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VIA ELECTRONIC MAIL

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Mark Draper, Chair
Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Comments on Petition to Require Rulemaking, Chapter 400

Dear Chair Draper and Members of the Board:

On behalf of our client, NEWSME Landfill Operations, LLC ("NEWSME"), we are writing to urge the Board of Environmental Protection (the "Board") to reject the citizen petition proposing changes to Chapter 400. NEWSME operates the Juniper Ridge Landfill ("JRL") in Old Town, which is owned by the State of Maine. NEWSME is a subsidiary of Casella Waste Systems, Inc., a vertically-integrated solid waste management company that owns and operates solid waste collection and disposal, transfer, recycling, and organics services.

I. Overview

The petition proposes two significant changes to Maine's solid waste laws that will impede recycling and processing of solid waste in Maine and limit Maine's ability to achieve its solid waste hierarchy. It does so by proposing significant changes to the public benefit determination process. This process requires solid waste disposal facilities to demonstrate that their project is needed even before they can apply for a license to build and operate the facility.

1. First, the petition would change the definition of the term "waste that is generated within the State" (commonly referred to as "in-state waste") based solely on where an item was initially disposed, rather than the current definition in statute. The current statutory definition includes as in-state waste the residue¹ from facilities operating in Maine that are engaged in recycling, processing, and incineration activities, regardless of where the raw material was initially discarded. In other words, under the current statutory definition, the waste produced by these businesses here in Maine is, in fact, Maine waste, even when the raw material originated in another state. The Board does not have the authority to change by rule what the Legislature

¹ "Residue" means waste remaining after the handling, processing, incineration or recycling of solid waste including, without limitation, front-end waste and ash from incineration facilities. 38 M.R.S. § 1303-C(25).

has established by statute. Further, changing this definition as the petition proposes will conflict with the solid waste management hierarchy set forth in the statute.

2. Second, the petition would also create an expanded concept of “equal protection” that goes well beyond the doctrine of equal protection in the U.S. and Maine Constitutions and create a new requirement for “environmental justice.” These new concepts are vague and untested and largely ignore the fact that Maine already has robust public notice and comment requirements, as well as rigorous environmental standards, that all solid waste disposal facilities must meet.

II. Waste that is generated within the State

There are two reasons that the Board should not adopt the petition’s revised definition of in-state waste. First and foremost, the phrase “waste that is generated within the state” is defined by statute, and the Board therefore lacks the authority to adopt a different definition by rule. Beyond that, the change would be inconsistent with Maine’s solid waste management hierarchy because it would make the operation of facilities like incinerators and recycling and processing facilities much more costly, thereby very likely leading to *more* landfill disposal.

A. The Board does not have the authority to adopt a rule that is inconsistent with statute.

The Legislature has long defined in statute what constitutes in-state waste. In fact, during the most recent legislative session, the Legislature enacted, and the Governor signed into law, 2019 P.L. Chapter 619, which carefully revised the term “waste generated within the State.” That law took effect on June 16, 2020. In that law, after a significant stakeholder effort involving the Department of Environmental Protection (the “Department”), the Environment and Natural Resources Committee, and members of the business community, the Legislature once again made clear that residue from Maine’s incinerators and recycling and processing facilities is Maine waste, *regardless of where the raw materials for those facilities were initially disposed*. See 2019 P.L. Ch. 619, Sec. 3 (to be codified at 38 M.R.S. § 1303-C(40-A)).²

² Specifically, the new law provides:

Sec. 3. 38 MRSA §1303-C, sub-§40-A is enacted to read:

40-A. Waste generated within the State. “Waste generated within the State” means:

A. Waste initially generated within the State;

B. Residue generated by an incineration facility or a recycling facility that is located within the State, regardless of whether the waste incinerated or processed by that facility was initially generated within the State or outside the State;

C. Residue generated by a solid waste processing facility that is located within the State, regardless of whether the waste processed by that facility was initially generated within the State or outside the State, as long as:

(1) The residue is used at a solid waste landfill for daily cover, frost protection or other operational or engineering-related purpose, including, but not limited to, landfill shaping or grading, and such use has

To further emphasize this legislative decision, the original language of the legislation, LD 401, would have provided that the Legislature enact a law to “ensure that waste materials imported from outside the State that are processed at facilities in the State are not classified as Maine-generated waste.” This provision was not only rejected by the Legislature, but a new definition of “waste generated in the State” was adopted. The proposal in the petition is the same proposal that was rejected and replaced by the Legislature in the spring of 2020.

