



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

BOARD ORDER

IN THE MATTER OF

STATE OF MAINE, ACTING THROUGH)	APPEALS OF
THE BUREAU OF GENERAL SERVICES)	SOLID WASTE LICENSE
OLD TOWN, PENOBSCOT COUNTY, ME)	
JUNIPER RIDGE LANDFILL)	
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Pursuant to the provisions of the *Maine Hazardous Waste, Septage and Solid Waste Management Act*, 38 Maine Revised Statutes (M.R.S.) §§ 1301 to 1319-Y; *Solid Waste Management Hierarchy*, 38 M.R.S. § 2101; the *Rule Concerning the Processing of Applications and Other Administrative Matters*, 06-096 Code of Maine Rules (C.M.R.) ch. 2 (last amended June 9, 2018); the *Solid Waste Management Rules: General Provisions*, 06-096 C.M.R. ch. 400 (last amended April 6, 2015), *Landfill Siting, Design and Operation*, 06-096 C.M.R. ch. 401 (last amended April 12, 2015), and *Water Quality Monitoring, Leachate Monitoring, and Waste Characterization*, 06-096 C.M.R. ch. 405 (last amended April 12, 2015) (collectively, the Rules), the Board of Environmental Protection (Board) has considered the appeal filed jointly by the applicant, the State of Maine acting through the Bureau of General Services (BGS) and the contracted operator of the Juniper Ridge Landfill (JRL), NEWSME Landfill Operations, LLC (NEWSME) (referred to jointly as the BGS/NEWSME) and the appeal filed individually by Mr. Edward S. Spencer (Mr. Spencer) of Department license #S-020700-WD-BL-A. Based upon materials filed in support of the appeals, the responses to the appeals, comments received, and other related materials in the Department’s file, the Board FINDS THE FOLLOWING FACTS:

1. APPEAL SUMMARY

On April 30, 2018, the Board received two timely appeals of Department license #S-020700-WD-BL-A, issued on March 31, 2018 to the State of Maine, acting through BGS, which granted continued disposal of up to 81,800 tons per year of non-bypass, in-state municipal solid waste (MSW) at JRL up to and including March 31, 2019 with a potential six-month extension that would allow for no greater than 30,000 tons of non-bypass, in-state MSW.

The State of Maine, acting through BGS, owns JRL. NEWSME, a wholly-owned indirect subsidiary of Casella Waste Systems, Inc. (Casella), operates the landfill for the State of Maine, acting through BGS.

2. TERMS AND ACRONYMS

The following terms and acronyms can be found in this license and are listed in Table 1 for ease of reference:

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Table 1: License Terms and Acronyms

2013 Amendment	Department license #S-020700-WD-BC-A, issued December 20, 2013
2014 Board Order on Appeal	Board Denial of Appeals license #S-020700-WD-BG-Z, issued June 19, 2014
2018 Amendment	Department license #S-020700-WD-BL-A, issued March 31, 2018
Applicant	Refers to both BGS and NEWSME (or successor operator)
Board	Maine Board of Environmental Protection
BGS	Bureau of General Services
Casella	Casella Waste Systems, Inc.
C.M.R.	Code of Maine Rules
CRM	Coastal Resources of Maine, LLC
CRM facility	CRM facility refers to the solid waste processing facility in Hampden which was established by Fiberright as a special purpose entity and is managed entirely by Fiberright
Department	Maine Department of Environmental Protection
JRL	The Juniper Ridge Landfill
MERC	The former Maine Energy Recovery Company, an incinerator previously operated in Biddeford, Maine
MRC	Municipal Review Committee, Inc.
M.R.S.	Maine Revised Statutes
MSW	Municipal Solid Waste
MSW Bypass	Any MSW that is destined for disposal or processing at a solid waste incinerator, but that cannot be disposed of or processed at that incinerator because of the incinerator's malfunction, insufficient capacity, inability to process or burn, down-time, or any other comparable reason as approved by the Department
NEWSME	NEWSME Landfill Operations, LLC
OSA	Operating Service Agreement
PERC	Penobscot Energy Recovery Company
Rules	The Department's Solid Waste Management Rules, including 06-096 C.M.R. chs. 400, 401, and 405
WMDSM	Waste Management Disposal Services of Maine, Inc.

3. LICENSING HISTORY

The following history is a summary of relevant licensing events and does not include all licensing actions:

- A. On July 28, 1993, James River Paper Company, Inc. was issued license #S-020700-7A-A-N to construct and operate a 68-acre secure landfill, known as the West Old Town Landfill, to dispose of the James River Paper Company's pulp and papermaking residuals.

