



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION AUGUSTA, MAINE 04333-0017

BOARD ORDER

IN THE MATTER OF

STATE OF MAINE) APPLICATION FOR
BUREAU OF GENERAL SERVICES) MAINE HAZARDOUS WASTE, SEPTAGE AND
JUNIPER RIDGE LANDFILL EXPANSION) SOLID WASTE MANAGEMENT ACT, and
City of Old Town, Town of Alton) NATURAL RESOURCES PROTECTION ACT
Penobscot County, Maine) PERMITS and
#S-020700-WD-BI-N) WATER QUALITY CERTIFICATION
#L-024251-TG-C-N)
) THIRD PROCEDURAL ORDER

On May 18, 2016, the Chair of the Board of Environmental Protection (Board) held a pre-hearing conference at the Cross Office Building in Augusta, Maine regarding the application for expansion of the Juniper Ridge Landfill. The purpose of the pre-hearing conference was to review the status of the application and the list of issues submitted by the intervenors, to determine whether there is any agreement on issues not contested by the intervenors, and to discuss briefly the upcoming site visit and the schedule for the submission of testimony prior to the hearing. This procedural order reviews matters discussed at the conference and sets forth the rulings of the Board Chair, sitting as the Presiding Officer.

Participants:

James Parker, Board Chair and Presiding Officer	Brian Rayback, Pierce Atwood
Mary Sauer, Assistant Attorney General (AAG)	for NEWSME
Emily Green, AAG	Don Meagher, Casella Waste Systems, Inc.
Cynthia Bertocci, Board Executive Analyst	(Casella) and NEWSME
Ruth Ann Burke, Board Admin. Assistant	Michael Booth, Sevee & Maher for NEWSME
David Burns, DEP Bureau of	Jeremy Labbe, Casella and NEWSME
Remediation and Waste Management (BRWM)	Wayne Boyd, Casella and NEWSME
Victoria Eleftheriou, DEP BRWM	Toni King, Casella
Kathy Tarbuck, DEP BRWM Project Manager	Jim Katsiaficas, Perkins Thompson
James Beyer, DEP Land Bureau	for intervenor City of Old Town
Lynn Caron, DEP Land Bureau	William Mayo, Manager City of Old Town
Michael Barden, Dept. of Econ. & Comm. Dev.	Denis St. Peter, CES Inc. for City of Old Town
for Bureau of General Services	Dana Snowman, Intervenor
William Laubenstein, III, AAG	Edward Spencer, Intervenor
for Bureau of General Services	Chip Laite, Sargent Corp.
Thomas Doyle, Pierce Atwood	for intervenor SSR, LLC
for NEWSME Landfill Operations, LLC	Hillary Lister, Alton
(NEWSME)	

1. Status of Application Review

Statute requires that prior to holding a hearing on an application the Board shall ensure that the Department of Environmental Protection (Department) and any outside agency review staff assisting the Department in its review of the application have submitted to the Applicant their review comments and any additional information requests pertaining to the application and that the Applicant has had an opportunity to respond to those comments and requests (38 M.R.S. § 341-D(2)). Department staff stated that the Applicant has received and responded to the Department's review comments. The Department's review comments and the Applicant's responses thereto are available on-line for public review at www.maine.gov/dep/projects.html under "Juniper Ridge Landfill application for expansion."

2. Review of Issues Submitted by Intervenors

Intervenors City of Old Town and Edward Spencer submitted issues lists as specified in the Second Procedural Order. Chip Laite, on behalf of intervenor SSR, LLC, stated that at this time SSR does not intend to submit testimony but reserves the right to cross-examine the witnesses of the Applicant and the other intervenors. Intervenor Dana Snowman stated his intent to address the issue of waste origin as set forth in his petition for intervenor status and to cross-examine the witnesses of the other parties. It was noted that Jesse Pekkala has withdrawn as an intervenor and has been added to the interested persons list for the proceeding.