Furthermore, after stating in subsection A of the new law that in-state waste includes “waste initially generated within the State,” the new law goes on in subsections B, C, D, and E to establish additional categories of in-state waste, all of which apply “regardless of whether the waste . . . was initially generated within the State or outside the State.” 38 M.R.S. § 1303-C(40-A) (emphasis added). Thus, the Legislature deliberately chose to define in-state waste as including the residues from Maine’s incinerators and recycling and processing facilities.³

Given that the Legislature has clearly and directly defined in-state waste in statute, including by rejecting a sole focus on the waste’s original point of discard, the Board does not have the authority to change that definition by rule. *Valente v. Bd. of Env’tl. Prot.*, 461 A.2d 716, 718 (Me. 1983) (“Administrative agencies are creatures of statute, and can only have such powers as those expressly

been approved by the department under the landfill’s license and such use complies with all applicable rules of the department and all applicable conditions of the landfill’s license; and

(2) The use of the residue under subparagraph (1) complies with the requirements of section 1310-N, subsection 5-A, paragraph B, subparagraph (2);

D. Residue generated by a solid waste processing facility that is located within the State, regardless of whether the waste processed by that facility was initially generated within the State or outside the State, as long as:

(1) The residue does not meet the requirements of paragraph C; and

(2) The residue is generated by the facility only as an ancillary result of the facility’s processing operations; and

E. Residue generated by a solid waste processing facility that is located within the State, regardless of whether the waste processed by that facility was initially generated within the State or outside the State, as long as:

(1) The residue does not meet the requirements of paragraph C or D;

(2) The residue is not considered recycled under section 1310-N, subsection 5-A, paragraph B, subparagraph (2) and is disposed of at a solid waste landfill; and

(3) The solid waste processing facility is in compliance with the requirements of section 1310-N, subsection 5-A, paragraph B, subparagraph (2).

³ In fact, this is not new. The Legislature has consistently rejected a point-of-discard approach to defining in-state waste since at least 1989. For more information on the history of the definition, including the Legislature’s recognition that residues produced here by Maine incinerators, recyclers, and processors is Maine waste, please see Exhibit A.

conferred upon them by the Legislature, or such as arise therefrom by necessary implication to allow carrying out the powers accorded to them.”). This is based in the constitutional requirement for the separation of powers between the legislative and executive branches, with the former being entrusted with the power to write the laws and the latter to carrying them out. Me. Const. Art. III, § 2. Accordingly, the Board should reject the petition’s proposed re-write of the statute on this basis alone.

B. The original point of discard theory would harm the solid waste hierarchy.

In addition to lacking the legal authority to change the definition of in-state waste, the Board should also deny the petition because it would harm Maine’s solid waste management hierarchy. The hierarchy, which addresses both waste generated in and imported into Maine, states:

It is the policy of the State to plan for and implement an integrated approach to solid waste management for solid waste *generated in this State* and solid waste *imported into this State*, which must be based on the following order of priority:

- A. Reduction of waste generated at the source, including both amount and toxicity of the waste;
- B. Reuse of waste;
- C. Recycling of waste;
- D. Composting of biodegradable waste;
- E. Waste processing that reduces the volume of waste needing land disposal, including incineration; and
- F. Land disposal of waste.

38 M.R.S. § 2101 (emphasis added).

The hierarchy promotes activities that recycle and process waste, including through incineration, over landfilling. The reality, however, is that those businesses themselves generate residues that cannot be further recycled, processed, or incinerated, and must be disposed in a landfill. As examples, such residues include ash from the operation of a Maine incinerator or materials like carpeting or fines in construction and demolition debris that cannot be recycled. Furthermore, multiple such facilities around the State have found that they need to import waste into Maine to have enough material to operate recycling, processing, and incineration facilities economically.

If businesses higher on the hierarchy cannot use JRL to dispose of their residues, there will be less competition among landfills to accept it. As a result, the cost of that disposal may rise and in some cases may even threaten the viability of their operations. In the alternative, those businesses may have to choose to manage only waste that is originally discarded in Maine, which in some cases will significantly limit how much material they can take in and again threaten their viability. Either way, the petition would make activities like recycling, processing, and incineration more difficult and costly for

both those engaged in the solid waste management field and for all of the Maine businesses and municipalities that rely on the private sector to help process waste responsibly.⁴

III. Equal Protection and Environmental Justice

In addition to redefining in-state waste, the petition also proposes a new requirement in the Department's public benefit determination for state-owned (but not private or municipal) facilities. Under the petition, the Department would have to conclude that the facility's operation is "not inconsistent" with both equal protection and environmental justice. The version of equal protection proposed in the petition greatly expands well-understood concepts in the U.S. and Maine Constitutions. Likewise, although much has been written about environmental justice over the years, Maine has never adopted environmental justice principles into law.

