STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

WASTE MANAGEMENT DISPOSAL SERVICES OF MAINE, INC. CROSSROADS LANDFILL PHASE 14 EXPANSION NORRIDGEWOCK SOMERSET COUNTY, MAINE #S-010735-WD-YB-N	)	LICENSEE'S MOTION TO DISMISS APPEAL FOR LACK OF STANDING

Licensee Waste Management Disposal Services of Maine, Inc. ("WMDSM" or "Licensee") hereby moves to dismiss the appeal filed by Conservation Law Foundation ("CLF") on the grounds that CLF lacks standing to bring this appeal. CLF asserts "organizational standing" on behalf of five members with barebone allegations of "particularized injuries" based on claims of harm that fail as a matter of law, are irrelevant to the licensing criteria in this matter and, as a result, lack any connection to causation or redressability regarding the decision under appeal, or represent pure conjecture untethered to any facts. Because its members lack standing, CLF has not and cannot demonstrate standing to appeal.

INTRODUCTION

WMDSM owns and operates a secure landfill in Norridgewock, Maine (the "Crossroads Facility" or "Facility"). In November 2019, WMDSM filed an application pursuant to Maine's Solid Waste laws, 38 M.R.S. §§ 1301-1319-Y, for approval to construct and operate an expansion that would extend the life of the existing facility by approximately 17 years (the "Phase 14 Project" or "Project"). Order at 3-6. Prior to filing its solid waste application, WMDSM sought and obtained a public benefit determination. In issuing a positive finding of

substantial public benefit, the Maine Department of Environmental Protection (the "Department") concluded that the Project: (1) provides a critical role in maintaining competitive markets for solid waste services, (2) meets the capacity needs of relevant local communities and the region, and (3) meets the State's waste management goals. Order at 48.

After a comprehensive 18-month review process that included an adjudicatory public hearing, the Department found the Project satisfied the licensing criteria of Maine's Solid Waste laws and implementing regulations and issued an order approving the Project. The Department's decision approving the Project is nearly 100 pages and reviews the applicable licensing criteria and record evidence that demonstrates compliance with those criteria. CLF did not participate as an intervenor in the public hearing but did submit comments during the review period and on the draft license and has now brought this appeal challenging the Department's approval of the Project.

LEGAL TEST FOR STANDING TO APPEAL

There is no dispute over the legal test for standing to appeal. Any final decision by the Department may be appealed to the Board by those "who have standing as aggrieved persons," which requires a showing that the appellant has suffered a "particularized injury" due to the Department's decision. 06-096 CMR Ch. 2, §§ 1(B), 24.[1] A person suffers a particularized injury when that person's property, personal, or pecuniary rights are adversely affected by the Department's decision. *See Friends of Lincoln Lakes v. Town of Lincoln*, 2010 ME 78, ¶ 15, 2 A.3d 284, 289.

Not any simple allegation of harm will suffice. The alleged harm must be distinct from harm suffered by the general public and must "genuinely flow" from the challenged action.

[1] Section 1(B) provides that the term "aggrieved person" is to be interpreted "consistent with Maine state court decisions that address judicial standing requirements for appeals of final agency action."

Nelson v. Bayroot, 2008 ME 91, ¶ 10, 953 A.2d 378, 382. Further, the alleged injury must be "sufficiently concrete and definite"; an "indirect injury will not suffice." *Varney v. Look*, 377 A.2d 81, 83 (Me. 1977). The harm must be "fairly traceable to the challenged action" and "it must be likely that a favorable [decision on appeal] will prevent or redress the injury." *Summers v. Earth Isl. Inst*., 555 U.S. 488, 493 (2009) (*citing Friends of the Earth, Inc. v. Laidlaw Envt'l Svcs., Inc*., 528 U.S. 167, 180-181). Finally, when the party alleging harm is not, itself, the object of the governmental action, standing is substantially more difficult to establish. *See id*.

