



JANET T. MILLS
GOVERNOR

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM
COMMISSIONER

Transmitted Via Electronic Mail

December 20, 2024

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Re: The Penobscot Nation and Conservation Law Foundation Application for a Stay, Juniper Ridge Landfill Public Benefit Determination, S-020700-W5-CV-N

Dear Alexandra Enriquez St. Pierre, Esq. and Nora Bosworth, Esq.:

Please accept this letter as my decision on behalf of the Department of Environmental Protection (Department) on your pending, request for a stay of the October 2, 2024 Public Benefit Determination (PBD) for a proposed expansion of the Juniper Ridge Landfill (JRL) in Old Town, Maine. I have also reviewed the November 22, 2024 Letter submitted by New England Waste Services of Maine (NEWSME) Landfill Operations, LLC in opposition to the stay request as well as your December 5, 2024 Letter in response to NEWSME Landfill Operations, LLC's opposition. The following outlines the procedural background, the stay criteria in Maine law, a brief description of the arguments, clarification on the purpose of a PBD, and a discussion of the stay criteria relative to your request.

A. Procedural Background

Pursuant to *Public Benefit Determination*, 38 M.R.S. § 1310-AA and the Maine Solid Waste Management Rules: *General Provisions*, 06-096 C.M.R. ch. 400, § 5, proposals for new or expanded solid waste disposal facilities must be found to provide a substantial public benefit prior to an applicant submitting an application under 38 M.R.S. § 1310-N. The standards for such a determination are outlined in 38 M.R.S. § 1310-AA and 06-096 C.M.R. ch. 400, § 5. In accordance with 06-096 C.M.R. ch. 400, § 5(G), the Commissioner of the Department shall issue a decision within 60 days of receipt of a PBD application. The Department issued a PBD for a proposed expansion of JRL on

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October 2, 2024. The Penobscot Nation and Conservation Law Foundation (CLF) filed a petition for judicial review of the Department's PBD in Penobscot Superior Court on November 12, 2024. An application for a stay was subsequently received by the Department from the Penobscot Nation and CLF on November 14, 2024.

B. Stay Criteria

The Maine Administrative Procedure Act, 5 M.R.S § 11004 outlines the criteria for obtaining a stay of an agency's decision pending a judicial review. The filing of an appeal does not operate to stay a decision issued by the Department. Petitioners seeking a stay (here the Penobscot Nation and CLF) must demonstrate that: (1) failure to obtain a stay will result in irreparable harm to the petitioners, (2) there is a strong likelihood of success on the merits of the petitioners' appeal, and (3) the issuance of a stay will result in no substantial harm to adverse parties or the general public. The petitioners must satisfy all three criteria to obtain a stay. Most importantly, the burden of demonstrating that all three criteria are met rests with the petitioners.

C. Arguments

In support of the stay request, with respect to irreparable harm, the Penobscot Nation and CLF argue that if the PBD is not stayed that "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." The Penobscot Nation and CLF also note that "should JRL expand or begin expansion[, t]he Penobscot River will be further eroded by PFAS..." With regard to the likelihood of success on the merits of their appeal, the Penobscot Nation and CLF argue that "the PBD Approval would deny the Penobscot Nation and other neighboring residents the right to be protected from environmental pollution" and "the increase in PFAS contamination that would result from an expansion of JRL remains a serious threat." Further, the petitioners allege that the PBD "lacks the necessary success criteria and safeguards to ensure equal protection of the Penobscot Nation" even with the PBD's condition requiring the applicant to install a PFAS leachate treatment system. The petitioners also claim that the PBD Approval "does not promote the State Waste Plan and Hierarchy" because it does not require dewatering of sludge. Lastly, the Penobscot Nation and CLF state that a stay of the PBD would not cause substantial harm to the adverse parties or to the general public because the public have a "significant interest in the health and safety of their population and communities" and "a stay would ensure the avoidance of wasteful spending by the applicant."