Issues submitted by the parties were reviewed at the pre-hearing conference for relevancy with respect to the licensing criteria. In accordance with the Maine Administrative Procedure Act, 5 M.R.S. § 9057(2) and Chapter 3, § 20(A) of the Department's rules, irrelevant testimony may be excluded. This section of the Order addresses the relevancy of a number of issues identified by the parties. The fact that a particular issue or aspect of an issue submitted by a party is not specifically addressed in this Order is not a finding that the issue is necessarily relevant. Parties have the right to challenge the relevancy of testimony throughout the course of the proceeding and decisions regarding relevancy may be made until the close of the hearing record.

- A. List of Issues Submitted by the City of Old Town. By letter dated May 13, 2016, the City of Old Town submitted a list of issues including comments on the Draft Declaration of Covenants and Restrictions for the Applicant's proposed preservation area and a technical review of the application conducted by the City's consultant, CES, Inc. The City reserved the right to address the issues set forth in its submittal through written materials and testimony.

At the conference, the Presiding Officer requested clarification regarding the following items mentioned in the City's submittal: the agreement in principle regarding truck traffic on area roads, the agreement in principle regarding third party oversight of the proposed wetland preservation area, the City's recommendations regarding monitoring for hydrogen sulfide emissions and associated odor, the City's recommendations regarding groundwater monitoring, and comments regarding fees associated with certain wastes accepted at Juniper Ridge Landfill. It was stated that, to the extent information pertaining to these items bears on the licensing criteria, the information must be provided to the Department and the intervenors. The discussion of these matters is summarized below.

- Agreements in Principle regarding Truck Traffic and the Wetland Preservation Area. The City provided a brief description of the scope of the proposed agreements. Both agreements appear to bear directly on relevant licensing criteria. The City stated that it will provide copies of the agreements to the Department and the intervenors when they are finalized and well in advance of the public hearing.
- Hydrogen Sulfide Monitoring. The City stated that it will provide to the Department and the intervenors the data in support of its recommendation regarding hydrogen sulfide monitoring.
- Groundwater Monitoring. In its technical review of the application, CES expressed uncertainty regarding the location of the bedrock groundwater divide and cautioned against relying upon it when assessing the need for monitoring of residential wells. The City will provide additional information in support of its technical comments if requested by the Department.
- Fees Paid to the City of Old Town. In its submission, the City mentioned discussions with the Applicant regarding fees for the disposal of certain wastes at the Juniper Ridge Landfill. At the conference, the City clarified that it does not consider fee payments to the City under the Host Community Agreement relevant to the licensing criteria. Mr. Spencer commented that fees paid to the City may have a bearing on the types and volumes of wastes received at Juniper Ridge Landfill and, therefore, compliance with the criteria pertaining to the solid waste management hierarchy.

A copy of the Host Community Agreement between the Applicant and the City of Old Town is included in the application. In accordance with 38 M.R.S. § 2170-A, the Department may not issue a license for a solid waste disposal facility unless a host community agreement is in place that includes certain provisions pertaining to impact payments as set forth in statute. However, the Department is not a party to the agreement and cannot revise or mandate the terms of the agreement. The Board will base its licensing decision on the licensing criteria in statute and rule. Any testimony regarding fees must be specifically linked to a relevant licensing criterion.

Additional Issues. Department staff requested that the City provide the calculations in support of the City's comments regarding the geomembrane anchor trench and the geosynthetic liner puncture analysis. The City's consultant, CES, will provide the requested information.

- B. List of Issues Submitted by Edward Spencer. By letter dated May 12, 2016, Mr. Spencer identified a number of issue areas that he would like to address in this proceeding. The Presiding Officer requested clarification from Mr. Spencer, and comment from the other parties, regarding the relevant licensing criteria for each of the issue areas listed.

After considering the submission and comments at the pre-hearing conference, the Presiding Officer rules as follows regarding the relevancy of certain issues:

- Public Benefit Determination. Several issue areas identified by Mr. Spencer¹ appear to be, at least in part, an attempt to revisit the findings and conclusions of the Public Benefit Determination required by 38 M.R.S. § 1310-N(3-A) and § 1310-AA.

