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December 5, 2024

Via Electronic Mail: Valerie.A.Wright@maine.gov

Commissioner Melanie Loyzim
c/o Attorney Valerie A. Wright
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's Application for Stay

Dear Commissioner Loyzim:

Enclosed for your consideration is the Penobscot Nation and Conservation Law Foundation's reply to NEWSME Landfill Operations LLC's opposition to the Penobscot Nation and Conservation Law Foundation's Application for Stay related to the above-referenced case.

Thank you for your assistance.

THE PENOBSCOT NATION,
CONSERVATION LAW FOUNDATION

By its attorneys,

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

PETITIONERS' REPLY TO THE OPPOSITION TO APPLICATION FOR A STAY OF PUBLIC BENEFIT DETERMINATION

The Penobscot Nation and Conservation Law Foundation ("CLF") (altogether "Petitioners") hereby respond to the NEWSME Landfill Operations, LLC's ("NEWSME") November 22, 2024 Opposition to Petitioner's Application for Stay of the Maine Department of Environmental Protection's ("MEDEP") Public Benefit Determination ("PBD Approval") for the expansion of the Juniper Ridge Landfill ("JRL") and respectfully request that MEDEP grant the Petitioners' requested stay. Petitioners have met all the statutory requirements for a stay.

I. Petitioners Have Shown Irreparable Injury.

As an initial matter, NEWSME has misstated the standard for irreparable injury in an application for stay. "'Irreparable injury' is defined as 'injury for which there is no adequate remedy at law.'" *Bangor Historic Track, Inc. v. Dep't of Agric.*, 2003 ME 140, ¶ 10, 837 A.2d 129, 133 (quoting *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980)). NEWSME's opposition claims that "irreparable harm must be immediate" and cites *Stanley v. Towne of Greene*. Stay Opposition at 2. However, "irreparable" harm in *Stanley v. Towne of Greene* is defined in reference to M.R. Civ. P. 65(a)—which sets forth the requirements for granting a temporary restraining order without written or oral notice to an opposing party, not stays pursuant to 5 M.R.S. § 11004—and which specifically requires *both* "immediate and irreparable harm." *Id.* Thus, in considering whether the Application for Stay adequately asserts "irreparable injury to petitioner," as is required by 5 M.R.S. § 11004, immediacy is simply not a requirement.

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Stanley v. Town of Greene, 2015 ME 69, ¶ 13, 117 A.3d 600, 604 ("Irreparable injury is defined as injury for which there is no adequate remedy at law.") (quoting *Bangor Historic Track, Inc.*, 2003 ME 140, ¶ 10, 837 A.2d 129).

Moreover, Petitioners have shown that there is no adequate remedy at law for their injury if the PBD Approval is not stayed. *See* Stay Application at 6–7. NEWSME misstates Petitioners' position by stating their claim of irreparable injury treats "the permit process as a forgone conclusion." Stay Opposition at 2. Petitioners do not assert that without a stay of the PBD, JRL is "likely . . . already expanding;" Petitioners argue that without a stay of the PBD, JRL is "likely either heading toward expansion or already expanding." Stay Application at 6. Thus, while the Petition for Review is proceeding through the judicial system, the Penobscot Nation and CLF want to prevent the harm caused by the entire JRL expansion process—including the harm caused by the licensing process proceeding without a proper PBD in place, as well as the harm 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). Instead, the Opposition wants MEDEP to gamble that the expansion process will not be able to cause irreparable injury before the judicial review is complete. The Penobscot Nation and other impacted communities are left to bear the brunt of that gamble.

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II. Petitioners Are Likely to Succeed on the Merits.

A "likelihood of success on the merits" simply means "at most, a probability; at least, a substantial possibility," that Petitioners will prevail. *Jones v. Sec'y of State*, 2020 ME 117, ¶ 2, 239 A.3d 628, 630. The Penobscot Nation and CLF have done so.

A. Petitioners Have Shown "At Least a Substantial Possibility" that the PBD Approval is Affected by an Error of Law.

NEWSME's opposition argues that the Penobscot Nation and CLF did not identify any error of law affecting the PBD Approval. Stay Opposition at 3. However, Petitioners clearly explain that the PBD Approval relies on multiple errors of law. For example, Petitioners identify that the PBD Approval is inconsistent with ensuring environmental justice as it directly contradicts 38 M.R.S. § 1310-AA(3)(E), which requires the final PBD to ensure that the proposed project is *not* inconsistent with environmental justice. Stay Application at 8.

Because the term is defined so broadly in statute, "environmental justice" remains an ambiguous term, *see* 38 M.R.S. § 1310-AA(3)(E) ("'Environmental justice' 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."), and this is the first time MEDEP is interpreting and implementing this statutory provision. Petitioners are likely to succeed on the merits because Petitioners will show (and have shown in detail through their three comment letters during the PBD public comment process, the Petition for Review, and the Application for Stay) that MEDEP's PBD Approval does not adequately take into account the considerations of the community so as to ensure meaningful engagement and does not sufficiently protect the surrounding communities from environmental

harm. *International Paper Co. v. Board of Envt'l Prot.*, 1999 ME 135, ¶ 13–14, 737 A.2d 1047 (finding that the court will not uphold an agency interpretation if the "language and purpose of the statute" contradict the interpretation, and the resulting decision is based on that erroneous interpretation). Accordingly, the Penobscot Nation and CLF have *at least* a substantial possibility of succeeding on the merits.

