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Admitted in: ME

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Via Email & US Mail

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Bureau of Remediation and Waste Management  
Maine Department of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017

Mr. Kevin Martin  
Compliance & Procedures Specialist  
Maine Department of Environmental Protection  
17 Stat House Station  
Augusta, ME 04333-0017

Re: DEP Chapter 2.6(B) Confidential Treatment of Disposal Fee Information in Two Private Commercial Agreements

Dear Dave and Kevin:

This firm represents Casella Waste Systems, Inc. and its subsidiary companies, NEWSME Landfill Operations, LLC ("NEWSME") and Pine Tree Waste, Inc. ("PTW"), collectively "Casella." By this letter, Casella respectfully requests a determination that the disposal fee information described below contained in two private commercial disposal services agreements will be held confidential by the Department should Casella submit unredacted copies of these agreements.

As you know, NEWSME and the Maine Bureau of General Services ("BGS"), together, the "Applicants," have submitted an amendment application now pending with the Department, #S-020700-WD-BL-A, for continued acceptance of in-state Municipal Solid Waste ("MSW") at the Juniper Ridge Landfill ("JRL"). In support of their application, the Applicants have submitted to the DEP two separate disposal services agreements<sup>1</sup>, with only the disposal fee information<sup>2</sup> redacted, that NEWSME and/or PTW have entered into as part of the Applicants' demonstration of consistency with the State's solid waste management hierarchy. (Dave and others at the DEP have seen, and have access to, both of these

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<sup>1</sup> The two agreements are: (1) Agreement for Disposal Services, dated November 10, 2017, between PTW and Coastal Resources of Maine, LLC ("CRM") (the "Fiberight Agreement"), and (2) Agreement for Disposal Services, dated January 29, 2018, among PTW, NEWSME, Maine Waste Processing, LLC, and Penobscot Energy Recovery Company, Limited Partnership (the "PERC Agreement").

<sup>2</sup> In the case of the Fiberight Agreement, the "disposal fee" is the price per ton PTW agrees to pay CRM for delivery of two categories of commercial MSW to the Fiberight facility and the price CRM agrees to pay PTW for disposal of bypassed MSW at JRL. In the case of the PERC Agreement, the "disposal fee" is the price per ton PTW agrees to pay PERC for delivery of four distinct categories of MSW at PERC, the price per ton that PTW would pay to PERC for any delivery shortfall in two such categories of MSW, and the price per ton that PERC agrees to pay NEWSME for bypass MSW and other Acceptable Waste (as defined in the agreement) that PERC delivers to JRL.

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agreements in redacted form.) As part of its review of the application, the DEP has requested that NEWSME submit for its review unredacted versions of these contracts.

Casella provides this letter to demonstrate that the disposal fee information it seeks to keep confidential constitutes a confidential trade secret under applicable Maine law. We submit this letter prior to submission of the unredacted agreements because the company and the counterparties to these agreements are not able to release sensitive confidential information without confirmation that the information will be protected by the DEP. If after reviewing this letter, you have any concerns or questions that require resolution before you can provide us with the confirmation we are seeking, let's discuss them as soon as possible.

Because the disposal fee information in the Fiberight and PERC agreements are trade secrets, the DEP must treat this information as confidential.

Pursuant to the DEP's regulations, it must keep confidential those records that are confidential pursuant to the Maine Freedom of Access Law ("FOAA"), 1 M.R.S. §§ 401-410.06 096 C.M.R. Ch. 2.6(B). FOAA protects from disclosure privileged information. 1 M.R.S. § 402(3)(B) (excluding from the term "public records" those records "that would be within the scope of a privilege against discovery or use as evidence"). Maine Rule of Evidence 507 provides the privilege against disclosure of trade secrets: "A person has a privilege to refuse to disclose, and to prevent any other person from disclosing, a trade secret that the person owns." M.R. Evid. 507. Accordingly, the DEP must keep trade secrets confidential.

While the term "trade secret" is not defined in Rule 507, the Maine Law Court has utilized the definition contained within the Uniform Trade Secrets Act (the "Act"). *Town of Burlington v. Hosp. Admin. Dist. No. 1*, 2001 ME 59, ¶ 21, 769 A.2d 857, 864. The Act defines a trade secret as "information" that "[d]erives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure ...." 10 M.R.S. § 1542(4)(A). Furthermore, the information must be the subject of reasonable efforts to maintain its secrecy. *Id.* at § 1542(4)(B).

The disposal fee information included in the Fiberight and PERC agreements are trade secrets under the Act because Casella and the counterparties to each agreement derive independent economic value from the secrecy of this price information and the parties have undertaken reasonable efforts to preserve this confidentiality. Both of these considerations are discussed in more detail below.