The Applicant has received a Public Benefit Determination for the proposed expansion at the Juniper Ridge site and that determination was upheld by the Board on appeal. As stated in the Second Procedural Order, statute prohibits the Board from revisiting the Public Benefit Determination in this licensing proceeding (38 M.R.S. § 1310-N(3-A)(B)). Therefore, the Board will not allow testimony or cross-examination by the parties regarding the need for the proposed 9.35 million cubic yard expansion. Additionally, testimony that the State should seek to develop other landfill sites is not relevant to the current licensing proceeding. However, to the extent the Public Benefit Determination imposes conditions on any license that may be issued in this proceeding, including limits on the types and volumes of waste, those limits are arguably relevant and may be addressed in testimony and cross-examination.

- Operating Services Agreement between the State and Casella Waste Systems, Inc. Mr. Spencer expressed concerns with the Operating Services Agreement and stated his view that the State has not exercised proper oversight of the existing landfill (state lack of control).

The Applicant has included a copy of the Operating Services Agreement in the application and intervenors may refer to it; however, as set forth in the Second Procedural Order, the terms of the Operating Services Agreement between the State and Casella Waste Systems, Inc. are not subject to review in this licensing proceeding. The Board has no authority to revise or mandate a change in the Operating Services Agreement. To the extent that concerns regarding oversight of the landfill bear on relevant licensing criteria such as technical ability, those concerns may be addressed in those contexts.

- Technical Ability. Several issue areas identified by Mr. Spencer question the technical ability of the Applicant. Technical ability is a relevant licensing criterion. See Chapter 400, § 4(C). However, to the extent testimony pertains to past performance of the landfill, parties are cautioned that the current licensing proceeding is not an enforcement proceeding. Additionally, with respect to Mr. Spencer's concerns regarding Department oversight of the landfill and any alleged violations, the Applicant cannot speak to questions intervenors may have regarding the Department's exercise of the Department's oversight responsibilities.
- Definition of Waste Generated within the State. Mr. Spencer stated that he intends to provide testimony on the amounts, true sources, and types of wastes entering Juniper Ridge Landfill (waste streams into JRL).

Title 38 § 1310-N(11) provides that:

... a solid waste disposal facility owned by the State may not be licensed to accept waste that is not waste generated within the

¹ The following issue areas identified by Mr. Spencer in his May 12, 2016 submission appear to revisit, at least in part, the Public Benefit Determination: state lack of planning, alternatives analysis, public benefit determination – unmet obligations by Casella/BGS, and environmental justice and distribution of costs and benefits.

State. For the purposes of this subsection, “waste generated within the State” includes residue and bypass generated by incineration, processing and recycling facilities within the State or waste, whether generated within the State or outside the State, if it is used for daily cover, frost protection or stability or is generated within 30 miles of the solid waste disposal facility.

Testimony regarding the quantities and types of waste accepted at the facility may be relevant to certain licensing criteria. However, testimony that the statutory definition of “waste generated within the State” quoted above is inadequate or should be changed, or that waste which meets the statutory definition of “waste generated within the State” should not be regulated as Maine waste is not relevant to the current licensing proceeding.

- Impact on Property Values. Mr. Spencer included effects on residential, commercial and industrial property values (also termed stigma effects) in his submission on issues. Impact on property values is not specifically included in Maine solid waste statute or rule as a licensing criterion. Impact on property values also does not fall within the criteria in 38 M.R.S. § 1310-N(2-F)(C) and Chapter 400, § 4(F)(1)(e) that the proposed facility may not unreasonably adversely affect existing uses.² A separate process is available under Maine law for persons claiming property devaluation. *See* 38 M.R.S. § 2175-A, Property Value Offset, and State Planning Office rule at Chapter 475, Property Value Offset Program for Agency-Operated Solid Waste Disposal Facilities. For these reasons, testimony and evidence on property devaluation is not relevant to the licensing criteria and will not be admitted.
- Effect on Economic Development. Mr. Spencer stated that he would like “the implications of the proposed expansion on economic development to be addressed.” There is no requirement in statute or rule that the Applicant conduct an economic impact analysis of the proposed project and, as stated above, a public benefit determination has been issued for the proposed project. However, to the extent testimony is offered on environmental issues that relate to specific licensing criteria in statute or rule, such testimony may be relevant.
- Stormwater and Flooding. Mr. Spencer included rainfall and extreme weather events as issues. Given the general relevance of these topics to the licensing criterion in Chapter 400, § 4(M) that “[a] solid waste facility may not unreasonably cause or increase flooding on-site or on adjacent parcels nor create an unreasonable flood hazard to a structure,” evidence on these topics generally will be admitted. Parties are cautioned, however, that the Board will make its decision based on licensing criteria in statute and rule, and that the Board has no authority in this proceeding to alter the licensing criteria.
- Threats to Public Welfare. Mr. Spencer states that the Applicant has not adequately addressed impacts on public welfare and that there seems to be no definition of “welfare.” He seeks to present testimony and/or cross-examination regarding impacts on welfare.