Another example of Petitioners demonstrating an error of law on which they are likely to succeed is the PBD Approval's inconsistency with the State Waste Plan and Hierarchy. Stay Application at 9. Statute requires that the "proposed facility . . . is consistent with the state waste management and recycling plan and promotes the solid waste management hierarchy as set out in section 2101." 38 M.R.S. § 1310-AA(3)(B). The implementing regulations further specify that a solid waste disposal facility must show that "waste has been reduced, reused, recycled, composted, and/or processed to the maximum extent practicable prior to landfilling." 06-096 C.M.R. ch. 400, § (4)(N)(2)(a). This clear language required MEDEP to consider what is happening *at the facility*—JRL—to reduce, reuse, recycle, and compost. However, MEDEP departs from the clear statutory language when it looks to Casella's *other* facilities for "existing programs" to meet this requirement, which violates the clear intent of the statute and is an error of law. Additionally, the implementing regulations required the waste entering JRL to be reduced, reused or recycled to the maximum extent practicable, and the conditions in the PBD either do not directly relate to the waste entering JRL, or do not uphold the standard of waste reduction to a maximum practicable extent. PBD Approval at 14. Accordingly, the Penobscot Nation and CLF are likely to succeed on the merits.

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B. Petitioners Have Shown "At Least a Substantial Possibility" that the PBD Approval is Not Supported by Substantial Evidence and/or is Arbitrary and Capricious.

"Substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion." *Richard v. Sec'y of State*, 2018 ME 122, ¶ 21, 192 A.3d 611, 616 (quoting *Osprey Family Tr. v. Town of Owls Head*, 2016 ME 89, ¶ 9, 141 A.3d 1114). NEWSME's opposition argues that the PBD Approval has "competent evidence in the record to support [the Department's] decision." Stay Opposition at 3. However, the evidence before MEDEP is insufficient to conclude the proposed expansion is consistent with the Waste Plan and Hierarchy and environmental justice and is therefore arbitrary and capricious. Petitioners have at least a substantial possibility of succeeding on the merits.

Regarding the Waste Plan and Hierarchy, the PBD Approval states, "A solid waste disposal facility must show that waste has been reduced, reused, recycled, composted, and/or processed to the maximum extent practicable prior to landfilling. The greatest amount of waste must be handled through means as high on the Hierarchy as possible without causing unreasonable increases in facility operating costs or unreasonable impacts on other aspects of facility operation." PBD Approval at 14. However, NEWSME's management of JRL contradicts the statutory Hierarchy by filling JRL with out-of-state waste, toxic construction and demolition debris, and huge volumes of undried sludge. *See* Stay Application at 9.

The Penobscot Nation and CLF also clearly lay out that consistency with the State Waste Plan and Solid Waste Hierarchy requires drying the sludge to reduce the fill rate and reduce the need for out-of-state waste and construction and demolition debris, Stay Application at 9–10, and the PBD Approval itself confirms that this is going to be a viable action at the time of the proposed

JRL expansion. PBD Approval at 15. Despite this, the PBD Approval does not include drying of sludge as a condition in the PBD Approval. *Id.* In both instances, the PBD Approval clearly lacks substantial evidence for making such decisions given that no "reasonable mind would rely on that evidence as sufficient support" that the application was aligned with the State's Waste Plan and Solid Waste Hierarchy. *Richard v. Sec'y of State*, 2018 ME 122, ¶ 21, 192 A.3d 611.

Moreover, it is unreasonable for the PBD Approval to find that environmental justice is ensured for the Penobscot Nation and other affected communities based only on NEWSME's assertions, which does not show that environmental justice is ensured by current landfill operations, let alone expansion operations. Specifically, the PBD Approval identifies that even without consideration of PFAS contamination from leachate released at the Nine Dragons outfall, Maine has already "established safe eating guidelines for fish from the Penobscot River" to "no more than two meals per month of any fish species." PBD Approval at 18. Despite this existing concern about the safety of consuming fish from the Penobscot River because of existing contaminants, there is no additional evidence that the sustenance rights of the Penobscot Nation will not be further impeded by additional exposure to harmful PFAS due to the expansion. Instead, NEWSME claims that the JRL expansion is the only way to begin treating PFAS. NEWSME states, "If the expansion is not allowed, then no PFAS remediation system would be installed at all;" however, this is a choice entirely within NEWSME's control. Stay Opposition at 9. There is absolutely nothing prohibiting NEWSME from protecting the Penobscot Nation and other local communities from its PFAS pollution *now*. *Id.* at 6. Accordingly, based on the evidence in the record as a whole, no reasonable person could conclude that the expansion is consistent with environmental justice and Petitioners are likely to succeed on the merits.

III. Conclusion

For the foregoing reasons, the Penobscot Nation and CLF reiterate their request that the MEDEP grant their Application for Stay.

Dated this 5th day of December 2024.

THE PENOBSCOT NATION,
CONSERVATION LAW FOUNDATION

By its attorneys,

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