

September 28, 2020

To Members of the Board of Environmental Protection and the Department of Environmental Protection;

I am submitting these comments following the Public Hearing on the Citizens petition to modify Chapter 400 Maine Solid Waste Management Rules.

These comments will address the history of Environmental Justice in federal and state policies and Maine statutes relating to the authority of the Board to implement the proposed rule changes.

Public Benefit and Environmental Justice

During the Hearing, the Board raised questions about the ability to measure and quantify proposed rule change language relating to environmental justice. While the EPA does provide resources that attempt to quantify impacts and make those measurements, the language proposed in the Citizen's petition relating to consideration of environmental justice in public benefit determination does not necessarily require quantification.

The petition calls for modifying Section 5, Part E, of DEP rules, clarifying that in order for the Department to determine Public benefit necessary for landfill licensing and expansion, 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.

In order to license most landfills in Maine under current Department rules, the Commissioner must determine the landfill will provide substantial Public benefit.

The standards to demonstrate Public benefit include determination that the landfill is not inconsistent with local, regional or state waste collection, storage, transportation, processing or disposal.

There are not specific statutes or regulations required to quantify this particular standard.

Another standard that is not clearly quantifiable, but is included in DEP rules for determination of Public Benefit, is that the operation of a landfill would be precluded or significantly impaired if the waste is not accepted. This is a very open-ended standard, with no further language relating to quantification in statute or rule.

The rule change proposed in the Citizens petition does not require quantification in order for impacts on environmental justice to be included in the standards of what the Department may take into consideration when determining whether a waste facility provides substantial Public benefit.

Environmental Justice Policy History

In testimony from the representative for NEWSME/Casella there was concern raised about including consideration of impacts on Environmental Justice in the Public Benefit determination process. This concern was based in part on the claim that environmental justice is a relatively new concept. In fact, specific provisions for consideration of Environmental Justice have been in the laws of neighboring states since the 1990's, and in federal statute since 1997(?).

The concept of imported waste being considered Maine-generated waste is in fact a much more recent concept than the idea that environmental justice needs to be included in laws relating to licensing toxic waste facilities such as landfills.

The beginning of environmental justice being considered in federal law resulted from responses to State of North Carolina's decision to operate a PCB waste landfill in Warren County, NC. Despite efforts by the local community and NAACP to secure a preliminary injunction to prohibit the siting of the facility, on the ground of racial discrimination, the landfill was approved. In response to major protests, the North Carolina conducted a statewide review of hazardous waste siting procedures. The State then passed a law barring additional sites in Warren County. This also led to actions on the federal level, with Congressman Walter Fauntroy directing the U.S. General Accounting Office to conduct a study of the states comprising Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee) "to determine the correlation between the location of hazardous waste landfills and the racial and economic status of the surrounding communities." The report found that three out of every four landfills were located near predominately low-income and minority communities.

In 1990, in response to meetings with community members from communities in Michigan impacted by toxic waste facilities, the EPA formed the Environmental Equity Workgroup to "assess the evidence that racial minority and low-income communities bear a higher environmental burden than the general population, and consider what EPA might do about any identified disparities."

In 1992 the EPA released a report (Environmental Equity - Reducing Risk for All Communities), with the following findings:

- *There are clear differences between racial groups in terms of disease and death rates. There are also limited data to explain the environmental contribution to these differences. In fact, there is a general lack of data on environmental health effects by race and income. For diseases that are known to have environmental causes, data are not typically dis-aggregated by race and socioeconomic group.*
- *Racial minority and low-income populations experience higher than average exposures to selected air pollutants, hazardous waste facilities, contaminated fish and agricultural pesticides in the workplace. Exposure does not always result in an immediate or acute health effect. High exposures, and the possibility of chronic effects, are nevertheless a clear cause for health concerns.*
- *Environmental and health data are not routinely collected and analyzed by income and race. Nor are data routinely collected on health risks posed by multiple industrial facilities, cumulative and synergistic effects, or multiple and different pathways of exposure. Risk assessment and risk management procedures are not in themselves biased against certain income or racial groups. However, risk assessment and risk management procedures can be improved to better take into account equity considerations.*

- Great opportunities exist for EPA and other government agencies to improve communication about environmental problems with members of low-income and racial minority groups. The language, format and distribution of written materials, media relations, and efforts in two-way communication all can be improved. In addition, EPA can broaden the spectrum of groups with which it interacts.

