.maine.gov/dep/waste/juniperridge/index.html> (last visited Nov. 13, 2024); Sevee & Maher Engineers, *Application for a Determination of Public Benefit Juniper Ridge Landfill*

Expansion, ME BUREAU OF GEN. SERV. & NEWSME LANDFILL OPERATIONS, LLC (June 2024), available at https://www.maine.gov/dep/ftp/Juniper-Ridge/PBD2024/PBDapplication/20240607_APPLICATION%20FOR%20A%20DETERMINATION%20OF%20PUBLIC%20BENEFIT.pdf [hereinafter PBD Application]. MEDEP's PBD Approval found that the Applicant's proposed expansion would be consistent with the State Waste Plan and promoting the Solid Waste Management Hierarchy and consistent with ensuring environmental justice for the community in which the expansion is proposed, as long as several conditions are met. *In the Matter of State of Maine, Department of Administrative and Financial Services, Bureau of General Services Old Town, Penobscot County, Maine Juniper Ridge Landfill Expansion S-020700-W5-CV-N (Approval with Conditions): Public Benefit Determination*, ME. DEP'T OF ENV'T PROT. (Oct. 2, 2024), available at <https://www.maine.gov/dep/ftp/Juniper-Ridge/PBD2024/Juniper%20Ridge%20PBD%20S-020700-W5-CV-N.pdf> [hereinafter PBD Approval]. While a step in the right direction, the conditions do not suffice to bring the PBD Application in line with the statutory requirements for a positive determination. The PBD Approval is inconsistent with the State Waste Plan, the State's Solid Waste Management Hierarchy, and with ensuring environmental justice for the communities where the expansion is proposed. M.R.S. § 1310-AA(3).

A successful application for a stay must demonstrate that: (1) absent a stay the party will suffer irreparable injury; (2) there is a likelihood of success on the merits; and (3) adverse parties and the public will not be subject to substantial harm if the stay was granted. 5 M.R.S.A. §11004; *Two Bros., LLC v. State, Dept. of Health and Human Services*, No. AP 21-01, 2021 WL 1779909, at *1

(Me. Super. Jan. 21, 2021). MEDEP should grant the requested stay because, absent a stay, Plaintiffs will suffer irreparable injury, there is a likelihood of success on the merits, and neither adverse parties nor the public will be subject to substantial harm if the stay is granted.

II. Statement of Facts

A. JRL's Pollution Harms Surrounding Communities.

JRL has long placed an environmental burden on both the Penobscot Nation and neighboring residents of Old Town and Alton—the proposed expansion will substantially exacerbate that burden. The landfill poisons the Penobscot River, discharging toxic leachate, threatening river life and the Penobscot Nation. Crawford Engineers, Sevee & Maher Engineers, *Study to Assess Treatment Alternatives for Reducing PFAS in Leachate from State-Owned Landfills*, 36 STATE OF ME DEP'T OF ADMIN. AND FIN. SERVS., BUREAU OF GEN. SERVS. (Jan. 2023), available at <https://www.maine.gov/dafs/bgs/sites/maine.gov.dafs.bgs/files/inline-files/Resolves%202021%2C%20ch.%20172%20Study.pdf>. The Penobscot River holds enormous value for the members of the Penobscot Nation and this contamination of the river has significantly impeded the Nation's capacity to maintain their way of life, economic activities, and customary practices. *One Health Assessment: Fish Returning to the Penobscot River*, U.S. ENV'T PROT. AGENCY (Nov. 29, 2022), <https://www.epa.gov/sciencematters/one-health-assessment-fish-returning-penobscot-river>. The U.S. Environmental Protection Agency has found dioxin, furan, polychlorinated biphenyl, and per- and polyfluoroalkyl substances ("PFAS") at levels in the fish that pose health threats to children and adults who consume them. When tested, certain PFAS found in the JRL leachate were at levels 20 times greater than those legally allowed in drinking