As an organization, CLF has standing to sue on behalf of one or more of its members only if: (1) the member has standing to sue in her own right, (2) the interests at issue are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the action. *Friends of the Earth*, 528 U.S. at 181. The burden is on CLF, and its members, to prove they have standing to appeal. *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 14, 973 A.2d 735, 739.[2]

ALLEGED FACTS RELATED TO STANDING

CLF asserts organizational standing on behalf of five of its members, none of whom are named. Appeal at 7-10. CLF alleges that Member #1 "passes" the existing landfill facility twice a day and "frequently" experiences a noxious odor. Appeal at 9. This member also kayaks on the Kennebec River downstream from the Anson-Madison Sanitary District wastewater treatment plant which, in addition to treating all residential and commercial wastewater from its service territory, also treats leachate from the Crossroads Facility. *Id*. This member claims that discharges from that facility will adversely impact water quality in the Kennebec River if the Department's Order approving Phase 14 is allowed to stand. *Id*. Similarly, Member #2 canoes

[2] WMDSM does not dispute that CLF can meet the second and third tests for organizational standing but, for the reasons set forth below, CLF's identified members lack standing to appeal in their own right.

on Kennebec River and contends that the Department's Order approving Phase 14 will adversely impact the River and the "overall water quality and air quality of the region." Appeal at 9.

Members #3 and #4 live "approximately" two miles away, and they are concerned that the Department's Order will "contaminate the aquifer which supplies their drinking water" and will result in a "risk of fire" to their property. *Id.* Member #3 or #4 is also concerned that operation of Phase 14 will adversely impact her "ability to eat and grow her own food" on her property two miles away from the facility. *Id.* The other contends that operation of the Phase 14 will prevent him from eating fish caught in the Kennebec River. *Id.*

The final member lives "near" the existing facility and is concerned that the Department's Order will result in the "destruction of wetlands" that will "disrupt" the watershed around and cause harm to North Pond, a pond located more than three miles from the Project. Appeal at 10.

Given these allegations, the grounds for standing fall into three distinct categories: (1) standing due to harm from driving by the Crossroads Facility, (2) standing due to harm to environmental and recreational resources (specifically, the Kennebec River); and (3) standing based on overly generalized allegations without sufficient specificity. These issues will be addressed in turn.

DISCUSSION

For CLF to assert organizational standing the allegations in the appeal must show that at least one of its members has suffered a particularized injury that harms the member's personal property or pecuniary interests. For the following reasons, the allegations in the appeal are inadequate to show that any of these members has standing in their own right.

As an initial matter, none of the members are named and, other than some vague

references that a few members live "near" the facility, the locations of their properties are not identified. "Nebulous allegations regarding its member's identities and their connection to the relevant geographic area" are insufficient to show that these CLF members have standing to challenge the Department's Order. *United States v. AVX Corp*., 962 F.2d 108, 117 (1st Cir. 1992). What is clear is that none of these members are abutters to the proposed facility, and while the threshold for demonstrating a particularized injury is minimal for abutters, for those not living in proximity to a development, the test for standing is more stringent. Such appellants must allege specific facts that show they, and not the public generally, will be adversely affected by the Department's Order. *Nergaard*, 2009 ME 56, ¶ 12, 973 A.2d at 739.

I. Standing Cannot be Premised on Driving by the Facility

CLF claims that Member #1 drives past the Crossroads Facility twice a day and "experiences noxious odor." Appeal at 9. This member's experience, however, is no different than any other person who might drive by the Facility. The Maine Supreme Court has held that, on identical facts, persons that suffer alleged harm only by driving by a site do not have standing to challenge permits issued for new development, as there is "no difference between the potential harm asserted by the [appellant] and the potential harm" experienced by other members of the public that also drive by the site. *Nergaard*, 2009 ME 56, ¶ 20, 973 A.2d at 741. As such, this allegation is, as a matter of law, inadequate to show standing.[3] Although Member #1 also alleges harm related to his recreational use of the Kennebec River, as discussed in Section II below, that is also legally insufficient to confer standing here.

[3] It is also important to note that Member #1 does not allege that the odor will become worse if Phase 14 proceeds. Any allegation concerning existing harm is inadequate to show standing because there is no causal connection between the alleged harm and the challenged action. *See Summers*, 555 U.S. at 493 (the alleged injury must be "fairly traceable to the challenged action").

II. Standing Cannot Be Premised on Alleged Water Quality Impacts to the Kennebec River

Members #1, #2, and #4 allege harm related to recreational use of the Kennebec or the impact of eating fish from the Kennebec. Appeal at 9. The only connection between the Project and the Kennebec River identified by CLF is the fact that leachate from the Crossroads Facility is currently transported off-site to two licensed waste-water treatment plants ("WWTPs") that discharge to the Kennebec River. Appeal at 9, 24. As a matter of law, however, any claim of harm resulting from licensed discharges from these facilities is insufficient to confer standing to appeal the Phase 14 Order.