² *See Harding v. Commissioner of Marine Resources*, 510 A.2d 533 (Me. 1986); *see also In re Spring Valley Development*, 300 A.2d 736 (Me. 1973).

While “welfare” is not specifically defined, protection of public welfare is addressed through implementation of the various solid waste statutes and rules. Parties are encouraged to address their concerns regarding public welfare in the context of the specific relevant licensing criteria in statute and rule. As stated in Chapter 400, § 13(A), “[t]he Department has determined that the requirements of these rules for solid waste facilities are best able to ensure that a facility will not pollute any waters of the State, contaminate the ambient air, constitute a hazard to health or welfare, or create a nuisance.”

- Compliance with Applicable Laws. Mr. Spencer seeks to present testimony on potential changes in State solid waste management policy and the universe of existing and proposed solid waste management facilities which he believes may impact the volume of waste requiring disposal at Juniper Ridge Landfill. He argued that the alternatives analysis required under the Natural Resources Protection Act should address these scenarios.

As stated above, the Public Benefit Determination, including the need for the proposed expansion, cannot be revisited in this licensing proceeding. Additionally, parties are reminded that under provisions of Chapter 2, § 11(F), the application is subject to the substantive laws and rules (including definitions) in effect at the time the application was accepted as complete for processing. Testimony and argument that terms in statute and rule should be redefined, new policies implemented, or that State law should otherwise be changed are not relevant to this licensing proceeding.

- C. Issue Submitted by Dana Snowman. Mr. Snowman stated at the conference that his sole issue in the current licensing proceeding is his view that a large percentage of the wastes accepted at Juniper Ridge Landfill is not Maine waste. He argues that the point of discard should be the determining factor when defining waste generated within the State.

Based upon Mr. Snowman’s statements at the pre-hearing conference, the Board understands that Mr. Snowman is seeking a change to the statutory definition of “waste generated within the State.” As stated above, the Board has no authority to change the statutory definition, and testimony that the Board should employ a different definition, or that the Legislature should change the definition, is not relevant to this licensing proceeding.

- D. Issues Not Contested. Under provisions of Chapter 2, § 11(F) of the Department’s rules, the Applicant bears the burden of proof to affirmatively demonstrate that each of the licensing criteria in statute and rule is met. While all licensing criteria must be met, the Presiding Officer has authority to limit the issues to be addressed at the hearing if the parties and the Presiding Officer agree to such limitation or if no prejudice to any party will result (5 M.R.S. § 9053(4) and Chapter 3, § 4(C)(4)). For issues that are not disputed, the Applicant may rely on the information contained in the application and any supplemental submissions filed in response to comments received.

At the conference the intervenors stated that they are not contesting the application with respect to the following licensing criteria:

- Title, Right or Interest: Chapter 400, § 4(A);
- Financial Ability: Chapter 400, § 4(B);
- Adequate Provision for Utilities and No Unreasonable Adverse Effect on Existing or Proposed Utilities: Chapter 400, § 4(L);
- Liability Insurance: Chapter 400, § 10; and
- Criminal or Civil Record: Chapter 400, § 12.