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- B. On October 21, 2003, the Department issued conditional approval for the transfer of the West Old Town Landfill licenses, from the Fort James Operating Company, to the State of Maine, State Planning Office (SPO) (including license #S-020700-WR-M-T). The transfer became effective when the sale of the landfill to the State of Maine, acting by and through SPO, occurred on February 5, 2004.
- C. On February 5, 2004, the State of Maine, acting by and through the SPO, and Casella Waste Systems, Inc. (Casella) entered into an Operating Services Agreement (OSA) for the operation of the West Old Town Landfill.
- D. On April 9, 2004, the Department approved an amendment application, license #S-020700-WD-N-A, for a vertical increase in the final elevation of the landfill and the disposal of additional waste streams. License conditions prohibited the acceptance of unprocessed MSW except for MSW bypass from specified Maine incinerators.
- E. In 2006, the West Old Town Landfill became known as the Juniper Ridge Landfill.
- F. Pursuant to PL 2011, ch. 655, § GG-69, on July 1, 2012, the BGS, within the Department of Administrative and Financial Services (DAFS), became the state agency acting as the owner and licensee of JRL. The Department of Economic and Community Development is the manager of JRL. NEWSME, a wholly-owned indirect subsidiary of Casella, operates the landfill for the State of Maine, acting through BGS.
- G. On December 20, 2013, the Department approved an amendment application, license #S-020700-WD-BC-A (2013 Amendment), for the disposal of 81,800 tons per year of MSW at JRL, limited to the period of time during which licensed disposal capacity remains available within the approved horizontal and vertical boundaries of the existing landfill or March 31, 2016, whichever is earlier.
- H. On January 21, 2014, two timely appeals of the 2013 Amendment were filed with the Board of Environmental Protection (Board) by BGS/NEWSME and Mr. Spencer.
- I. On June 19, 2014, the Board issued a Denial of Appeals, license #S-020700-WD-BG-Z (2014 Board Order on Appeal), but modified Condition 10 in license #S-020700-WD-BC-A by changing the acceptance date of the 81,800 tons per year of non-bypass MSW from March 31, 2016 to March 31, 2018.

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- J. On March 31, 2018, the Department issued a partial approval with conditions of an amendment application, license #S-020700-WD-BL-A (2018 Amendment), to revise the deadline for the disposal of 81,800 tons per year of MSW at JRL, from March 31, 2018 to March 31, 2019, with a potential six-month extension that would allow for no greater than 30,000 tons of non-bypass, in-state MSW.

4. PROCEDURAL HISTORY

A. Department License #S-020700-WD-BL-A

The application for Department license #S-020700-WD-BL-A, the subject of this appeal, was submitted in November 2017. The application requested removal of the March 31, 2018 date in the 2013 Amendment, as revised in the 2014 Board Order on Appeal, to allow for continued acceptance of no more than 81,800 tons per year of non-bypass, in-state MSW at JRL. The request applied only to the existing landfill operations and not the landfill expansion license, #S-020700-WD-BI-N/#L-19015-TG-D-N, issued June 1, 2017.

Issued on March 31, 2018 as a partial approval with conditions, license #S-020700-WD-BL-A (2018 Amendment) includes seven conditions, of which four (Conditions 3, 5, 6, and 7) are referred to in the appeal documents and are as follows:

- (3) Soil Erosion. The applicant shall take all necessary actions to ensure that its activities or those of its agents do not result in unnecessary or noticeable erosion of soils on site during operation of the landfill.
- (5) BGS and NEWSME shall accept no greater than 81,800 tons per year of non-bypass, in-state MSW at JRL, limited to a period of time up to and including March 31, 2019, except for a possible one-time six-month extension beyond March 31, 2019 of no greater than 30,000 tons of non-bypass, in-state MSW based on a demonstrated need as stated in Condition 7 below. The MSW restriction does not limit the authority of the applicant to accept MSW bypass and soft layer material for cell construction after March 31, 2019, provided that such acceptance is consistent with the relevant terms of Department licenses #S-020700-WD-N-A and #S-020700-WD-W-M.

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- (6) During the one-year extension period, scheduled to occur from April 1, 2018 through March 31, 2019, BGS and NEWSME shall develop and prepare to implement measures that eliminate the need for non-bypass, in-state MSW disposal at JRL. On or before March 31, 2019 these measures shall be implemented unless the six-month extension referenced in Condition 7 below is granted by the Department.
- (7) If a demonstrated need exists, BGS and NEWSME may submit a one-time request for a six-month potential additional extension to the Department for review and approval under the following conditions:
 - A. The one-time request shall be limited to no greater than 30,000 tons of non-bypass, in-state MSW over the six-month extension period; and
 - B. The one-time request shall be submitted no later than November 30, 2018 as a Condition Compliance submittal with a specific plan detailing the need for the extension based on the then-current solid waste landscape in Maine, with emphasis on the operational status of other solid waste management facilities in Maine which are higher on the hierarchy. This submittal must also include information sufficient for the Department to determine how the approved non-bypass, in-state MSW under this amendment will be handled after September 30, 2019 without utilization of JRL for disposal.

B. Appeals Received

Two timely appeals of the 2018 Amendment were filed with the Board on April 30, 2018 by BGS/NEWSME and Mr. Spencer. BGS/NEWSME filed an appeal requesting that the timeframe to accept 81,800 tons per year of non-bypass, in-state MSW be extended through December 31, 2023 and that Conditions 5, 6, and 7 be

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deleted.¹ Mr. Spencer requested, among other items, that the Department uphold a firm policy of no MSW into JRL.

