

Comments for the Maine Board of Environmental Protection regarding the Petition to modify Chapter 400 Maine Solid Waste Management Rules

To Members of the Board of Environmental Protection,

I am providing these comments to the Board in order to give clarity and some background history of the situation that has led to the need for modifications of the State's Waste Management rules.

The petition was signed by over 250 Maine residents and submitted to the Department of Environmental Protection on January 13, 2020.

The petition proposes to modify several sections of Chapter 400 rules in order to clarify and improve effectiveness of existing rules relating to Public Benefit determinations, and to respond to new information on threats to the environment and public health.

The rule change would specifically:

- 1) Clarify the definition of Maine generated waste in order to control the disposal of out-of-state waste in Maine's publicly-owned landfills, and
- 2) Provide standing, justice, and equal protection to people in communities who are directly impacted by the State's landfill licensing and permitting decisions.

Waste Generated in the State

The petition proposes to clarify the confusing definition of "Waste generated in the State," which is currently included in the rules governing Public Benefit Determination.

The petition calls on the Department to strike out the following language from Section 5, Part C(2) of Chapter 400 rules governing Public Benefit Determination for Acceptance by State-owned Solid Waste Landfills of Waste Generated Out-of-State:

~~For purposes of this section and pursuant to 38 M.R.S. §1310-AA, "waste that is generated within the State" includes residue and bypass generated by incineration, processing and recycling facilities within the State; waste whether generated within the State or outside of the State used for daily cover, frost protection or stability in accordance with all applicable rules and licenses; and waste generated within 30 miles of the solid waste disposal facility.~~

The petition also calls for modification of Chapter 400, Section 1, Definitions, to include a clear definition of waste that is generated within the State, with the following language:

"Waste that is generated within the State" means waste materials for which the original point of discard is located within the State of Maine. "Waste that is generated within the State" includes residue and bypass generated by incineration, processing and recycling facilities within the State, only if the materials creating the residue and bypass had an original point of discard within the State of Maine.

Environmental Justice

The petition calls on the Department to modify Section 5, Part E, Standards for Public benefit determination, clarifying that in order for the Department to determine Public benefit necessary for licensing and expansions, it must be demonstrated that:

The facility operation is not inconsistent with protecting the health and welfare of local communities and is not inconsistent with ensuring equal protection and environmental justice for communities where the waste facility is proposed or operating.

The petition calls on the Department to modify Chapter 400, Section 1, Definitions, by adding the following language:

Environmental Justice. "Environmental Justice" means the right to be protected from environmental pollution and to live in and enjoy a clean and healthful environment regardless of ancestry, class, disability, ethnicity, income, national origin, or religion. Environmental justice shall include the equal protection and meaningful involvement of all people with respect to the development, implementation, and enforcement of waste management laws, regulations, and licensing decisions.

Equal Protection. "Equal Protection," means protection of all groups of people, regardless of ancestry, class, disability, ethnicity, income, national origin, or religion, from an unfair burden of environmental hazards resulting from waste facility operations.

Background on Out of State Waste Policies

In response to concerns about controlling the flow of out-of-state waste into Maine in 1989, following the collapse of the landfill in Norridgewock which had been badly managed and overloaded with out-of-state waste, the State legislature enacted new policies to prevent the licensing of new commercial landfills. This was an attempt to control the imports of out-of-state waste into Maine without violating the Commerce Clause.

The 1978 Supreme Court ruling of *Philadelphia v. New Jersey* determined that States violate the Interstate Commerce Clause if they enact laws that discriminate against interstate commerce for purposes of protecting in-state business interests against out-of-state businesses.

The primary reason the State took ownership of Juniper Ridge Landfill (JRL) in 2004 was to ensure the State would maintain the legal authority to prevent the Publicly-owned landfill from being filled with waste imported from out of state.

When the proposal to license a new landfill in West Old Town was presented in 2003, concerns about the ability of the State to control out-of-state waste were central to the discussion.

In situations where States act as market participants instead of regulators, Courts have ruled that States may restrict the type of waste they accept at a landfill without violating the Commerce Clause.