First, as a threshold matter, the harm alleged by CLF's members must be within the "zone of interests protected by the law invoked." *AVX Corp.*, 962 F.2d at 114. The applicable statues and rules that govern construction and operation of a solid waste landfill in Maine do not regulate point source discharges into waters of the State of Maine. To the contrary, water quality in the Kennebec River and discharges from facilities located there are regulated by the Department pursuant to the federal Clean Water Act and its Maine counterpart. *See* 33 U.S.C. § 1251 *et seq.*; 38 M.R.S. § 411-420-D. Simply put, CLF's complaints about licensed discharges to the Kennebec River do not fall within the zone of interests protected by the solid waste laws governing the Phase 14 project or the scope of the Department's review of the Project. *See, e.g., Brink's Inc. v Maine Armored Car and Courier Svc., Inc*., 423 A.2d 536, 538 (Me. 1980) (regulated carrier without standing to appeal regulatory decision because it was not within the class of entities protected by the applicable statute); *Central Maine Power Co. v. Public Utilities Comm'n*, 382 A.2d 302, 312 (Me. 1978) (association did not have standing to appeal rate decision by PUC because relevant statute existed to protect ratepayers, not competitors, and thus association's alleged harm was outside the interests protected by the law invoked).

Second, and relatedly, allegations of harm to the Kennebec River fail to satisfy the requirement that the harm be caused by the decision under appeal and that prevailing on appeal "will afford some redress for the injury." *Maine People's Alliance et al. v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006). As noted above, the cause of the alleged harm is a concern about licensed discharges from WWTPs, not the licensing of the Phase 14 Project. CLF is not alleging that the WMDSM is discharging effluent from a point source to the Kennebec River or engaging in any other activity that violates Maine law. *See Conservation Law Foundation v. American Recycled Materials, Inc*., 2017 WL 2622737, *5, (D. Mass. 2017) (CLF did not have standing to challenge industrial activity due to lack of causation between complained of activity and the alleged harm; nowhere did CLF even allege the defendant was discharging pollutants from a point source). As such, the Department's approval of Phase 14 is not the cause of any alleged harm to water quality in the Kennebec River or to its resident fish species. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (to show standing plaintiff must show that she has sustained a "direct injury as a result of the challenged official conduct") (internal quotations omitted).

Moreover, there is nothing in this appeal that can or will provide redress for CLF's complaints about licensed discharges from the WWTPs. As made clear in its appeal, CLF's chief complaint is that the licensing program for waste discharge permits do not address a host of chemicals of concern to CLF. Appeal at 25. That is simply not an issue that the Department in this proceeding or the Board in this appeal can address. CLF's concerns can only be addressed in another forum with other parties and an entirely different decision by the Department applying a different regulatory scheme. As a result, CLF's claims of harm fail the requirement of

redressability.[4]

Finally, although allegations of harm to recreational or environmental resources can be sufficient to confer standing where such harm is a direct result of the action under appeal, bald assertions of harm and a "purely subjective fear" of environmental harm are insufficient to ground standing. *Maine's People's Alliance*, 471 F.3d at 284. Instead, an individual's decision to forgo recreational activities "based on concern about pollution will constitute a cognizable injury only when the concern is premised upon a realistic threat." *Id*. No member has articulated how, if at all, the Project's contribution to licensed and lawful discharges from WWTPs will have any impact on water quality in the Kennebec River. Generalized concerns over water quality and air quality are not, by themselves, a cognizable injury absent a showing that such harm is a direct and realistic threat caused by the Project.[5] *See Conservation Law Foundation v. Paul R. LePage,* (Me. Super. Ct. Dkt. No. CV-18-045, July 20, 2018) (Horton, J.) at 16-17 (CLF lacked standing to challenge permitting stay because its members alleged only an indirect injury due to the challenged action).

For these reasons, allegations of harm to the water quality of the Kennebec River, including harm to recreational uses, fishing or consumption of fish, are inadequate to confer standing on Members #1, #2, #3 and #4.

[4] To the extent CLF's challenge to the Department's approval of Phase 14 is a collateral attack on the MEPDES permits for these WWTPs, that is neither permitted, nor does it provide CLF with standing in the present appeal. *See, e.g., Sold, Inc. v. Town of Gorham*, 2005 ME 24, ¶ 10, 868 A.2d 172, 176 (one statute cannot be used to challenge a permit issued under a separate and distinct statutory scheme); *Town of Boothbay v. Jenness*, 2003 ME 50, ¶ 25, 822 A.2d 1169, 1177 (party precluded from collaterally attacking prior permitting decision in separate proceeding).