- Since they have broad contact with affected communities, EPA's program and regional offices are well suited to address equity concerns. The potential exists for effective action by such offices to address disproportionate risks. These offices currently vary considerably in terms of how they address environmental equity issues. Case studies of EPA program and regional offices reveal that opportunities exist for addressing environmental equity issues and that there is a need for environmental equity awareness training. A number of EPA regional offices have initiated projects to address high risks in racial minority and low-income communities.

- Native Americans are a unique racial group that has a special relationship with the federal government and distinct environmental problems. Tribes often lack the physical infrastructure, institutions, trained personnel and resources necessary to protect their members.

- EPA should increase the priority that it gives to issues of environmental equity.

- EPA should establish and maintain information which provides an objective basis for assessment of risks by income and race, beginning with the development of a research and data collection plan.

- EPA should incorporate considerations of environmental equity into the risk assessment process. It should revise its risk assessment procedures to ensure, where practical and relevant, better characterization of risk across populations, communities or geographic areas. These revisions could be useful in determining whether there are any population groups at disproportionately high risk.

- EPA should identify and target opportunities to reduce high concentrations of risk to specific population groups, employing approaches developed for geographic targeting.

- EPA should, where appropriate, assess and consider the distribution of projected risk reduction in major rulemakings and Agency initiatives.

- EPA should selectively review and revise its permit, grant, monitoring and enforcement procedures to address high concentrations of risk in racial minority and low-income communities. Since state and local governments have primary authority for many environmental programs, EPA should emphasize its concerns about environmental equity to them.

- EPA should expand and improve the level and forms with which it communicates with racial minority and low-income communities and should increase efforts to involve them in environmental policy-making.

- EPA should establish mechanisms, including a center of staff support, to ensure that environmental equity concerns are incorporated in its long-term planning and operations.

Executive Order

In 1994, the Federal government issued the Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.

According to the White House Memorandum for the Heads of all Departments and Agencies:

That order is designed to focus Federal attention on the environmental and human health conditions in minority communities and low-income communities with the goal of achieving environmental justice.

That order is also intended to promote non-discrimination in Federal programs substantially affecting human health and the environment, and to provide minority communities and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment.

The purpose of this separate memorandum is to underscore certain provision of existing law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment.

Environmental and civil rights statutes provide many opportunities to address environmental hazards in minority communities and low-income communities.

Application of these existing statutory provisions is an important part of this Administration's efforts to prevent those minority communities and low-income communities from being subject to disproportionately high and adverse environmental effects. I am therefore today directing that all department and agency heads take appropriate and necessary steps to ensure that the following specific directives are implemented immediately:

In accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.

Each Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. section #321 et seq. .

Mitigation measures outlined or analyzed in an environmental assessment, environmental impact statement, or record of decision, whenever feasible, should address significant and adverse environmental effects of proposed Federal actions on minority communities and low-income communities.

Neighboring States Policies

The State of Massachusetts Office of Energy and Environmental Affairs began its implementing Environmental Justice policy in 2002, which was developed through collaboration with representatives from local community groups, including indigenous communities.

The Massachusetts policy makes clear that all communities must have a strong voice in environmental decision-making regardless of race, income, national origin or English language proficiency. In addition, it specifies that increased attention must be focused on communities that are built in and around the state's oldest areas with a legacy of environmental pollution, particularly in areas that may already have a status of vulnerable health.

In 1993, the Connecticut Department of Energy and Environmental Protection adopted the following Environmental Equity Policy policy: "...no segment of the population should, because of its racial or economic makeup, bear a disproportionate share of the risks and consequences of environmental pollution or be denied equal access to environmental benefits."

The State of CT DEEP policy includes the following course of action:

The Department will review and assess the impacts of and opportunities provided by its activities with regard to racial and ethnic minority groups and lower income residents.

The Department will enhance communication with, and improve environmental education opportunities for, minority and lower income communities. The Department will encourage community participation in the Department's ongoing operations and program development, including but not limited to inclusion on the agency's advisory boards and commissions, regulatory review panels, and planning and permitting activities.

The Department will foster a heightened awareness of environmental equity issues among its own staff and will provide training on the environmental issues affecting low-income and minority communities. Managers will implement specific environmental equity goals in their respective programs.

The Department will work with other federal, state and municipal agencies and coordinate on environmental equity issues.

The Department will employ a staff person responsible for ensuring that environmental equity principles are incorporated into all the Department's policies and programs.