As defined in the petition, "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." This would be a massive expansion of how equal protection is defined and understood under both federal and Maine law.

The United States Supreme Court has explained, "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Generally, legislation is presumed valid and will be upheld "if the classification drawn by the statute is rationally related to a legitimate state interest," a test that is nearly always met. *Id.* Only if a statute makes a distinction based upon "*race, alienage, or national origin*" will it be subject to greater scrutiny. *Id.* (emphasis added). Similarly, the Maine Supreme Court has explained, "Faced with an equal protection challenge to a statutory classification that does not impinge on fundamental rights or draw distinctions on a suspect basis such as race, color, creed or national origin, the test is to determine if there is a rational basis for the classification that furthers a legitimate governmental aim." *Peters v. Saft*, 597 A.2d 50, 52 (Me. 1991).

The petition proposes that a new version of the equal protection doctrine for these purposes should include class, income, and disability, which goes well beyond how that term is understood under well-established law. Nor does any federal or State law identify "freedom from environmental hazards" as a fundamental right requiring legal protection under notions of equal protection. Adopting the petition's definition for the narrow purposes of public benefit determinations for some types of solid waste facilities will therefore adopt a second understanding of equal protection into Maine law, which will lead to confusion.

Likewise, no Maine statute or rule has incorporated the concept of "environmental justice" into the State's environmental regulatory framework. The version proposed by the petition appears to incorporate some of the same concepts as the re-defined version of equal protection, including class,

⁴ As an examples of the economic impact of this policy change, tipping fees paid by municipalities and businesses to use JRL would likely increase by an estimated \$1.6 million to cover the cost of virgin soil needed to replace the fines that are currently used for daily cover.

disability, and income, as well as “equal protection” itself and a right of “meaningful involvement” in the development and implementation of laws. It is unclear what this means or how the Department will be able to apply it, and thus this, too, will lead to confusion.

We do not believe that a rulemaking about the somewhat arcane topic of public benefit determinations for state-owned solid waste facilities is the right way or the right place to slip these untested public policy concepts into Maine’s environmental law for the first time. These kinds of dramatic changes need a fulsome public policy debate in the Legislature.

Regardless, it is not clear why such dramatic changes would be needed. Maine’s laws already guarantee the right of citizens to participate in various ways in developing, implementing, and enforcing our waste laws. This includes, for example, the right to petition for rulemakings; the right to testify to the Legislature on proposed statutes or offer comment to the Board and/or Department on rules, applications, and enforcement matters; and the right to appeal adverse decisions.⁵ Maine’s statutes and rules also implement rigorous environmental protections that apply regardless of who is affected, and thus protect all citizens equally.⁶ Thus, it is not clear why either of these vague new concepts is needed.

IV. Conclusion

In sum, because the Legislature has already defined what constitutes in-state waste, and reaffirmed that approach as recently as this past session, the Board does not have the authority to take a different approach through rulemaking. Further, the petition’s primary impact will be to threaten the viability of the very facilities that Maine relies upon to make its solid waste hierarchy function – those Maine businesses that incinerate, recycle, and process solid waste and need a place like JRL to dispose of the residues of their operations that cannot be recycled or processed any further. This would conflict with Maine’s policy of *promoting* such industries so that society does not simply dispose of all of its solid waste in a landfill. Finally, a rulemaking regarding public benefit determinations for State-owned solid waste facilities is not the appropriate place to incorporate for the very first time the vague and untested

⁵ For example, pursuant to Section 5(F) of Chapter 400, a public benefit determination requires (1) that public notice be mailed to facility abutters and the municipal office in the municipality where the facility is located, and published in a newspaper circulated in the area where the project is located, and (2) that the Department accept and consider written public comment while processing the application. Pursuant to Section 5(G) of Chapter 400, a decision on a public benefit determination may be appealed to the Board. And, pursuant to 38 M.R.S. § 1310-N(12), there is even a citizen advisory committee that receives an additional notice of any application, except for minor alterations, filed by a state-owned solid waste disposal facility.

