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September 18, 2018

**Via E-Mail and U.S. Mail**

Linda J. Butler  
Licensing and Compliance Specialist, Div. of Technical Services  
Maine Department of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017

Re: Application for Public Benefit Determination for the Proposed Expansion of the Crossroads Landfill in Norridgewock, Maine

Dear Linda:

On behalf of Waste Management Disposal Services of Maine (WMDSM), the following responds to the September 5, 2018 comments filed by NEWSME Landfill Operations, LLC (NEWSME), the operator of the Juniper Ridge Landfill (JRL). NEWSME is a subsidiary of Casella Waste Systems, Inc. (“Casella”).

A. Projected Fill Rate of the Phase 14 Expansion

The Phase 8 area was designed and permitted based on a projected fill rate of 455,000 tons per year. See April 3, 2001 WMDSM Public Benefit Determination for Phase 8 Expansion. The Phase 14 area is being designed and permitted based on a similar projected fill rate of 450,000 tons. Although Phase 14 is being designed to operate with a fill rate that is slightly less than what was approved for Phase 8, the actual fill rate is expected to vary. NEWSME knows that annual rates fluctuate, sometimes significantly, based on a multitude of factors including economic growth or slowdown as well as activities occurring in the waste management industry. For example, the annual fill rate for the Crossroads Facility since Phase 8 commenced accepting waste in 2004 has ranged from 245,803 to 447,097 tons. Thus, while Phase 14 contemplates an increase over the 2016 fill rate referenced by NEWSME in its comments,<sup>1</sup> it is consistent with the existing Phase 8 license and the expectations for future growth and disposal needs. It is substantially less than the projected annual fill rate of 899,000-935,000 cubic yards of capacity for the recently approved JRL expansion. June, 2017 JRL Solid Waste License at p. 6 (9.35 million cubic yard expansion that would extend the site life by 10-12 years). Importantly, like it

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<sup>1</sup> NEWSME argues the Phase 14 public benefit demonstration application seeks a 35% increase in the annual tonnage rate when compared to the fill rate for 2016. That is not the case. NEWSME has conflated tons and cubic yards. The 2016 fill rate in tons was 351,342. The Phase 14 public benefit application projects an annual fill rate of 450,000 tons, which represents less than a 30% increase over the 2016 fill rate.

has done with Phase 8, WMDSM will utilize capacity judiciously and annual fill rates may be less than projected.

NEWSME also selectively picks numbers to suggest that disposal of municipal solid waste (MSW) at Crossroads will increase to 137,700 tons annually. There is no data to support that projection and it is not the intent of WMDSME. As stated in its application, WMDSM is not actively seeking to expand its MSW customer base and does not expect overall MSW volumes to increase significantly. Phase 14 will essentially represent a continuation, and not necessarily an expansion of the Crossroads disposal operation and the role it plays in the State. MSW volumes will be affected by economic growth and recycling rates, factors that NEWSME has cited in support of its own application to accept increasing volumes of MSW at JRL.

Finally, making predictions based on one or two years of data is often times misleading. Disposal volumes fluctuate over time and, as a result, WMDSM believes it is more appropriate to evaluate longer term trends and data and to refrain from using individual data points as a basis for drawing broader conclusions, as NEWSME does in its comments.

#### B. Supra-Competitive Pricing

NEWSME suggests that even if JRL provided the only available landfill capacity in Maine it would not pose a risk of supra-competitive pricing because it is subject to a tipping fee price cap pursuant to its operating agreement with the State. First, that cap could be lifted and is not subject to control by the Department as part of its licensing authority. Second, although there may be a cap on tip fees, Casella is vertically integrated and is not subject to a cap on the transportation portion of the services it provides, including transportation for waste disposed of at JRL. As a result, the impact of the cap on tip fees at JRL is uncertain. Casella also suggests that if JRL is subject to limits on waste, such as a limit on oversized bulky waste (OBW) or MSW, and WMDSM is not subject to the same limits, that supra-competitive pricing is a real risk for those waste generators that may be forced to use the Crossroads Facility. We are not aware of any evidence that JRL has been unable to compete to accept wastes in Maine and, to the contrary, it continues to accept significant volumes of wastes from generators across the State. The assertion that the conditions in its permit somehow raise supra-competitive pricing concerns is unfounded and appears purely speculative.