water. Crawford, *Study to Assess Treatment Alternatives for Reducing PFAS*, ES-3 to ES-4. This polluting of traditional water and food sources of the Penobscot Nation is part of a larger web of disproportionate harm that the State’s landfilling has wrought on the Penobscot people for decades. Since Maine outlawed new commercial landfills in 1989, all three state-owned landfills were built along a 50-mile stretch of land “at the heart of the Penobscot Reservation.” Marina Schaffler, *Compound Injustice: PFAS may concentrate over time in landfills near the Penobscot Indian Reservation*, ME MONITOR, (Sept. 10, 2022), <https://themainemonitor.org/compound-injustice-pfas-may-concentrate-over-time-in-landfills-near-the-penobscot-indian-reservation/#:~:text=There%20are%20more%20than%20400%20closed%20municipal%20landfills,contaminants%20like%20PFAS%20into%20groundwater%20or%20surface%20waterways.> In addition, there are 72 closed landfills in the Penobscot River watershed; many of them are unlined landfills that easily leak toxins into groundwater. *Id.* The Maine Legislature has found and declared as law that the “preservation and restoration of the Penobscot River is of the highest priority.” 38 M.R.S. § 418-A(1).

Those living even closer to JRL have also suffered from the landfill’s pollution. Members of Old Town and Alton, the two towns containing JRL, have cited odors so strong they can “feel the smell in the back of [their] throat,” endured swelling lips and headaches on particularly bad days, and similar health effects from incidents like landfill fires. L. Sanborn Decl. ¶ 9; Spencer Decl. ¶ 8.¹

¹ All declarations cited herein are exhibits attached to Case # PENS-C-APP-2024-00014 Petition for Review filed on November 12, 2024, in Penobscot County Superior Court.

For both the Penobscot Nation and neighbors of JRL, the threat of PFAS looms large. In particular, municipal sludge is a highly toxic substance that has poisoned Maine’s farms, wells, and residents through its exorbitantly high levels of PFAS, but the residents of Old Town and Alton are now burdened with a gravely disproportionate amount of it. An Act to Prevent the Further Contamination of the Soils and Waters of the State with So-Called Forever Chemicals, H.P. 1417 – L.D. 1911(April 20, 2022) *available at* <https://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1417&item=8&snum=130>; *Analysis of Sludge and State-Owned Landfills as Public Utilities*, 7–8 ME DEP’T OF ENV’T PROT. (Jan. 2024), *available at* <https://www.maine.gov/tools/whatsnew/attach.php?id=12275717&an=1>. After banning the land application of sludge due to its highly toxic nature, Maine deemed JRL the dumping ground for the vast majority of the State’s untreated sludge. *Id.* The Applicant’s refusal herein to invest in dehydrating the sludge has meant the diminishing of more and more landfill capacity—both because they are dumping thousands of tons of watery sludge, and because they are “stabilizing” the sludge with thousands of tons of extra construction and demolition debris. Penobscot Nation and CLF Letter to MEDEP, *Application DEP# S-020700-W5-CV-N): Application for a Determination of Public Benefit Juniper Ridge Landfill Expansion*, ME DEP’T OF ENV’T PROT. (July 31, 2024), *available at* https://www.maine.gov/dep/ftp/Juniper-Ridge/PBD2024/comments/2024_07_31%20CLF%20and%20Penobscot%20Nation.pdf [hereinafter Penobscot Nation and CLF July 31 Letter]. MEDEP has recognized that JRL’s current practices run counter to the Solid Waste Management Hierarchy.

The 2024 State Waste Plan states that “investing in sludge dewatering facilities . . . may be a far more sustainable option in the long run than continuing to landfill larger amounts of construction and demolition debris (“CDD”) in order to accommodate landfilling of sludge.” *Maine Materials Management Plan: 2024 State Waste Management and Recycling Plan Update and 2022 Waste Generation and Disposal Capacity Report*, ME. DEP’T OF ENV’T PROT. 37 (Jan. 2024), available at <https://www.maine.gov/dep/publications/reports/index.html> [hereinafter State Waste Plan 2024]. More plainly MEDEP states that, “the current trajectory of sludge and CDD disposal encourages the expansion and use of landfilling.” State Waste Plan 2024 at 38. With all of this in mind and more, public opposition to the expansion of JRL has been powerful.