⁶ As just one example, pursuant to 38 M.R.S. § 1310(AA)(3), to obtain a public benefit determination, a solid waste facility must show that it:

- A. Meets immediate, short-term, or long-term capacity needs of the State;
- B. Is consistent with the state waste management and recycling plan and promotes the solid waste hierarchy; and
- C. Is not inconsistent with local, regional, or state waste collection, storage, transportation, processing, or disposal.

To actually obtain a license for a new or expanded facility, one must demonstrate compliance with potentially hundreds of pages of Department rules in Chapters 400-425.

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concepts proposed by the petition for a new understanding of equal protection and environmental justice into Maine's laws.

We respectfully recommend that the Board vote against the petition.

Sincerely,



Brian M. Rayback

Enclosure

cc: Toni King, Casella

EXHIBIT A

In-State Waste Legislation

The Maine Legislature has consistently concluded that residue and bypass from Maine incinerators, recyclers, and processors is in-state waste, regardless of where the waste was originally discarded. This issue has been explicitly discussed in the Legislature on at least the following occasions, in addition to the most recent changes from 2020 discussed above in 2019 P.L. Ch. 619, Sec. 3.

I. P.L. 1989, Ch. 585

- a. **Through this Legislation—which is the basis for the current hazardous and solid waste regulatory framework—the Legislature sought to establish a comprehensive and integrated approach to hazardous and solid waste management in Maine.**

Prior to enacting this legislation, the Legislature considered and abandoned an effort to ban the importation of solid waste into Maine and instead decided to undertake a comprehensive approach to managing hazardous and solid waste disposal in the State:

During the Second Special Session of the 112th Maine Legislature, the Energy and Natural Resources Committee considered legislation establishing a moratorium on the importation and disposal of solid waste in Maine. The committee rejected this action after hearing testimony that such a moratorium posed serious constitutional problems. Instead, the committee decided to undertake a more comprehensive study of state solid waste policy.¹

The Legislature decided to take an integrated approach in regulating the disposal of solid waste, meaning that it would encourage and incentivize reduction and recycling efforts while recognizing that incineration and landfilling would continue to be a part of Maine’s solid waste disposal strategy into the future.

This bill, as amended by the majority committee report (H-640), enacts a comprehensive framework for solid waste management in the state. The bill establishes a Waste Management Agency within the executive branch of government to oversee waste management planning, waste reduction and recycling efforts and the siting, development and operation of disposal facilities as needed by the state.²

¹ Office of Policy and Legal Analysis, Study of Solid Waste Management and Disposal Policy in Maine at 1 (June 18, 1987).

² Bill Summary, LD 1431: An Act to Promote Reduction, Recycling and Integrated Management of Solid Waste and Sound Environmental Regulation.

- b. Rather than abolish incineration as a method of waste disposal, the Legislature chose to encourage waste reduction and recycling efforts, recognizing that waste incineration supported those recycling efforts.**

The legislation established a hierarchy of solid waste disposal options and included incineration in that hierarchy:

The Legislature finds and declares that it is the policy of the State to pursue and implement an integrated approach to hazardous and solid waste management, which shall be based on the following priorities: reduction of waste generated at the source, including both the amount and toxicity of waste; waste reuse; waste recycling; waste composting; waste processing which reduces the volume of waste needing disposal, including waste-to-energy technology; and land disposal.³

II. Resolve 2003, ch. 93

When the Legislature debated whether the State should purchase the Juniper Ridge Landfill in 2003, Legislators questioned whether the landfill would handle waste from out-of-state sources. At that time, Georgia Pacific owned and operated the Juniper Ridge Landfill—then known as the Old Town Landfill—for the purpose of disposing paper mill waste. When the Old Town paper mill was in danger of closing, the State offered to purchase the landfill from Georgia Pacific as a means of decreasing the Mill’s operating costs while giving the State much-needed landfill space.

During the floor debate on the Resolve giving the State permission to acquire the Juniper Ridge Landfill, Legislators acknowledged that residue from the incineration of out-of-state solid waste was in-state waste and that such waste could be disposed of in the Juniper Ridge Landfill upon the State’s purchase. This was a concern because the Resolve gave the State authority to enter into a contract with a private entity to operate the landfill:

Any agreement for the operation of the disposal facility must be established by the office through a competitive bidding process and must require the operator to indemnify the office for liabilities and costs associated with the acquisition, development and operation of the disposal facility.⁴

Allowing a private contractor to operate a state-owned landfill was a concern to several legislators:

REPRESENTATIVE MAKAS: During our hearings it was also explained to us that this is a good risk free deal for the state in that the operator who had bid on this would assume all costs and all liabilities My

³ P.L. 1989, Ch. 585, Part D, Sec. 4 (38 M.R.S. § 1302).