C. Supplemental Evidence

BGS/NEWSME and Mr. Spencer submitted proposed supplemental evidence for inclusion in the record. Following an opportunity for comment, Board Chair Parker ruled on the admissibility of the proposed supplemental evidence pursuant to 06-096 C.M.R. ch. 2, § 24(D) in a June 22, 2018 letter. Evidence not admitted to the record was redacted from the appeal submissions.

D. Responses to the Appeals

A deadline of July 12, 2018 was set for arguments on the merits of the appeals. In addition to the responses filed by BGS/NEWSME and Mr. Spencer to one another's appeal, which are discussed in detail in Section 9 of this Order, the Board received written responses from 9 interested persons.

The following interested persons requested that the amendment time restriction be lifted, extended further into the future, or reconsidered to allow for maximum flexibility: Troiano Waste Services, Inc.; MRC; Oceanside Rubbish, Inc.; Aggregate Recycling Corporation; Shipyard Waste Solutions, LLC; Penobscot Energy Recovery Company (PERC) Holdings, LLC; and Coastal Resources of Maine, LLC (CRM).

Mr. Antonio Blasi commented in support of admissible evidence regarding truck traffic and noted that landfilling was supposed to be a temporary option for the MRC communities and that the MRC waiver fee to haul to PERC is profiteering.

The comments received from ecomaine are summarized as follows: BGS/NEWSME, not Casella, has the burden to demonstrate compliance with the hierarchy; BGS/NEWSME's landfill diversion claims are overstated; the 2013 license did not set a precedent for consistency with the solid waste management hierarchy since the Department found consistency with the hierarchy only if certain

¹ BGS/NEWSME also included a motion to disqualify Chair Parker from the appeal proceeding. In a May 4, 2018 letter, Chair Parker declined to recuse himself from this Appeal. Mr. Parker cited, among other things, changed circumstances in the solid waste management landscape in the five years since his prior recusal as well as his uncontested participation in the JRL expansion licensing proceeding. Mr. Parker stated that he can fairly judge the evidence and arguments in the pending appeals.

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conditions are imposed; the third party agreements with PERC and the CRM facility do not establish consistency with the hierarchy; and the Department’s 2018 Amendment is supported by the available disposal capacity in Maine.

E. Board Meeting

The Board heard oral arguments by the parties at its September 20, 2018 meeting in Bangor and at its October 4, 2018 meeting in Augusta.

5. STANDING

06-096 C.M.R. ch. 2, § 24 states that final license decisions of the Commissioner may be appealed to the Board by persons who have standing as aggrieved persons. The term aggrieved person is defined in 06-096 C.M.R. ch. 2, § 1(B) as “any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision. The Board will interpret and apply the term “aggrieved person”, whenever it appears in statute or rule, consistent with Maine state court decisions that address judicial standing requirements for appeals of final agency action.”

BGS is the owner and permittee of JRL. NEWSME is the contracted landfill operator. As such, both BGS and NEWSME may suffer particularized injury as a result of the licensing decision and qualify as aggrieved persons.

BGS/NEWSME question Mr. Spencer’s standing to appeal the Commissioner’s license decision. BGS/NEWSME argues in a footnote on page 2 of their July 12, 2018 comment letter that although the Department and Board have previously granted Mr. Spencer “aggrieved person” status in JRL matters, they respectfully disagree that Mr. Spencer be given such status since he lives 1.75 miles from JRL and the licensing decision does not expand the landfill boundaries, make it taller, or meaningfully change its operations other than extending the time period for which it can accept MSW.

In his appeal, Mr. Spencer states that he qualifies as an aggrieved person based on his location relative to the facility and his assertion that the extension of MSW acceptance could mean more odors, traffic issues, litter and vector problems deleterious to his quality of life, property values, and environmental integrity. The Board finds that the time extension and therefore the amount of MSW disposed of at JRL may impact Mr. Spencer. Additionally, the Board previously found that Mr. Spencer had standing to appeal the Department’s 2013 Amendment regarding acceptance of non-bypass, in-state MSW at JRL and granted Mr. Spencer standing as an intervenor in the proceedings for the landfill expansion (#S-020700-WD-BI-N/#L-19015-TG-D-N, issued June 1, 2017).

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The Board finds that BGS/NEWSME and Mr. Spencer have demonstrated that they are aggrieved persons as defined in 06-096 C.M.R. ch. 2, § 1(B) and may bring the appeals before the Board.

6. PROJECT DESCRIPTION

In its application associated with the 2018 Amendment, BGS/NEWSME requested removal of the March 31, 2018 deadline in the 2013 Amendment as modified by the 2014 Board Order on Appeal, for the existing landfill to continue to accept no more than 81,800 tons per year of non-bypass, in-state MSW at JRL. The applicant stated that an approved amendment would provide a disposal option to meet the ongoing needs of primarily southern Maine communities, formerly contracted with the now closed Maine Energy Recovery Company (MERC). BGS/NEWSME also asserted that an approved amendment is necessary because of a potential shortfall, beginning April 1, 2018, in the availability of existing and planned solid waste facilities to manage the MSW generated within the State.