III. Argument

A. Irreparable Injury Would Result if the Conditioned PBD Approval is Not Stayed.

If this matter is not stayed on appeal, JRL will likely be either heading toward expansion or already expanding, increasing the existent harm the landfill inflicts on the surrounding community and the Penobscot Nation.

Irreparable injury is an “injury for which there is no adequate remedy at law.” *Bangor Historic Track, Inc. v. Dep’t of Agriculture, Food & Rural Resources*, 2003 ME 140, ¶10, 837 A.2d 129, 133. Plaintiffs must show that irreparable injury will be likely absent a stay. *Nextera Energy Resources LLC v. Maine Dept. of Environmental Protection*, No. KEN-AP-20-27, 2021 WL 9349108, at *1 (Me. Super. Jan. 08, 2021). The potential for ongoing construction alone has been

found to constitute irreparable injury when it would interfere with the plaintiff’s quiet enjoyment of their property. *Mills v. Town of Bar Harbor*, No. BANSC AP-19-18, 2019 WL 6902669, at *7 (Me. Super. Nov. 27, 2019).

There is no legal remedy to rectify the harms that would arise should JRL expand or begin expansion. The Penobscot River will be further eroded by PFAS, which are duly called “forever chemicals” since they persist indefinitely. The connection between the Penobscot River and the Penobscot Nation is intricate and important beyond measure. The disparate harm this Indigenous Nation has suffered and continues to suffer is a violation of their right to be protected from the environmental pollution and to live in and enjoy a clean and healthful environment.

Penobscot Nation and CLF July 31 Letter.

Other neighbors of JRL will also be irreparably harmed if this expansion proceeds during the appeal process. As one resident stated, the size of this expansion is a “whole new landfill.” L. Sanborn Decl. ¶ 21. Construction of the expansion alone will increase odors, loud noises and truck emissions for the landfill’s neighbors, hampering their ability to enjoy their properties—as such construction at JRL has proven to do in the past. L. Sanborn Decl. ¶ 11; Spencer Decl. ¶ 9. In sum, the Mainers now suffering the effects of JRL’s pollution would be irreparably injured by the aggravation of the pollution they endure if this matter is not stayed on appeal and the landfill expansion proceeds. A larger landfill footprint will create more air pollution and more toxic discharge—that much is certain.

B. Plaintiffs Have a Likelihood of Success on the Merits.

The PBD Application did not meet the standards for a positive determination because the expansion would be both inconsistent with ensuring environmental justice for the parties where the expansion is proposed and inconsistent with the State Waste Plan and Solid Waste Management Hierarchy.

A likelihood of success on the merits is “at most, a probability; at least, a substantial possibility.” *Jones v. Sec’y of State*, 2020 ME 117, ¶ 2, 239 A.3d 628, 630; *Suzman v. Harvey*, No. AP-07-78, 2008 WL 4106414 (Me. Super. May 05, 2008). Plaintiffs are likely to succeed on the merits.

Firstly, the PBD Approval would deny the Penobscot Nation and other neighboring residents the right to be protected from environmental pollution. Expanding JRL under the terms of the PBD Approval would deprive these communities of equal protection with respect to the implementation of waste management decisions, as required by law. 8 MRSA § 1310-AA(3)(E). The expansion would primarily burden the Penobscot Nation and the communities of Old Town and Alton, all of whom already bear the burden of a landfill that accepts 52% of Maine’s solid waste. 38 MRSA § 1310-AA(3)(E); An Act To Protect the Health and Welfare of Maine Communities and Reduce Harmful Solid Waste, S.P. 523 - L.D. 1639 (April 18, 2022), *available at* https://legislature.maine.gov/bills/display_ps.asp?PID=1456&snum=131&paper=SP0656. Moreover, the conditions that MEDEP has put forth in their conditional approval do not suffice to ensure environmental justice for the surrounding communities. In particular, the increase in PFAS contamination that would result from an expansion of JRL remains a serious threat to the Penobscot Nation. MEDEP attempted to resolve this by conditioning their approval on the