#### C. Issues Specific to JRL

NEWSME argues that the same conditions and restrictions on the type and amount of waste that JRL is allowed to accept, as well as a requirement for third-party audits of CDD processing operations that deliver OBW to JRL, should be imposed on WMDSM as a condition of its public benefit determination. The conditions imposed on the JRL facility, however, are a result of specific and unique issues associated with that State-owned facility and do not have similar applicability to the Crossroads Landfill.

JRL is owned by the State and therefore there are legal and policy considerations unique to the use and licensing of that State-owned asset. For example, Maine law provides that a state-

owned waste disposal facility (such as JRL) may not be licensed to accept waste that is not generated within the State. 38 M.R.S.A. §1310-N(11). There is no similar restriction imposed on privately owned landfills and any effort to do so would violate the commerce clause of the U.S. Constitution. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622-23 (1978). The determination of whether material disposed of at JRL, a State-owned facility, is truly in-state waste has been a key factor in the licensing of that landfill. For example, the limits in the January, 2012 license on OBW resulted from the DEP's concern that the KTI facility in Lewiston, which at the time was owned by Casella, was generating a significant amount of OBW (96,520 tons in 2010) and fines that were being sent to JRL, and the DEP's concern that much of that waste was coming from out-of-state. January, 2012 JRL Public Benefit Determination (Partial Approval) at pp.11-12. The Department found that (i) the majority of the CDD accepted at KTI was imported from other states, and (ii) much of the CDD imported into Maine for processing at KTI had little or no processing value and therefore was going directly to JRL for disposal. *Id.* at 11-13, 19-20. Likewise, the third-party audit requirement was imposed to address the substantial increase in OBW being sent to the JRL by processing facilities. *Id.* at 20. The Crossroads Facility accepts nominal amounts of OBW and does not accept processing fines. Accordingly, the factors resulting in OBW and third-party audit provision in the JRL license do not exist at Crossroads.

The State has also imposed a host of other restrictions on use and operation of the facility pursuant to the Operating Services Agreement entered into between Casella and the State of Maine (OSA), initially through the State Planning Office and more recently the Bureau of General Services. These conditions would not be appropriate for a private landfill such as the Crossroads Facility.

In summary, the JRL public benefit provisions based on issues associated with OBW volumes and concerns that JRL was circumventing the prohibition on acceptance of out-of-state waste do not apply to the Crossroads Landfill. It is entirely appropriate for the Department to make licensing decisions based on the specific application and circumstances presented to it, which necessarily means that different facilities may be subject to different terms and conditions. This is particularly the case where, as here, one of those facilities is owned by the State.

#### D. Long-Term Capacity Needs of the State

WMDSM has shown that there is a need for additional landfill capacity beginning in 2024, which is less than ten years from the date of any public benefit determination that might be issued by the Department.<sup>2</sup> NEWSME does not appear to challenge that assumption. NEWSME suggests however, that the size of the expansion should be limited to a projected site life of no more than ten years and that the size should be further reduced to allow the disposal of only in-

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<sup>2</sup> In its January, 2012 Public Benefit Determination (Partial Approval) of the JRL expansion, the Department noted that in general, it evaluates the need for capacity based on the time from the positive public benefit determination until the date that the capacity considered in the determination becomes available. 2012 JRL Public Benefit Determination (Partial Approval) at 8. The Phase 14 expansion would be available beginning in 2024, which is less than ten years from the date the Department would issue its public benefit determination.



state waste. As discussed below, neither the statute nor prior Department decisions support NEWSME's request.

38 M.R.S.A § 1310-AA(3) requires that the Department find that there is a capacity need within the next ten years. Assuming there is such a need, as has been shown here and is not disputed by NEWSME, then the Department must consider the totality of the criteria under Section 1310-AA(3) to evaluate whether the size of the project, including its estimated site life, provides a significant public benefit. That determination may be based on capacity needs that extend beyond ten years, the inherent uncertainty in projecting future waste needs and markets, the significant time lag between obtaining a positive finding of public benefit and the availability of the capacity that is the subject of that public benefit determination,<sup>3</sup> as well as the other criteria relevant to the public benefit determination such as consistency with the waste management and recycling plan and promotion of the state waste hierarchy.