As listed above in the Licensing History in Section 3 of this Order, a number of licensing actions have addressed the acceptance of MSW at JRL. Only MSW bypass was allowed as acceptable waste in the 2004 license amendment; allowance of 81,800 tons per year of non-bypass, in-state MSW was licensed from December 20, 2013 to March 31, 2016 with an extension granted to March 31, 2018, stemming from the closure of the MERC incinerator in Biddeford; and the 2018 Amendment now under appeal allows non-bypass, in-state MSW acceptance up to specified dates in 2019. The 2018 Amendment was based on a demonstrated need in the near-term to provide disposal options due to unknowns associated with the change in the operating capacity of PERC and the construction and commercial operation date of the Coastal Resources of Maine (CRM) facility.

7. BASIS FOR APPEALS AND REMEDIES REQUESTED

A. BGS/NEWSME

- (1) Objections and Basis for Appeal. BGS/NEWSME objects to the Department’s utilization of the solid waste management hierarchy to both limit disposal of MSW at JRL and require BGS/NEWSME to take steps to resolve state-wide MSW management problems, which BGS/NEWSME argue are out of their control.
- (2) Remedy Requested. BGS/NEWSME requests that the Board delete Conditions 5, 6, and 7 from the 2018 Amendment and in their place, extend the date allowing non-bypass, in-state MSW disposal at JRL to December 31, 2023.

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B. Mr. Spencer

- (1) Objections and Basis for Appeal. Mr. Spencer objects to disposal of non-bypass MSW at JRL and the permitted time extension for such disposal. Mr. Spencer's appeal addresses several areas in which he objects to actions taken during the review of the application and to several Department findings, conclusions or conditions in the license, including the hierarchy and future capacity concerns. Other areas of Mr. Spencer's objections include contractual issues, sources of MSW, traffic study adequacy, odor and erosion considerations, promises of no out-of-state waste or MSW, air emissions, and Old Town's Chapter 24 requirements.
- (2) Remedy Requested. Mr. Spencer requests that the Board allow for only 30,000 tons of MSW to be accepted at JRL between March 31 and September 30, 2018, require that BGS/NEWSME reveal what their plan was for MSW disposal after April 1, 2018 if the Department had not granted the 2018 Amendment, and require the Department to conduct a State audit of waste flow during the six-month period (March 31, 2018 to September 30, 2018).

8. STATUTORY AND REGULATORY FRAMEWORK

The relevant review criteria for the subject Order include, but are not limited to, the following applicable statutes and Rules.

- A. *Department of Environmental Protection Organization and Powers*, 38 M.R.S. §§ 341-A-349-B (2017), as applicable.
- B. *Maine Hazardous Waste, Septage and Solid Waste Management Act*, 38 M.R.S. §§ 1301-1319-Y (2017), as applicable.
- C. *Solid Waste Management Hierarchy*, 38 M.R.S. § 2101 (2017).
- D. *Rule Concerning the Processing of Applications and Other Administrative Matters*, 06-096 C.M.R. ch. 2 (last amended June 9, 2018), as applicable.
- E. *Solid Waste Management Rules: General Provisions*, 06-096 C.M.R. ch. 400 (last amended April 6, 2015), *Landfill Siting, Design and Operation*, 06-096 C.M.R. ch. 401 (last amended April 12, 2015), and *Water Quality Monitoring, Leachate*

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Monitoring, and Waste Characterization, 06-096 C.M.R. ch. 405 (last amended April 12, 2015), as applicable.

9. DISCUSSIONS AND FINDINGS

A. Solid Waste Management Hierarchy

Both appeals included discussion on the solid waste management hierarchy, which has been one of the primary considerations in addressing MSW disposal at JRL and the management of wastes at other Maine solid waste facilities since its establishment as a statutory and regulatory requirement.

As stated in 38 M.R.S. § 1310-N(1)(D) and 06-096 C.M.R. ch. 400, § 4(N)(1), the purpose and practices of the solid waste facility must be consistent with the State’s solid waste management hierarchy (hierarchy) set forth in 38 M.R.S. § 2101(1), which reads as follows:

Priorities. It is the policy of the State to plan for and implement an integrated approach to solid waste management for solid waste generated in the 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.

In addition, 38 M.R.S. § 2101(2) establishes that “it is the policy of the State to actively promote and encourage waste reduction measures from all sources and maximize waste diversion efforts by encouraging new and expanded uses of solid waste generated in this State as a resource.”

The Department’s Rule at 06-096 C.M.R. ch. 400, § 4(N)(2)(a) states that for a solid waste disposal facility, the applicant must affirmatively demonstrate consistency with the hierarchy, including the following:

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[T]hat the waste has been reduced, reused, recycled, composted, and/or processed to the maximum extent practicable prior to incineration or landfilling, in order to maximize the amount of material recycled and reused, and to minimize the amount of waste being disposed. Such evidence shall include, but is not limited to, a description of the reduction, reuse, recycling, composting and/or processing programs/efforts that the waste is or will be subject to, and that are sufficiently within the control of the applicant to manage or facilitate, including relevant metrics to evaluate effectiveness; and a description of ongoing efforts to increase the effectiveness of these programs/efforts.