It was for this reason that the State of Maine became a market participant by purchasing JRL in 2004.

When the proposal to license a new landfill in West Old Town was presented in 2003, the argument from regulators and elected officials in favor of licensing a publicly-owned landfill like JRL was that by the State owning the landfill it could control set standards for waste generated in the state, and apply the same the sources of waste being dumped in the facility, and ensure that the facility would meet the long-term disposal needs for Maine.

Disparity with Surrounding States

The current definition of Maine-generated waste is resulting in incentives to import wastes to Maine which are banned from disposal in surrounding states.

The closure of many large waste disposal and recycling facilities in nearby states, coupled with the increasing difficulty in licensing new facilities, is resulting in increased pressure to send materials to Maine for disposal

NH, MA, NY, CT, VT, and NJ have enacted bans on disposing of organics (variously septage, municipal and industrial waste water sludge, compostable materials, liquid waste) in landfills. These materials are often the most likely to include contamination by PFOS and PFAS. In the past, biosolids were often imported for landspreading in Maine. Since Maine regulatory agencies have started restricting the landspreading of organics/biosolids contaminated with PFAS/PFOS on farmland, the only acceptable alternative method of disposal has been landfilling, resulting in an increase in disposal of more PFAS-contaminated biosolids Maine landfills.

MA, VT, and NH ban various types of construction and demolition debris from landfilling, and most other northeast states have much stricter controls on what types of CDD are allowed in landfills.

Maine is the only northeast state to allow burning of CDD in biomass facilities that receive Class I Renewable Energy Credits. Other states allow some burning of CDD in MSW incinerators, or allow limited burning in biomass burners so long as there is no contamination of treated or painted wood.

As neighboring states have tightened their rules on CDD waste, Maine landfills has seen increasing pressure to import the materials that are banned from burning and landfilling in surrounding states. This has resulted in increased pressure to expand the types of CDD that can be burned and disposed of in Maine facilities.

For example, there is very little market available outside of Maine for chromated copper arsenate (CCA) treated wood. It isn't used by chipboard facilities, and is banned from burning in New Hampshire and landfilling in NH and MA.

However, 2018 Rule changes to Chapter 418 DEP Rules on Beneficial Use of Solid Wastes allowed a 33% increase in the amount of arsenic-treated wood products used as fuel in biomass boilers receiving Class I Renewable Energy Credits.

In 2006, Maine's DEP was one of eight New England regulatory agencies to participate in development of the NESCAUM Report on Emissions from Burning Wood Fuels Derived from Construction and Demolition Debris.

The Northeast States for Coordinated Air Use Management report found that a critical element for safely using CDD as a fuel source was the development of strict fuel standards, with specific recommendations to eliminate chromated copper arsenate and minimize CDD fines.

The NESCAUM Report states, "The elimination of treated wood such as chromated copper arsenate (CCA) wood and penta-treated wood significantly reduces arsenic emissions."

The increased volume of CCA wood imported for burning by a Maine biomass facility results in increased amounts of arsenic production. Most of the particulate matter containing arsenic is filtered by the biomass facility, with the toxins becoming concentrated in ash and filters that are ultimately disposed of in Maine landfills.

The 2018 amendments to Chapter 418 rules weakened many limits on toxins in CDD fuel. The amendments removed limits on PCBs contained in CDD incinerated in biomass burners.

Prior to the rule change, Department standards for construction and demolition debris being burned for "beneficial use" listed 575 contaminants that must be screened for as part of implementing a hazardous and special waste exclusion plan.

The rule change removed over 400 contaminants from the list of contaminants subject to screening required for "beneficial use" of CDD fuel and ash. The list of contaminants that would no longer be screened includes highly toxic preservatives, dioxins, and furans, which are already found in elevated levels in Maine's waterways and wildlife, and which are known to be present in CDD and resulting ash.

The Chapter 418 rule changes also allowed a significant increase in the amount of CDD fines (recovered screen material) in biomass facilities.

Analysis of CDD used by the Boralex biomass facility in Athens, Maine was performed by the University of Maine and presented in a report issued May of 2005, titled "Fate of Dioxin and Arsenic from the Combustion of Construction and Demolition Debris and Treated Wood".