The public benefit denials referenced by NEWSME do not support a contrary conclusion. As a threshold matter, a number of the decisions referenced are draft decisions and do not reflect final agency decisions. Moreover, each of the decisions was based on unique circumstances associated with the particular application and status of then-existing capacity and disposal needs. In the draft denial for the new landfill proposed by the Municipal Review Committee (MRC), the Department found that the applicant's assessment of capacity was substantially influenced by its stated need for a landfill owned by and subject to MRC's control, and was not a factual analysis of the disposal capacity available within and near the MRC service area. 2014 Draft MRC New Landfill Public Benefit Determination (Denial) at 23 -24.

Likewise, in its draft denials of the JRL and Pine Tree Landfill (PTL) expansions, the Department found that there was available capacity for disposal of CDD, special wastes and other wastes known to be generated in Maine in the immediate, short term and long-term (ten years). January, 2010 Draft JRL Expansion Public Benefit Determination (Denial) at 16-17; 2006 Draft PTL Expansion Public Benefit Determination (Denial) at 15. Additionally, in evaluating the JRL proposed expansion, the Department found that the timing of the application was being dictated by the terms of the OSA and not the capacity needs of the State. January, 2010 Draft JRL Expansion Public Benefit Determination (Denial) at 17. Similarly, in evaluating the PTL proposed expansion the Department noted that in 2004 a significant amount of additional landfill capacity had become available when the State completed its acquisition of JRL and obtained approval for additional capacity there. 2006 Draft PTL Expansion Public Benefit Determination (Denial) at 9.

In its most recent partial approval of public benefit determination for the JRL landfill, the Department similarly found that there was sufficient landfill capacity in the immediate and short term, and there "likely" was sufficient capacity in the long-term, ten years, "provided the existing solid waste disposal options remain available and waste generation rates remain

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<sup>3</sup> In its January, 2012 Public Benefit Determination (Partial Approval) of the JRL expansion, the Department found that both uncertainty in solid waste management systems and the time required to permit and construct a new or expanded landfill can be considered in the assessment of capacity needs. 2012 JRL Public Benefit Determination (Partial Approval) at 21.

depressed.” January, 2012 JRL Public Benefit Determination (Partial Approval) at 19. The Department again found that the timing of the application was based at least in part on the terms of the OSA as opposed to capacity needs in the State. *Id.* Nonetheless, because of uncertainty in the solid waste management system and in recognition of the significant time period required to permit and construct new landfills, the Department found that it was prudent to approve 9.35 million cubic yards of additional capacity. *Id.* The Department specifically found that the full expansion of 21.9 million cubic yards was not consistent with the waste hierarchy. *Id.* at 25.

There is no basis for the Department to artificially limit the Phase 14 expansion based on decisions on unrelated applications and findings specific to those applications, a projected site life of no more than ten years, or volumes that exclude out-of-state waste.

E. Requirements of 38 M.R.S.A. §1310-X

NEWSME contends that the Phase 14 expansion is a new landfill prohibited under existing law. Specifically, NEWSME appears to argue that the Phase 14 disposal area must be contiguous to (presumably touching) an existing landfill unit. NEWSME’s interpretation is contrary to the plain language of the statute, the purpose of the ban on new commercial landfills, and Department practice over more than 25 years.

38 M.R.S.A. § 1310-X, first enacted in 1989, is a statutory ban on new commercial landfills. It allows, however, expansions that are “contiguous with the existing facility” and meet certain other statutory requirements. Initially, any such expansion had to be on property owned on December 31, 1989 by the licensee (subsequently expanded to include an entity under common ownership or control with the licensee). In 2012, the Legislature allowed additional expansions as long as the facility was not under an order or agreement to close and the expansion was located on property owned by the licensee. 38 M.R.S.A. § 1310-X(3)(B).