For the purpose of 06-096 C.M.R. ch. 400, § 4(N):

[R]educing, reusing, recycling, composting and/or processing waste to the “maximum extent practicable” prior to disposal means handling the greatest amount of waste possible through means as high on the solid waste management hierarchy as possible, resulting in maximizing waste diversion and minimizing the amount of waste disposed, without causing unreasonable increases in facility operating costs or unreasonable impacts on other aspects of the facility’s operation. Determination of the “maximum extent practicable” includes consideration of the availability and cost of technologies and services, transportation and handling logistics, and overall costs that may be associated with various waste handling methods.

(1) Compliance with the Hierarchy – BGS/NEWSME’s Appeal

- a. BGS/NEWSME states that for the Commissioner to have issued the 2018 Amendment, the conclusion must be that the application met the hierarchy in the near-term and notes that there is no affirmative statement anywhere in the decision stating that the application did not meet the hierarchy in the medium or long term. BGS/NEWSME asserts that it appears the Commissioner agrees that Casella² takes significant steps to comply with the hierarchy and that prohibiting disposal of MSW at JRL may be a financial burden; however, the

² Casella is the parent company of NEWSME.

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Commissioner’s conclusion appears to be that “the applicants have only made this showing in the short term” (page 14 of BGS/NEWSME’s appeal). BGS/NEWSME states that the Commissioner’s concerns about Casella’s compliance with the hierarchy are misguided.

BGS/NEWSME focuses on the following three points in its arguments regarding the perceived concerns of the Commissioner on the hierarchy: the specific towns or businesses generating the MSW is not relevant to the hierarchy analysis, the amount of MSW disposal under the 2013 Amendment, and the fact that Casella’s contracts with PERC and CRM are contingent on the Department’s approval. BGS/NEWSME also discusses the economics of the hierarchy.

BGS/NEWSME asserts that although the Commissioner focuses on the fact that the MSW management shortfall in 2012 was caused by the closure of MERC and Casella’s corresponding contracts with communities serviced by MERC, this is not the key issue. BGS/NEWSME contends that the issue is how much MSW there is to manage with a shortfall in Maine’s capacity for non-landfill disposal of MSW, and with no basis under the hierarchy to prefer one landfill over another in managing the shortfall.

BGS/NEWSME states that although “the Commissioner notes several times that the tonnage of MSW disposed at JRL under the [2013 Amendment] has gone up each year,” the Commissioner “fails to acknowledge, however, that NEWSME has *not once reached the 81,800 tons per year limit*” (page 14 of BGS/NEWSME’s appeal). Additionally, BGS/NEWSME states that although MSW disposal increased at JRL from 2014 to 2016, Casella diverted more than five times the MSW it disposed at JRL over the three years. In the highest year of MSW disposal, 2016, BGS/NEWSME states that MSW accounted for approximately 10 percent (%) of the total waste tonnage accepted at JRL.

BGS/NEWSME states that Casella’s contracts to divert waste to the PERC and CRM facilities are contingent on the Department’s approval of MSW disposal at JRL because the contracts are the direct result of a desire to comply with the hierarchy and not to create undue pressure on the Department. BGS/NEWSME also

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states that as a direct result of its need to promote the hierarchy to support the application for the 2018 Amendment, Casella agreed to deliver a combined total of 120,000 tons of in-state MSW each year to PERC to incinerate and CRM to process.³ However, without full approval of the Amendment application, BGS/NEWSME states it would no longer need a license amendment, no longer need to demonstrate compliance with the hierarchy for this waste stream, and therefore would no longer need the contracts. BGS/NEWSME asserts that linking the PERC and CRM contracts to the JRL 2018 Amendment shows that the hierarchy alters behavior in favor of facilities like PERC and CRM, but if the disposal of MSW to JRL is limited to just 12 or 18 months, it will drive MSW away from the PERC and CRM facilities to other landfills.

BGS/NEWSME refutes the assumption from others that agreements can be reached with PERC and CRM to send more MSW to them. BGS/NEWSME asserts that additional tonnage sent to these facilities would have required an uneconomical tip fee, the contracts were heavily negotiated by private parties, and the hierarchy does not allow the Department to insert itself into private contracts and force “bad deals.”

BGS/NEWSME argues that the 2017 application for the 2018 Amendment “documented how refusing to allow existing JRL to accept MSW through its closure will increase operating costs and may necessitate using materials like virgin soil or woodchips that will take up valuable landfill space in lieu of MSW” (page 11 of BGS/NEWSME’s appeal). BGS/NEWSME asserts that “MSW will be used beneficially at JRL as pre-grading and shaping material as part of closure.”