The study concluded that the fines in the fuel had the highest concentration of metals and dioxin.

The 2006 NESCAUM Report states, "fuel standards minimizing contamination from other C&D materials and removing C&D fine material (known as "fines") from the fuel chips increases fuel quality substantially, resulting in lower metal and other air toxic emissions."

The closure of many biomass facilities and low costs of landfilling in Maine has resulted in increased volumes of contaminated CDD being imported in Maine, and instead of being burned is now increasingly filling Maine landfills under the guise of alternative daily cover.

Leachate

As compared to other states, Maine has minimal requirements for testing and pollution control equipment required at wastewater discharge sites disposing of landfill leachate.

The State's requirements for testing and discharge levels of various toxins in waste water treatment plant discharge were rolled back in 2012, following the passage of LD 515, "An Act to Review Water Quality Standards." The law change reduced mercury testing requirements for many wastewater discharge facilities, and dramatically increased allowable limits for arsenic discharged into rivers.

In testimony by DEP Commissioner Brown in support of the legislation, "This change would make the State's ambient water quality criteria for inorganic arsenic 100 times less stringent than it is now." The testimony went on to explain, "In 2005 the DEP adopted the EPA's most recent human health criteria for inorganic arsenic. Inorganic arsenic is classified by the EPA as a human carcinogen. Shortly after the adoption of the inorganic arsenic criteria in 2005, the regulated community began to voice concern regarding the technical ability to meet inorganic arsenic waste discharge limits once they are established as enforceable limits.it appears that treating wastewater effluent to meet current arsenic discharge limits is likely not technologically or financially feasible."

LD 515 circumvented Chapters 584 "Surface Water Quality Criteria For Toxic Pollutants" requirements specifying that changes to statewide water quality criteria must be as protective as EPA's Water Quality Criteria. The Commissioner was clear in his testimony in support of the weakened water quality criteria that since these changes were weaker than Clean Water Act standards, they would need approval by the EPA to go in effect. On January 14, 2013 the EPA responded to a request for approval of the new Maine Water Quality Standards, refusing to extend approval for the new water quality standards set by LD 515 to waters that are within Indian territories. When the EPA refused to give full approval to the drastically weakened standards for protection of river communities and fisheries in Maine, the State of Maine initiated a lawsuit against the EPA, in an attempt to force the EPA to accept the new wastewater discharge standards.

In spite of legislation being passed in 2019 to address issues of water quality and sustenance fishing, the issues relating to arsenic has not been resolved, most of the unprotective water quality standards remain in effect for facilities discharging waste water into Maine rivers.

The amount of arsenic in landfill leachate is likely to increase as the disposal of arsenic-treated wood, and ash from incineration of arsenic-treated wood, is disposed in landfills and used as "daily cover" and "shaping materials" in landfills.

Landfill leachate is not being treated for arsenic, PFAS/PFOS, or many other likely contaminants.

The landfill footprint for JRL was 62.6 acres in 2016, at which time it was producing 10,000,000 (ten million) gallons of leachate per year. At the time there were about 6 acres uncovered, actively receiving waste. Since that time, JRL has received approval to expand the landfill footprint an additional 54 acres. This is likely to result in greater volumes of leachate being generated, and greater burdens on people living near the landfill and downstream of the Old Town mill WWTP where landfill leachate is discharged into the Penobscot River.

Each of the rollbacks on WWTP discharges has increased the likelihood that arsenic and other toxic compounds will find their way into the air, land and water of communities that host landfills and landfill leachate discharge sites.

Public Benefit and Environmental Justice

The petition calls for adding the proposed definitions of Environmental Justice and Equal Protection to the Chapter 400 rules, and with it a new, fifth public benefit determination standard that states “The facility operation is not inconsistent with protecting the health and welfare of local communities and is not inconsistent with ensuring equal protection and environmental justice for communities where the waste facility is proposed or operating”.

Surrounding states (from which Maine is receiving waste) have enacted dozens of policies ensuring consideration of Environmental Justice impacts in waste facility licensing decision making processes. From a list of initiatives that states have adopted to facilitate environmental justice, Maine has only adopted one measure - the vague step of “Agency EJ Personnel Training.”