While the intervenors have stated that they are not contesting the application with respect to the criteria listed above, Board members and staff may question the Applicant on compliance with these criteria. Additionally, testimony from members of the public on these criteria is not limited by this Procedural Order.

E. Opportunities for Consolidation of Intervenors. No opportunities were identified.

3. Site Visit

The Board will visit the site on Thursday, June 23, 2016 (rain date of Wednesday, June 29, 2016) to view the existing facility and surrounding area. A draft list of site features the Board intends to view was distributed at the conference and the parties were invited to suggest additional items. Department staff will lead the site visit. The facility will provide a bus to transport Board members and party representatives around the site.

4. Hearing

The Board has tentatively scheduled the hearing for October 18 and 19, 2016. Parties should also reserve October 20 in the event an additional day is needed to conclude the hearing. The hearing will be held in the Bangor area at a site to be determined.

As set forth in the Second Procedural Order, the Board is requiring pre-filed testimony and exhibits. Parties are reminded that a witness will not be allowed to testify at the hearing if the testimony has not been pre-filed. The requirement of pre-filed testimony allows Board members, staff, Board counsel and the parties to review testimony in advance of the hearing and come to the hearing prepared to conduct efficient and focused cross-examination. Oral testimony by parties at the hearing will be limited to a concise summary of their pre-filed testimony so that the majority of time may be allocated to questioning and cross-examination of witnesses. A party that does not pre-file testimony will be allowed to cross-examine the witnesses of the other parties. Each party is required to present its case during the time allotted for parties and not during the portion of the hearing that will be reserved for testimony from the general public.

Interested persons are not required to pre-file testimony; they will have an opportunity to address the Board during the portion of the hearing reserved for the public. If an intervenor wants to change status from an intervenor to an interested person, he/she should contact the Board's Executive Analyst.

Another pre-hearing conference will be held following submission of pre-filed testimony to discuss a schedule for the hearing.

5. **Other**

Identification of Persons Testifying/ Contracted Speech. Mr. Spencer requested that the Board require persons testifying in the public session to state their name, residence, the entity they represent, and whether their testimony is freely given or a matter of legal contract.

It is standard practice for the Board to request that persons testifying state their name, residence, and whether they are speaking on behalf of any entity or organization. The Board will not require persons testifying in the public session to state whether they currently have, or have had, a contractual relationship with any party to the proceeding that would bear on the testimony they are about to provide. The Board notes that parties to the proceeding have the right to “make oral cross-examination of any person present and testifying” (Chapter 3, § 8) as long as questioning is relevant, not overly repetitious, and within time constraints as the Presiding Officer may direct (Chapter 3, § 11(A)(5) and § 19(B)(7)).

Testimony by Members of the Public. In accordance with Chapter 3, § 19(C), “where a member of the public is affiliated with a party to the proceeding, the member of the public shall speak on his or her own behalf and shall not provide evidence that should have been provided by the party as part of its case in chief.” Members of the public will be encouraged to focus their testimony on the issues the Board has authority to address in this licensing proceeding.

This Order establishes the following schedule:

1. By Friday, July 1, 2016, the Applicant and each intervenor shall submit a list of its witnesses who will present testimony and evidence in this proceeding. The list must include the name of the witness; the witness’ affiliation, if any; whether the witness is presented as an expert witness and, if so, the witness’ relevant credentials; and the issues/licensing criteria each witness will address in his/her testimony.
2. The deadline for submission of pre-filed direct testimony and exhibits is Friday, July 22, 2016.
3. The tentative deadline for submission of pre-filed rebuttal testimony is Friday, September 9, 2016. This deadline may be adjusted based upon the resolution of any motions to strike pre-filed direct testimony.
4. The public hearing is scheduled for October 18 and 19, 2016. Parties shall also reserve October 20 in the event it is needed to conclude the hearing.
5. Any appeal from this order to the full Board must be filed by Monday June 6, 2016.

DONE AND DATED AT AUGUSTA, MAINE THIS 27th DAY OF MAY, 2016.

BOARD OF ENVIRONMENTAL PROTECTION



BY: _____
James W. Parker, Board Chair
and Presiding Office