BGS/NEWSME states that the application for the 2018 Amendment complies with the hierarchy and nothing more should have been required of them.

³ This 120,000 tons per year is the in-state MSW contracted amount. The total contracted number is 170,000 tons per year (80,000 tons per year of in-state MSW and 50,000 tons per year of out-of-state MSW to PERC and 40,000 tons per year of in-state MSW to CRM).

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- b. Mr. Spencer’s Response to BGS/NEWSME’s Appeal. Mr. Spencer is concerned with the waste amounts obligated by Casella for disposal. Mr. Spencer states that 22,000 tons per year was the amount produced by the southern Maine MERC communities meant to be helped temporarily by their waste being sent to JRL and now MSW is being directly disposed of at JRL from the Bangor area. Mr. Spencer notes that total MSW produced in Maine is trending lower and takes exception to the statement on pages 14 and 15 of BGS/NEWSME’s appeal that “there were modest gains in how much MSW went to JRL (from 36,878 tons in part of 2014 to 69,934 tons in 2016).” Mr. Spencer states that the term ‘modest’ in reference to an 89% increase in MSW deliveries exemplifies the lack of statistical justifications of some of BGS/NEWSME’s statements.

Mr. Spencer states that there is little proof given to substantiate BGS/NEWSME’s claim that the hierarchy will be harmed if the extension is not granted because more MSW will be disposed at other landfills. Mr. Spencer refutes their argument that “[t]his has nothing to do with the hierarchy because all landfills are at the same level” (page 4 of BGS/NEWSME’s appeal), since JRL is state-owned and the OSA has conditions specifying that BGS/NEWSME must comply with the hierarchy.

Mr. Spencer makes the statement that the clauses in the Casella contracts with PERC and the CRM facility that are contingent upon the Department’s granting of the MSW acceptance extension are Casella’s way of saying “if you don’t let us landfill at JRL, we will cause other MSW to be landfilled and held back from facilities higher on the hierarchy scale” (page 2 of Mr. Spencer’s July 12, 2018 comment letter). Mr. Spencer states that this may illustrate lack of commitment to supporting the hierarchy.

Mr. Spencer states that the hierarchy is a permitting standard and the fact that JRL is a state-owned landfill gives the Department authority to regulate it and determine that MSW should not be going to JRL, in accordance with the original Request for Proposal and OSA for the landfill.

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(2) 2018 Amendment Conditions – BGS/NEWSME’s Appeal

- a. BGS/NEWSME states there are two flaws in the 2018 Amendment approval conditions: that the purpose of the hierarchy is to ensure that solid waste is being managed at levels as high on the hierarchy as practicable without preference for facilities that are on the same level of the hierarchy and that the Department has forced the applicant to develop a plan to eliminate the need to dispose of MSW at JRL, which may facilitate the preference for other landfills.

BGS/NEWSME asserts that Conditions 5 and 7 of the 2018 Amendment, granting 12 to 18 months for JRL to continue MSW disposal, will not push waste up the hierarchy, but will result in disposal of MSW at other landfills. BGS/NEWSME states that Maine does not have the capacity to manage non-bypass, in-state MSW at the rate it generates, state law prohibits new commercial incinerators, no additional processing facilities are being developed, and recycling is now hamstrung by China’s new policy limiting acceptance of recycled materials. BGS/NEWSME asserts that there will still be the same uncertainty in the management of solid waste in 12 to 18 months and although it has agreements with PERC and CRM to divert up to 120,000 tons of in-state MSW each year, it could not reach agreements to expand that figure. BGS/NEWSME reiterates that the hierarchy specifically requires looking at what is ‘practical’ and states that JRL is held to a higher standard than other facilities such as the CRM facility, which is allowed to divert MSW from its communities to a commercial landfill while it is being built, and the City of Bath, which was not required to take MSW to an incinerator prior to landfilling. BGS/NEWSME notes that the hierarchy discussion in the licenses of the CRM facility (#S-022458-WK-A-N, issued July 14, 2016), City of Bath (#S-004991-WD-J-A, issued May 23, 2017), and the JRL 2018 Amendment vary in length from less than a full page in the City of Bath’s license to 22 pages in the JRL 2018 Amendment. BGS/NEWSME states that boxing JRL out of the MSW market after 12 to 18 months will push the 81,800 tons of MSW from JRL to other landfills and presumably drive up the price of disposal for generators of MSW by limiting disposal options.

BGS/NEWSME states that Condition 6 of the 2018 Amendment requiring implementation measures that eliminate the need for non-

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bypass, in-state MSW disposal at JRL expects the applicant to resolve problems beyond their control. BGS/NEWSME states that this requirement improperly relies on the hierarchy and that the applicant does not generate the MSW and should not be required to resolve the MSW disposal problem. BGS/NEWSME also states that the change needs to come from the homes, businesses, and municipalities that generate the waste.

BGS/NEWSME states that the appeal request to delete Conditions 5, 6, and 7 and extend the allowance for disposal of up to 81,800 tons per year of non-bypass, in-state MSW at JRL until December 31, 2023 will allow the CRM facility to become fully operational and allow more time for other marketplace factors to create potential options.