⁴ Resolve 2003, ch. 93, Sec. 1(3).

question is, what is in it for operator? Why would someone bid on this opportunity assuming all costs and all liabilities in exchange for what initially should be a very modest profit, if any, for providing waste management for Georgia Pacific.

The reason that an operator would bid was explained during a hearing and is listed as items two and three on the Divided Report that all of you have gotten. The operator will attempt to get an expanded license to handle waste from other sources, not just Georgia Pacific and to handle other types of waste, which I have been told is classified as special waste by some and toxic or potentially hazardous waste by others, including incinerator ash. We were told that this expanded license would also benefit the state in that we could develop the Old Town Landfill at a lesser cost than developing the Carpenter Ridge Landfill.⁵

As another example:

REPRESENTATIVE TWOMEY: Mr. Speaker, Men and women of the House. I apologize for rising yet one more time, but this will be an RFP that will be run privately and I do think the Casella Waste will be the only ones that could come in and bid on it and run it. We have no control because I asked that question from the DEP and once that waste is incinerated it becomes Maine waste. That ash is now Maine ash.⁶

Despite the concerns about private operation of a state-owned landfill, the Legislature approved the purchase of the Juniper Ridge Landfill with the clear understanding that residue from the incineration of out-of-state waste would be disposed of at Juniper Ridge.

III. P.L. 2007, Ch. 338

In 2007, the Legislature amended Maine's solid waste statutes and explicitly clarified that "waste generated within the State" includes residue and bypass from the incineration of solid waste, regardless of where the solid waste originated.⁷ The 2007 Legislation implemented the recommendations of a Blue Ribbon Commission on Solid Waste Management, which the Natural Resources Committee convened after considering several technical changes to the State's solid waste policy framework.⁸

⁵ 2 Legis. Rec. H-997 (1st Reg. Sess. 2003).

⁶ 2 Legis. Rec. H-999 (1st Reg. Sess. 2003).

⁷ See 38 M.R.S. § 1310-AA(1-A)(D) and 38 M.R.S. § 1310-N(11) (*superseded by* 38 M.R.S. § 1303-C(40-A)).

⁸ Report of the Blue Ribbon Commission on Solid Waste Management to the Maine Legislature's Joint Standing Committee on Natural Resources, at 1 (March 2007).

The Blue Ribbon Commission recommended “that the Natural Resources Committee review the issue of acceptance of out-of-state waste at state-owned solid waste disposal facilities.”⁹ An executive summary discussing the implementation of the Blue Ribbon Commission’s recommendations provides:

Both the Commission and a State Planning Office Solid Waste Task Force have recommended keeping the prohibition against the creation of new, privately owned landfills as a means to limit the importation of solid waste. But there is nothing in statute that would prevent the executive branch from allowing importation to state-owned landfills.¹⁰

In considering how to implement the Blue Ribbon Commission’s recommendations, and whether to prevent the importation of out-of-state waste, the Legislature’s Environment and Natural Resources Committee heard testimony from Donald Meagher, Manager of Planning and Development for Casella Waste Systems:

LD 1908 would essentially undo decisions that have already been made. If policy makers in 2003 did not want residue from out-of-state [construction and demolition debris] or municipal solid waste processed in Maine to go to a state-owned landfill, then the Legislature shouldn’t have passed the Resolve; the state should not have taken our company’s money, the state should not have purchased Georgia-Pacific’s landfill, and the state should not have entered into an operating services contract that implemented those decisions.¹¹

Mr. Meagher explained to the Committee that access to out-of-state construction and demolition debris waste was necessary for the economic viability of incinerators and processing and recycling facilities located in Maine: “On the topic of out of state construction and demolition debris, Casella simply cannot meet its contractual C&D fuel supply obligation from what is generated in Maine.” *Id.*

Consistent with Mr. Meagher’s testimony, the Committee ultimately approved—and the Legislature adopted—statutory language indicating that “waste that is generated within the State” includes “residue and bypass generated by incineration . . .” 38 M.R.S. § 1310-AA(D).

⁹ *Id.* at 8.

¹⁰ Blue Ribbon Commission on Solid Waste Management: Executive summary of issues and next steps, at 1 (April 3, 2007).

¹¹ Testimony of Donald Meagher, at 2 (May 22, 2007).