Environmental justice requires an equitable distribution of the costs and benefits of an environmental policy. In this case, however, the benefits of hosting a landfill go to the operators of the landfill and to the host community in the guise of impact fees. The costs of landfill expansion are concentrated on the nearby residents, but are also imposed upon the natural environment and on future generations, who do not have a voice at the table. We would like to ensure that the distribution of costs is considered.

Lack of ability for meaningful community representation in the process, beginning at the earliest possible time, has resulted in lack of protection from environmental, health, and welfare hazards for local communities.

The Board of Environmental Protection issued an opinion in 2017 indicating that consideration of environmental justice would not be relevant to licensing proceedings for the State-owned landfill. The Board Order dated May 27, 2016 disputes the relevancy of including the issue area of Environmental Justice in Board proceedings. The only reason given for lack of relevance to the proceedings is that including issues of environmental justice could revisit the Public Benefit Determination. However, the issue of environmental justice is not included in the criteria required for determination of Public Benefit.

Public benefit determination, as defined by Title 38, Chapter 13, 1310-AA, is based upon whether the facility meets capacity needs for the State, promotes the solid waste management hierarchy, and is not inconsistent with local and state waste collection storage, transportation, processing or disposal. Health, welfare, and environmental justice are relevant to the licensing decision independent of the determination of Public Benefit.

Licensing criteria for this solid waste facility requires both a Public Benefit Determination and a finding that “the facility will not pollute any water of the State, contaminate the ambient air, constitute a hazard to health or welfare or create a nuisance,” as specified in Title 38, Chapter 13.

Testimony submitted by appellants to the JRL expansion licensing in 2016 contended that issues of environmental justice were central to determination of whether the proposed expansion would harm the health and welfare of already burdened local communities.

Including consideration of impacts on Environmental Justice in the Public benefit determination is the least the State can do to protect the people and communities adjacent to landfills and leachate sites, who have historically struggled to acquire adequate legal standing regarding decisions that could impact their health and property.

Procedural Challenges

People most impacted by waste facilities have consistently lacked opportunities for meaningful participation in decision making processes affecting their health and community well-being.

A lack of comprehensive environmental justice programs also contributes to procedural injustice, because it enables organizations and individuals to ignore the environmental justice implications of their decisions and exclude impacted community members from meaningful participation in the public process.

Executive Order 12,898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, recommends that minority and low-income populations be afforded greater public participation in licensing and permitting processes.

Distributive justice focuses on fairly distributed environmental burdens and benefits – the outcome, rather than the process. Even if the permitting process was procedurally fair, the fact that a couple communities are serving as the hosts for potentially toxic waste from across the northeast may point to an occurrence of distributive injustice.

Conflicts of interest have been allowed in licensing and oversight decisions, resulting in situations where the regulated entity appears to be creating the regulations and preventing enforcement.

The State has continually reduced funding for oversight of waste operations and Department enforcement.

The 2003 resolve that allowed for the State to purchase JRL stipulated that the City of Old Town and the Town of Alton shall establish a joint citizen advisory committee consisting of seven members, of which five must be from the city of Old Town and two from the town of Alton. It was then amended to include one member from the Penobscot Nation. The Advisory Committee has been excluded from stakeholder notifications and decision-making processes, and have not been contacted by the State or NEWSME in advance of large changes proposed to which they should be a party.

A letter from the Government Oversight Committee to the Environment and Natural Resources Committee of the legislature dated September 14, 2012, raised concerns about the role of the JRL Advisory Committee and factors affecting its ability to be effective in that role.

The letter explained that JRL Advisory Committee members expressed concerns from their experience in trying to fulfill the roles and responsibilities assigned them, including frustrations that their voices were not being heard. The letter asked, "What are the barriers to the JRL Committee effectively fulfilling the role envisioned in statute and how should those barriers be addressed?"

Making clear the need for environmental justice and meaningful opportunities for public participation in the rules governing Public benefit determination is a step toward addressing these barriers.