[5] In addition to concerns about impacts to the Kennebec, Member #2 has also raised concerns about harm to the "overall water quality and air quality of the region." Appeal at 9. Given the myriad of causes to water and air quality in the region these allegations are woefully inadequate to show there is any "direct" injury from the Department's approval of the Phase 14 Project.

III. Alleged Impacts to Groundwater and North Pond Are Speculative

Members #3 and #4 claim that groundwater impacts from Phase 14 will travel "approximately two miles" to their property, rendering their garden and groundwater unfit for consumption.[6] Appeal at 9. Member #5 claims that wetland impacts from Phase 14 (it is not clear what type of impacts) will travel more than three miles leading to "irrevocable harm" to North Pond. Appeal at 10.

None of these members allege any facts to suggest that operation of Phase 14, some two to three miles away from these member's property or resource of interest, will have any impact on these resources. CLF does not identify where Members #3 and #4 live, or any facts to suggest that there are hydrological groundwater connections between the Crossroads Facility and the Members' property. Regarding North Pond, this resource is more than three miles from the Crossroads Facility. Member #5 does not even allege how wetland impacts will travel that distance, let alone in a manner that will "irrevocably harm" the pond.

"Conjectural" or "hypothetical" allegations of harm are insufficient. *City of Los Angeles*, 461 U.S. at 102; *Conservation Law Foundation v. American Recycled Materials, Inc*., 2017 WL 2622737, at *5. Instead, CLF must allege facts that show that these members will be "immediately in danger of sustaining some direct injury" to their property due to the Department's approval of Phase 14. *City of Los Angeles*, 461 U.S. at 102. Although CLF need not prove such connections with scientific certainty, the Board is not required to "credit bald assertions," "unsubstantiated conclusions," or "outright vituperations." *AVX Corp*. 962 F.2d at 115. CLF must set forth "reasonably definite factual allegations," and where the cause of the

[6] Members #3 and #4 also claim harm related to their use of the Kennebec River. Those claims fail for the reasons discussed in Section II.

alleged injury is not obvious, CLF must "plead the existence in [its] complaint with a fair degree of specificity."[7] *Id.*

No such specificity exists regarding how operation of Phase 14 will cause harm to the personal, property, or pecuniary interests of Members #3, 4 and 5. Such allegations are "conjectural" and "hypothetical," short of the "real and immediate" harm required for standing. *City of Los Angeles,* 461 U.S. at 102; *see also Summers*, 555 U.S. at 495 (a "chance" of harm is insufficient; party must assert facts showing a likelihood of concrete harm).

CONCLUSION

CLF offers generic allegations, attributed to unidentified members, of injuries that are neither particularized nor personal to these members. It has not offered allegations to show that the Department's approval of Phase 14 will be the direct cause of any of the alleged harms, nor has it alleged facts showing that the reversal of the Department's decision will provide redress for these injuries. Such "barebones allegations" fail to show the type of "concrete injury" that is necessary to confer standing to appeal the Department's Order.

[7] Not only has CLF not alleged a groundwater connection to show such harm is possible the record in this case is clear that such a claim is simply imagined. The Supplemental Geologic and Hydrogeologic Report submitted with the application evaluated the time of travel to the nearest well, which is located on WMDSM property approximately 1,500 feet from the Project. *See* July 31, 2020 Phase 14 Solid Waste Permit Application Supplemental Geologic and Hydrogeologic Report Prepared by Golder Associates Inc. ("Golder Report") at 17. Based on an evaluation of average input values, the Golder Report demonstrated it would take more than 100 years for a hypothetical leak from the Phase 14 Project to travel the 1,500 feet to the WMDSM well. *Id.* at 21. Even under conditions using unrealistic input parameters, it would take longer than six years to reach this nearest well. *Id.* at 21-22. At "approximately two miles," Members #3 and #4's property is greater than 10,000 feet away or almost seven times the distance between the Project and the WMDSM well used for the time of travel calculations. In addition to their significant distance from the Project, there is no information on whether those properties are downgradient from the Project. Allegations of groundwater impacts to Member #3 and #4's property are purely speculative and insufficient to demonstrate standing.

For these reasons, the Licensee respectfully requests that the Board dismiss CLF's appeal for lack of standing.

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