implementation of a PFAS remediation system for the landfill's leachate, but this condition lacks the necessary success criteria and safeguards to ensure equal protection of the Penobscot Nation. As it stands, the proposed expansion would only perpetuate environmental *injustice* on the Penobscot Nation. Moreover, those living closest to the landfill already suffer diminished quality of life from the odors of potentially toxic gases, headaches and other physical reactions to the pollution. The proposed expansion would compound these injustices. Incidents like landfill fires have affected the residents of Old Town, Alton, and Penobscot members alike. L. Sanborn Decl. ¶ 18; Spencer Decl. ¶¶ 14, 16; Penobscot Nation Decl. ¶ 17. MEDEP's approval of the PBD Application, as it stands, would perpetuate environmental injustice in violation of the statutory criteria. 38 MRSA § 1310-AA(3)(E).

Secondly, the PBD Application does not promote the State Waste Plan and Hierarchy, as required for a positive determination. 06-096 C.M.R. ch. 400, § 4(N)(1). By statute, waste reduction, including both amount and toxicity of waste, and waste diversion must be actively promoted as the highest priority, while landfilling is the last. 38 M.R.S. § 2101. Contrary to this statutory hierarchy, the landfill operator's management of JRL has filled up this state-owned landfill with out-of-state waste, toxic construction and demolition debris, and huge volumes of untreated sludge. Penobscot Nation and CLF July 31 Letter. To resolve the inconsistency of the expansion with the State Waste Plan and Hierarchy, conditions must be placed on the management of JRL itself. These conditions must increase waste diversion and reduce the volume of waste landfilled at JRL. In particular, the State Waste Plan clearly establishes that JRL's current practice of acquiring more and more CDD to balance out the voluminous sludge will simply encourage more landfilling and expansions. The State Plan establishes that investing in sludge dewatering is

the sustainable solution to stopping the unfettered filling of JRL with CDD. State Waste Plan 2024 at 38. Based on the above, it is plain to see that *not* mandating dewatering of the sludge is inconsistent with the State Waste Plan.

No such conditions were imposed in the PBD Approval. Because the PBD Application is inconsistent with ensuring environmental justice and runs counter to the State Waste Plan and Solid Waste Management Hierarchy, the PBD Approval is likely to be found contrary to the legal requisites for a positive public benefits determination. Specifically, the PBD approval was made upon unlawful procedure, affected by error of law, unsupported by substantial evidence on the whole record, and/or arbitrary, capricious, or characterized by an abuse of discretion.

C. A Stay Would Cause No Substantial Harm to Adverse Parties of the General Public.

A stay of the PBD Approval would cause no substantial harm to the adverse parties or to the general public. On the contrary, the public, including the Penobscot Nation, has a significant interest in the health and safety of their population and communities. There is a pressing public interest in decreasing the burden JRL has and will have, absent the stay on this pending appeal. There is also a pressing public interest in ensuring that the State Waste Plan and Solid Waste Management Hierarchy is promoted in any approved PBD, as required by law. The expansion of the landfill is a threat to the public, and this stay will not have a harmful effect on the public interest.

Additionally, there will be no substantial harm to the Applicant by staying the PBD on appeal; on the contrary, a stay would ensure the avoidance of wasteful spending. Absent a stay, the Applicant could start expanding the landfill, spending important resources on a project that could later be deemed unlawful through a successful appeal. Alternatively, absent a stay the

the Applicant could move forward with an expansion in a manner that runs contrary to additional legal conditions that a successful appeal could result in. This too would result in the Applicant wasting resources. The next major and imminent stage in the landfill expansion process is the filing of a landfill expansion application, a resource intensive process that would also not be in the Applicant's interest if the PBD is deemed unlawful, or new conditions are required. It is in the Applicant's interest to move forward only once the legality of the PBD is definitively decided.

IV. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that MEDEP grant a stay of the PBD Approval pending the resolution of Plaintiffs' appeal of such in Superior Court.

Dated: November 14, 2024.

Respectfully submitted,

THE PENOBSCOT NATION,
CONSERVATION LAW FOUNDATION

By its attorneys,



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