### **Independent Economic Value of the Secrecy of the Disposal Fee Information**

Casella and its counterparties arrived at agreed upon disposal fees in these two agreements after lengthy, arms-length negotiations that required both internal and external resources. They would be placed at a competitive disadvantage if this private disposal fee information became known to competitors or other persons who would seek to obtain value from this information and/or enhance their own competitive positions. Keeping this disposal fee information confidential is essential to Casella's and its counterparties' competitive positions now and in future negotiations with other parties. This pricing information could be used by current and future competitors to the disadvantage of Casella and its counterparties and make one or more of them less competitive, such as by undercutting one of the parties on price. Or they could be charged more at another facility because of disclosure of this fee

information, as that facility would now know what each of them is willing to pay. It is standard practice in the waste industry not to share with outside parties (i.e., those not party to the agreement) disposal fee information in such disposal agreements. It is from Casella's and its counterparties' competitive interest that this fee information's independent economic value derives.

Because of the independent economic value of the secrecy of the disposal fee information, Casella and the respective counterparties to these two agreements have taken reasonable measures to preserve the secrecy of this information.

### **Efforts to Maintain the Secrecy of the Disposal Fee Information**

Under the law, trade secret information must be kept confidential until it no longer derives independent economic value. In other words, so long as the public disclosure of disposal fee information would advantage the competitors of Casella or its counterparties or disadvantage Casella or its counterparties, it must be protected. Accordingly, Casella and its respective counterparties have taken reasonable steps to maintain the secrecy of this information by redacting the important disposal fee information prior to submission of the agreements to the DEP. Casella sought the counterparties' consent prior to submitting even redacted versions of the agreements to DEP. All parties agreed they needed to protect the disposal fee information as confidential.

As such, to the best of Casella's and its counterparties' knowledge and effort, the disposal fee information is not publicly known and will not be disclosed publicly as long as the respective parties to each agreement continue to derive value from its continued secrecy.

Because cost (or pricing) information is of such economic value not only to the company that owns the information, but also to its competitors, another Maine agency that has extensive experience regulating economic relationships, the Public Utilities Commission, frequently issues protective orders protecting cost information as confidential when such information is provided to it.<sup>3</sup>

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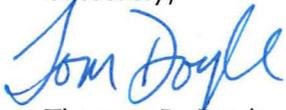
<sup>3</sup> See, e.g., Docket No. 2006-686, Protective Order No. 2 at 1 (Feb. 28, 2007) (granting protective order of cost estimates regarding the construction of a transmission line, finding that "Public disclosure of the cost estimates might adversely impact BHE's ability to negotiate or conduct a bid process effectively."); Docket No. 2010-180, Temporary Protective Order No. 5 [Corrected] at 1 (May 5, 2011) (holding that disclosure of "line construction cost information" including "details of business arrangements between CMP and its contractors" relevant to a CMP initiated RFP for contractor services on the proposed transmission project under review, "could prejudice CMP in the letting of bids, bid analysis and negotiation of future contracts by divulging the Company internal commercial plans and strategies"); Docket No. 2014-48, Protective Order No. 10 (Nov. 14, 2014) at 1-2 (holding that "detailed proprietary pricing, cost and business method and calculation information," including relevant portions of contractors' bids related to a generation developer's proposed construction of a generation lead line and per-mile cost estimates of prior generator-constructed lead lines constituted confidential information); Docket No. 2014-48, Temporary Protective Order No. 9 at 1 (July 8, 2014) (holding that a generator's project cost estimates, i.e., "detailed proprietary pricing, cost and business method and calculation information, financial models, and the cost to acquire landowner rights and the right of way access for the wind farm generator lead line" constituted confidential information); Docket No. 2014-00048, Protective Order No. 7 at 1 (Jul. 7, 2014) (protecting as confidential NHT's transmission line and substation construction cost information, as this information has value to NHT, to companies doing or seeking to do business with NHT, and to potential business competitors of NHT, and that its release would be valuable to competitors and harmful to NHT and its affiliates ).

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In sum, the disposal fee information in the Fiberight and PERC Agreements are trade secrets. Casella and the other parties to these agreements have the utmost interest in keeping this information confidential, and have done so to date. Because this information is essential to their competitive positions, it must be kept confidential. Casella therefore respectfully requests that the DEP designate this disposal fee information as confidential and confirm that it will protect this information from disclosure under Chapter 2.6(B) of the DEP's rules for as long as Casella and its counterparties continue to derive economic value from the continued secrecy of this information. Casella commits to inform the DEP and to "sunset" the continued protection of this disposal fee information as a trade secret when it no longer constitutes a trade secret.

Thank for your consideration of this request for confidential treatment of the disposal fee information in the Fiberight and PERC Agreements. Fiberight and PERC join in this request.

Sincerely,



Thomas R. Doyle

cc: Brian Oliver, Casella  
Craig Stuart Paul, Fiberight  
Kevin Nordy, PERC  
William Laubenstein, Esq., AAG  
Michael Barden, DECD