- b. Mr. Spencer’s Response to BGS/NEWSME’s Appeal. Mr. Spencer notes that JRL is a state-owned landfill that didn’t originally accept MSW per the OSA and shouldn’t continue to do so. Mr. Spencer states that there are other non-MSW options for shaping and grading, and that no MSW should be allowed at JRL. Mr. Spencer’s additional objections have been described further in Section 9(A)(1)(b) above.

(3) Hierarchy Implementation – Mr. Spencer’s Appeal

- a. Mr. Spencer states that the greatest implementation of the hierarchy should be by reduction at the source or reuse. Mr. Spencer asserts that curbside pickup of unsorted MSW does not promote the hierarchy. Mr. Spencer states that the Department should enforce the hierarchy. Mr. Spencer agrees that the Department does not have the authority to direct waste flow as noted in Section 8(D)(5) of the 2018 Amendment (page 32), but states the Department does have the power to say where MSW cannot go and believes it should not go into the state-owned JRL.

Mr. Spencer states that since the March 31, 2018 deadline for MSW deliveries has passed and the shipments cannot be stopped, the same conditions should be applied that would occur after March 31, 2019: allowing for 30,000 tons of non-bypass, in-state MSW to be accepted at JRL between March 31 to September 30, 2018. Mr. Spencer states that this would expedite the approach to resolving

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disposal of the MSW and that hopefully this MSW would go to a facility higher on the hierarchy than another landfill, such as PERC or the CRM facility, once operational.

Additionally, Mr. Spencer requests that the Department document independently that other out-of-state waste-to-energy facilities are not available to accept Maine’s MSW and that the State conduct an audit of waste flow into JRL between March 31, 2018 and September 30, 2018 to ascertain which MSW is actually flowing into JRL.

Mr. Spencer states that after September 30, 2018, no MSW should be allowed at JRL and conditions should be monitored as markets are allowed to function without JRL as a MSW disposal option.

- b. BGS/NEWSME’s Response to Mr. Spencer’s Appeal. BGS/NEWSME states that the claim that any delivery of MSW to JRL necessarily subverts the hierarchy is too simplistic. BGS/NEWSME maintains that “Mr. Spencer’s view that any landfilling of MSW automatically violates the hierarchy cannot prevail” (BGS/NEWSME July 12, 2018 response letter, page 7).

BGS/NEWSME notes that Mr. Spencer mentions that none of the efforts to comply with the hierarchy are through source reduction; however, Mr. Spencer does not acknowledge that BGS/NEWSME does not generate the MSW. BGS/NEWSME states that source reduction is beyond the applicant’s control under the Rules at 06-096 C.M.R ch. 400, § 4(N)(2). BGS/NEWSME contends that JRL should not be held to a higher standard under the hierarchy based only on the fact that it is owned by the state, as Mr. Spencer argues. BGS/NEWSME states that it is unlawful for the Commissioner to discriminate against JRL under the hierarchy based on its owner’s identity, forcing MSW diversion from one landfill to another does not promote the hierarchy, and denial of the application completely would only compound the problem.

BGS/NEWSME states that there is no evidence in the record that denying the application would increase incineration at PERC and contends the opposite would happen. BGS/NEWSME states that Casella’s contracts to supply PERC and CRM with MSW would end without approval to continue to dispose of MSW at JRL.

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Additionally, BGS/NEWSME contends that PERC may not accept the additional MSW, even if it had capacity available, based on information in the record.

BGS/NEWSME asserts that Casella has taken significant steps to comply with the hierarchy, such as operating recycling and composting businesses, managing waste efficiency at JRL to save landfill space, and diverting MSW to other facilities. BGS/NEWSME states that these actions promote the hierarchy, as intended. BGS/NEWSME also states that the applicant has diverted more than 5 times more MSW to other solid waste facilities than it disposed of at JRL. BGS/NEWSME also includes in a footnote on page 9 of their July 12, 2018 comment letter that the 2013 Amendment did not require that only MSW from former MERC communities be disposed at JRL, although the closure of MERC was the precipitating event.

(4) Future Capacity Uncertainty – Mr. Spencer’s Appeal

- a. Mr. Spencer asks how much of the uncertainty in the near-term of solid waste management in Maine is due to Casella’s actions. Mr. Spencer cites the 130,000 tons per year of MSW to be delivered to PERC under the contract with Casella, and notes the contract is contingent upon Department approval of the amendment and the amendment was only partially approved. Mr. Spencer questions what will happen now. Mr. Spencer agrees that the future viability of the CRM facility is uncertain and notes that Casella also has a contract to deliver 40,000 tons per year of MSW to the CRM facility once it is operating. Mr. Spencer asserts that it appears Casella is being rewarded for its inattention to the 2013 Amendment requirements and MRC is being rewarded for its lack of planning, which is a violation of the hierarchy. Mr. Spencer also refers to a March 28, 2018 letter from the MRC to its members which refers to Waste Management Disposal Services of Maine, Inc. (WMDSM) being back-up during the bypass period and suggests that the term is used incorrectly given the status of the CRM facility which is not yet operational. Mr. Spencer notes that the term ‘bypass’ usually refers to MSW destined for an operational facility that is temporarily unable to accept it. Mr. Spencer states that any discussion of ‘bypass’ from the CRM facility is premature and the Board should make this clear.