D. Clarification of the Purpose of a Public Benefit Determination

The Department's issuance of the PBD means that the Department has determined that the proposed expansion would provide a substantial public benefit. It is not an approval of the proposed landfill expansion. An application for the proposed expansion must be submitted and must go through a separate licensing process which will provide an

opportunity for public participation. The petitioners' statement that "without a stay of the PBD, JRL is 'likely either heading toward expansion or already expanding'" is incorrect because the Department has not received, let alone reviewed for approval, an application for expansion.

E. Discussion of Stay Criteria Relative to the Request

Upon review of your request for a stay, I am not persuaded that the Penobscot Nation and CLF have satisfied any of the three parts of the standard required for my granting of a stay, each of which is independently required.

1. Irreparable Harm to Petitioners

The Penobscot Nation and CLF must demonstrate that there will be irreparable harm to petitioners if the PBD is not stayed. In its argument petitioners bring up the following allegations to support this claim:

- Construction would interfere with the petitioners' quiet enjoyment of their property due to increased traffic, noise, and truck emissions;
- Expansion of the landfill will cause PFAS to further "erode" the health of the Penobscot River; and
- A larger landfill footprint will cause more toxic discharge.

The petitioners allege that these harms would flow from the expansion of the landfill. As explained above, the issuance of the PBD simply authorizes the submittal of an application to proceed with the expansion licensing process. It does not allow expansion to begin or otherwise change the terms of the existing license held by JRL.

After the Department receives an application to expand JRL, inherent in Maine's statutes governing the Department's review of such an application are requirements to evaluate noise, emissions, traffic, and other potential environmental impacts of the proposed construction.

Similarly, the petitioners' allegation that PFAS discharges in connection with an expansion would further erode the health of the Penobscot River does not demonstrate that they will suffer irreparable harm absent a stay of the PBD. Furthermore, the Department conditioned the PBD to require leachate treatment for PFAS as a requirement of the expansion specifically to mitigate any impacts to the Penobscot River. Petitioners have not shown why this condition is not appropriate or why it does not protect petitioners from irreparable harm. To the extent they wish to advocate for additional conditions on any proposed landfill expansion, they will be able to do so during the public process after a license application for expansion is filed.

Finally, petitioners allege that a large landfill footprint will result in a larger toxic discharge. Again, this alleged harm presupposes an expansion that has not been

licensed. It also does not take into account that an expansion, if approved, would require as a condition of the PBD that the leachate be treated for PFAS. Where treatment occurs, the toxic discharges are mitigated.

Petitioners express concerns in their December 2024 Letter that harm would result from “any construction and the ultimate expansion of operations that might be contrary to additional legal conditions obtained as a result of this appeal (i.e., proceeding (i) with an inadequate PFAS treatment system; (ii) without requiring the drying of sludge; (iii) without an annual fill rate; and (iv) without a cap on construction and demolition debris fines).” Again, the issuance of the PBD does not license an expansion or permit construction to begin, so denial of a stay will not trigger any of these alleged harms. The Department will be able to evaluate these items in more depth when a license application (which must include design and operational plans) is submitted.

In fact, all of the items identified by petitioners as a basis for a stay are routine components of a licensing process that will be evaluated and discussed in further detail once an application has been received by the Department. The licensing process also provides additional opportunities for public input. For these reasons, I believe that petitioners are incorrect in stating that they will be irreparably harmed if the PBD is not stayed. For all of these reasons, I find that the petitioners have not met their burden of showing irreparable harm.