As neighboring states have taken action to adopt strong policies to require consideration of impacts on environmental justice in waste facility licensing decisions, Maine has taken extremely limited steps to implement changes in policy, making this likely the easiest and most profitable state in the northeast to operate a landfill.

Maine is unique among northeast states in that municipalities have no home rule authority in regulating the siting or operation of waste facilities. Powers of local control power were removed from Maine communities following legislation passed in 1999, lobbied for by the attorney who would later become the attorney for the operator of the State-landfill. Maine communities are at a disadvantage in protecting the well-being of the health and well being of local people, and are often left out of the decision-making process until well after licensing decisions have been set in motion.

Requiring consideration of impact on overburdened local communities would help restore balance with surrounding states that have protected the ability of local communities to set protective standards for landfills.

The proposed rule change language would make clear that protection of the well-being of the people living in communities most impacted by the operation of these large landfills is taken into consideration when the Commissioner determines whether licensing these operations truly provides substantial Public benefit.

Rulemaking Authority

During the Public Hearing, several Board members inquired as to what statutes provide BEP authority to implement rules as proposed in the Citizen's petition.

Maine Statute Title 38, Section 341-H, authorizes the Board of Environmental Protection to adopt, amend or repeal reasonable rules necessary for the interpretation, implementation and enforcement of any provision of law that the department is charged with administering.

Title 5, Section 8002, subsection 9, of Maine Statute defines "Rule" to mean the whole or any part of every regulation, standard, code, statement of policy, or other agency guideline or statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency.

The proposed rule changes implement, assist, and make specific the waste management statutes that the DEP is charged with interpreting and enforcing.

According to the BEP Information Sheet on Rulemaking (BEP-IS-04/September 2019), the DEP may initiate rulemaking for a number of reasons including:

- (1) to address a change in state or federal law,
- (2) to respond to new information on threats to the environment or public health,
- (3) to improve the effectiveness of an existing rule, or
- (4) to incorporate advancements in pollution control technology.
- (5) in response to a citizen petition.

The rule changes proposed by the Citizen petition would assist the Department in responding to new information on threats to public health and the environment, it would improve effectiveness of the existing Public Benefit Determination rule, and it could potentially incorporate advancements in pollution control technology if options for landfill cover other than out-of-state CDD waste must be considered.

Title 38, Chapter 13, Subchapter 1, Section 1302 of Maine statute states:

[...]the Legislature finds and declares it to be the policy of the State, consistent with its duty to protect the health, safety and welfare of its citizens, enhance and maintain the quality of the environment, conserve natural resources and prevent air, water and land pollution, to establish a coordinated statewide waste reduction, recycling and management program.

[...]The Legislature finds that it is in the best interests of the State to prefer waste management options with lower health and environmental risk and to ensure that such options are neither foreclosed nor limited by the State's commitment to disposal methods.

[...]The Legislature finally declares that the provisions of this chapter shall be construed liberally to address the findings and accomplish the policies in this section.

The proposed rule changes would be in compliance with Section 1302 of State law which declares it to be the policy of the State to protect the health, safety and welfare of its citizens, enhance and maintain the quality of the environment, conserve natural resources and prevent air, water and land pollution. The language of Section 1302 specifies the statute should be construed liberally to address the findings and accomplish the policies in this section.

Maine Statute Title 38, Section 1304, authorizes the BEP to *"adopt, amend and enforce rules as it deems necessary to govern waste management, including the location, establishment, construction and alteration of waste facilities as the facility affects the public health and welfare or the natural resources of the State."*

Section 1304 goes on to clarify, *"The rules shall be designed to minimize pollution of the State's air, land and surface and ground water resources, prevent the spread of disease or other health hazards, prevent contamination of drinking water supplies and protect public health and safety."*

In adopting these rules, the board shall also consider economic impact, technical feasibility and such differences as are created by population, hazardous or solid waste, sludge or septage volume and geographic location."

Title 38, Section 1310-N gives statutory authority to the DEP to license landfills when it finds 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 and only when the facility provides a substantial public benefit.

The proposed rule changes would improve effectiveness of current rules governing waste management, and would assist the Department in implementing State law which requires rules to be designed to minimize pollution, consider impact on populations and geographic locations, prevent spread of disease and other health hazards, prevent contamination of drinking water, and protect public health and safety.

Sincerely,
Hillary Lister
Augusta, ME

hillarylister@mainematters.net