Although the term “facility” is not separately defined, there is no support for NEWSME’s assertion that “facility” means “landfill.” Landfill is a very specific term that refers to the discrete solid waste disposal unit. 06-096 CMR 400.1(WWW). In contrast, facility is a broader term. For example, at the same time it passed the moratorium, the Legislature adopted a definition of “waste facility” as “any land area, location, structure, equipment *or combination of them*, including dumps, used for *handling* hazardous, biomedical, or solid waste, waste oil, sludge or septage . . .” 38 M.R.S.A. § 1303-C(30) (emphasis added). The solid waste regulations similarly define “solid waste facility” as “any land area, structure, location, equipment *or combination of them*, used for the *handling* of solid waste.” *Id.* at 400.1(Jjj) (emphasis added). “Facility site” is defined as “any developed land area of a solid waste facility including internal access roads controlled by the facility site owner or operators, structures (including those for erosion and sedimentation control), parking lots, and waste handling areas, or any areas thereof approved by the Department for development, but excluding monitoring wells.” 06-096 CMR 400.1(XX). Finally, Section 1310-X(4)(B) exempts the expansion of “a commercial solid waste disposal facility” from the moratorium if “the expansion will not result in an increase in the

facility's disposal capacity and the expansion will not be used for solid waste disposal." This statutory language makes clear that "facility" encompasses more than individual landfill units.<sup>4</sup>

Importantly, there is no practical reason to equate "facility" with "landfill" in Section 1310-X. The original moratorium limited expansions based on property ownership and a requirement that such property be contiguous to the existing licensed facility, not contiguity of individual landfill units. Indeed, NEWSME's interpretation is at odds with how the statute has been applied over the last 25 years. Since 1989, the Department has licensed several expansions at Crossroads as well as at the Pine Tree Landfill owned by Casella. The landfill expansions have involved construction of new disposal units (new landfills) on property within the 1989 footprint. Although there has always been a requirement that such expansions "be contiguous with the existing facility," there has never been a requirement that the new landfills touch or be contiguous to existing landfill units, as NEWSME now argues. For example, the Phase 11 and 12 landfills at Crossroads, which were permitted in 1997 and were required to be "contiguous to the existing facility," are stand-alone landfills that are not physically connected to any other landfill. October, 1997 Phase 9, 11, 12 Landfill Expansion, WMDSM Solid Waste License (Approval) at p. 2 (describing Phase 9 as contiguous to and overlapping portions of existing Phase 7 landfill, and Phases 11 and 12 as separate landfill units).

Finally, NEWSME questions WMDSM's demonstration of title, right or interest to the entirety of the expansion area. A portion of the expansion is within the existing facility, which is outlined in solid red on the tax map included in Appendix D, and a portion is on the contiguous property, also owned by WMDSM, that is outlined in dashed red and is identified as Tax Map 14, Lot 20.

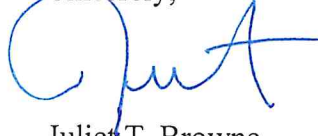
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<sup>4</sup> At a minimum, facility refers to the areas that are subject to various Department solid waste orders issued to the Crossroads Landfill over the years and where there are roads, landfill units, offices, and other activities associated with waste management activities. There is an argument that facility also includes abutting parcels owned by WMDSM but that are not developed or used for waste management activities, but that issue need not be resolved at this time because the Phase 14 expansion is on property that is contiguous to areas where solid waste management activities currently occur. Indeed, a portion of the Phase 14 expansion is within the existing facility footprint, and a portion is on property that is contiguous to the existing facility.

Linda J. Butler  
September 18, 2018  
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Thank you for consideration of these comments. If you have questions, please don't hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Juliet T. Browne', with a large, stylized initial 'J' and a long horizontal flourish extending to the right.

Juliet T. Browne

cc: David Burns (DEP, Director of Bureau of Remediation and Waste Management) (via email)  
Richard A. Labelle (Norridgewock, Town Manager) (via regular mail)  
Jeff McGown (WMDSM) (via email)  
Sherwood McKenney (WMDSM) (via email)  
Steve Poggi (Waste Management, Inc.) (via email)  
Scott Luettich (Geosyntec Consultants, Inc.) (via email)  
Mat Todaro (Verrill Dana LLP) (via email)