2. Likelihood of Success on the Merits of Petitioners’ Appeal

The Penobscot Nation and CLF must demonstrate that there is a strong likelihood of success on the merits of their appeal. Petitioners allege that the PBD “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.” The petitioners do not articulate how the PBD was affected by any unlawful procedure, unsupported by substantial evidence, or arbitrary, capricious, or an abuse of discretion. In their December 2024 Letter, the petitioners argue that they are likely to succeed on the merits of their claim because the Department committed “errors of law” by finding in the PBD that:

- The proposed project is not inconsistent with ensuring environmental justice (EJ) for petitioners; and
- The proposed project is consistent with the State’s solid waste management plan and promotes the solid waste management hierarchy.

In that same letter, the petitioners argue that the PBD “does not adequately take into account the considerations of the community so as to ensure meaningful engagement;” however, this ignores all the thoughtful community engagement that the Department afforded to the public prior to issuing the PBD including:

- Multiple letters sent directly to the Penobscot Nation’s soliciting input from the Penobscot Nation (to which the Department did not receive responses); and

- Multiple public meetings held both virtually and in person as well as acceptance of written comments to hear concerns from citizens.

Moreover, specific safeguards were integrated into the PBD as conditions based upon the Department's thoughtful and comprehensive review of the concerns expressed by the public from public engagement as outlined above.

Also in their December 2024 Letter, the petitioners argue that the PBD does not sufficiently protect the surrounding communities from environmental harm. While the petitioners appear to disagree with the PBD's finding that the proposed project is not inconsistent with ensuring environmental justice for the community in which the facility is proposed, they do not clearly state how that finding was an error of law. I am not persuaded that the PBD's finding was based on an error of law.

With respect to consistency with the solid waste management plan and hierarchy, the only claimed errors of law the petitioners mention are that the Department should have conditioned the PBD on sludge dewatering and should not have considered programs at Casella's other facilities. The Department considered sludge dewatering and addressed the subject in the PBD. While the petitioners appear to disagree with the Department about the viability of placing such a condition on JRL at this time, I am not persuaded that the Department committed any error of law.

For these reasons above, I find that the petitioners have not met their burden of showing that they are likely to succeed on the merits of their appeal.

3. Harm to Adverse Parties or the General Public

The Penobscot Nation and CLF must demonstrate that the issuance of a stay will result in no substantial harm to adverse parties or the general public. The Penobscot Nation and CLF argue that a stay of the PBD:

- Would cause no substantial harm to adverse parties or the general public;
- That there is pressing public interest in decreasing the burden JRL has; and
- That a stay would ensure the avoidance of wasteful spending by the applicant.

Petitioners have not demonstrated that there is no substantial harm to the general public by staying the PBD and thereby delaying the submission of an expansion application. The 2024 Maine Materials Management Plan clearly outlined a need for expanded landfill capacity in Maine and particularly at JRL to address the overall management of solid waste within Maine. The process of reviewing an expansion application is an opportunity for the Department to determine whether and how JRL can be expanded in a manner that protects the environment, public health and welfare. Delaying the application process would only harm the general public because sufficient capacity to manage solid waste generated in Maine must be in place before Maine's landfill capacity is exhausted.

Regarding decreasing JRL's burdens or wasteful spending by the applicant, the owner of the JRL anticipates submitting a landfill expansion application to the Department in early 2025 and has already initiated public outreach. The application is likely already prepared and resources already expended. Moreover, as explained above, the Department finds that the petitioners are unlikely to succeed on the merits of their appeal and, therefore, that a stay will only delay the submission of a license application for landfill expansion.

I disagree with petitioners' assertions and believe that the requested stay is at odds with promoting the needs of the general public concerning waste management. For these reasons, I find that the petitioners have not met their burden of showing that the requested stay would cause no substantial harm to adverse parties or the general public.

For all the reasons noted above, the Penobscot Nation and CLF have not adequately demonstrated that they have met the criteria necessary to justify a stay of the PBD. Accordingly, the stay request of the Penobscot Nation and CLF is denied. I appreciate you reaching out to me with your request.

Sincerely,

A handwritten signature in blue ink, appearing to read "Melanie Loyzim".

Melanie Loyzim
Commissioner

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