Cumulative Impacts

Lack of consideration of environmental justice has led to disproportionately high and adverse health and environmental effects resulting from policies and polluting activities that place an undue burden on people living in proximity to JRL and obtaining food downstream from leachate discharge locations.

The proposed expansion could create greater burdens on communities in the Penobscot watershed who are already negatively impacted by cumulative exposure to toxins. Much of the JRL expansion site is in NOAA mapped Atlantic Salmon Mapped Critical Habitat, and increased volumes of leachate would be discharged into waterways subject to changing Clean Water Act regulations.

A health assessment for the Penobscot Indian Nation done in 2010 by the Agency for Toxic Substances and Disease Registry found elevated levels of dioxins, furans and PCBs in Penobscot River fish and turtle at levels that pose increased cancer risk. The assessment recommended that children under 8 years old or women who are pregnant or breastfeeding not eat any fish from the river.

According to the 2017-1018 SWAT report, arsenic has been found in the tissue of blue mussels sampled at 60 locations through the Maine SWAT monitoring program at levels exceeding the Maine CDC cancer Fish Tissue Action Level.

According to the EPA, arsenic is a known carcinogen that may cause cancer in skin or internal organs such as the liver, lungs and bladder. Acute arsenic poisoning is infamous for its lethality, which stems from arsenic's destruction of the integrity of blood vessels and gastrointestinal tissue and its effect on the heart and brain. Chronic exposure to lower levels of arsenic has been shown to result in peripheral nerve damage, diabetes, blood vessel damage, and a markedly elevated risk for developing a number of cancers, including skin cancer, cancers of the liver, lung, bladder, and possibly the kidney and colon.

A health assessment for the Penobscot Indian Nation done in 2010 by the Agency for Toxic Substances and Disease Registry found that community members who eat more than two Penobscot River fish per month could be exposed to harmful mercury levels.

Cancer incidence rates for Penobscot County are far above national average incidence rates and significantly above state average rates. According to testimony submitted by appellants to the JRL expansion, cancer rates in the area where discharge would be released are already significantly above the County incidence rate.

In addition to risks from water contamination by leachate, landfill operations generate ongoing cumulative effects on the people who live adjacent to it. The impacts include increased traffic levels, diesel exhaust, gas odors, risk of water contamination, and risk of fires. Ignoring the "side effects" of a massive landfill on abutters represents a failure to recognize the distributive burden placed on this community. The fact that Maine's landfills make up some of the last remaining landfilling space available in New England for a variety of toxic materials creates greater burdens on the communities that host their operations and is a distributive justice problem.

Conclusions

The past year has seen a decrease in recycling services and increases in waste generation. The Covid crisis has magnified disparities between affluent communities and low-income and minority communities. We have seen that people living in communities with greater pollution and toxic burdens, many of whom are already immune-compromised or living with pre-existing health conditions, are at greater risk of getting sick from the virus. Agency-responses to Covid designed to maintain social distancing have also resulted in more limited opportunities for meaningful participation for low-income people, people in rural areas, older people, and people with disabilities who often lack access to technology necessary to participate in the now-digital public processes.

Lack of ability for meaningful community representation in the process, beginning at the earliest possible time, has resulted in lack of protection from environmental and health hazards for local communities.

Interrelated cultural, social, occupational, historical, and economic factors amplify the environmental and health effects of landfill operations, resulting in disproportionate health impacts on low-income, minority, and tribal communities.

As surrounding states are increasingly pressured to send materials to Maine for disposal, it is more important than ever that the communities most impacted by landfill operations and waste discharges have clear protection for their health, well-being, and ability to have meaningful opportunities for participation in the decision-making process. A clear definition of Waste generated in the State, with clear requirements for consideration of Environmental Justice in licensing decisions is essential to ensuring justice for the communities that bear the disproportionate burden of these waste facilities' operations.

The concerns and protection of communities surrounding JRL and other landfills deserve at least equal consideration as those of the industries that are impacted by licensing and permitting decisions.

Thank you for your time reviewing this matter.

Sincerely,
Hillary Lister
hillarylister@mainematters.net

August 25, 2020