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b. BGS/NEWSME’s Response to Mr. Spencer’s Appeal. BGS/NEWSME states that the assertion by Mr. Spencer that Casella is to blame for the uncertainty in the solid waste market because the contracts are contingent upon Department approval is misguided for three reasons. BGS/NEWSME states the contracts are a direct result of the effort to comply with the hierarchy and absent these requirements, Casella would have no need for the contracts. BGS/NEWSME also states that even with the 130,000 and 40,000 tons of MSW per year to PERC and the CRM facility, respectively, there is still a significant shortfall in Maine’s ability to manage MSW in a way other than landfilling. Additionally, BGS/NEWSME states that there are significant market uncertainties, such as maximum capacity and electrical prices at the Maine incinerators, turmoil in the international recycling markets, and other factors beyond BGS/NEWSME’s control. BGS/NEWSME contends that the “uncertainty goes well beyond the short-term approval that the Commissioner granted” (page 6 of BGS/NEWSME’s July 12, 2018 comment letter) and the uncertainty supports extension of MSW disposal through at least December 31, 2023.

(5) Board Analysis – Hierarchy

a. Closure of MERC. BGS/NEWSME states in its appeal that the key issue is MSW management and not the closure of MERC; however, the application for the 2018 Amendment states on page 1-1, “this extension will serve to meet the ongoing need of primarily southern Maine communities, formerly contracted with Maine Energy Recovery Company, as an environmentally safe and secure method for handling MSW.” Stated by BGS/NEWSME in its March 1, 2018 response to comments during the processing of the 2018 Amendment, “[t]he sole reason for the prior amendment application, which resulted in the 2013 DEP license to accept non-bypassed MSW at JRL, was the closure of the Maine Energy Incinerator.”

Addressing BGS/NEWSME’s statement that the 81,800 tons per year limit was never historically reached, the record shows that the amount of in-state MSW disposed of at JRL has increased each year (i.e., 57,521 tons in 2015 and 69,934 tons in 2016) and that not all of the municipalities and commercial entities disposing waste at JRL

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are former MERC communities. Although the 2013 Amendment did not mandate that the 81,800 tons per year of non-bypass MSW specifically come from the communities formerly served by MERC, providing this capacity was BGS/NEWSME’s stated purpose for its amendment request and the intention of the Department and Board in their respective 2013 and 2014 licensing decisions. The addition of non-MERC communities disposing of non-bypass MSW at JRL appears contrary to these licensing decisions and may suggest that the hierarchy may be being subverted with the acceptance of additional MSW at JRL from non-MERC communities.

- b. Current and Future Available Capacity for Management of MSW. The assertion by BGS/NEWSME that “there is clearly a shortfall in Maine’s capacity for non-landfill disposal of MSW” (page 14 of BGS/NEWSME’s appeal) was addressed and negated in the 2018 Amendment. Maine’s MSW disposal capacity as of 2018 and disposal and processing capacity at the conclusion of 2018 was reviewed during the processing of the 2018 Amendment. The following information was presented in the Department’s analysis in Sections 8(D)(3) and (4) on pages 28 and 29 of the 2018 Amendment for current and future capacity:

As of 2018, Maine’s solid waste disposal facilities include three waste-to-energy plants, five municipally-owned landfills, one state-owned landfill and one commercially-owned landfill. The State Plan specifies that the total remaining licensed capacity of the seven abovementioned landfills, as of 2016, is 8,043,980 cubic yards although some of this capacity includes landfill space that has not been built. The total available capacity, as of pre-March 31, 2018, at Maine’s waste-to-energy plants is approximately 550,000 tons per year with PERC having an average annual processing capacity of 310,000 tons; MMWAC having an average annual processing capacity of 70,000 tons and ecomaine having an average annual processing capacity of 170,000 tons.

At the conclusion of 2018, Maine’s solid waste management facilities will include three waste-to-

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energy plants, one processing facility, five municipally-owned landfills, one state-owned landfill and one commercially-owned landfill. The total available capacity at some point post-March 31, 2018 at Maine’s waste-to-energy and processing plants will be 595,000 tons per year with PERC having an average annual processing capacity of 210,000 tons; MMWAC having an average annual processing capacity of 70,000 tons; ecomaine having an average annual processing capacity of 170,000 tons and CRM having an average annual processing capacity of 145,000 tons. Based on 2016 annual report data, Maine’s municipal and regional MSW landfills received approximately 87,000 tons of MSW and the commercially-owned landfill received approximately 85,000 tons of MSW.

The assertion by BGS/NEWSME that there is no affirmative statement in the license decision finding that the application did not meet the hierarchy in the medium-or-long term is not accurate. Section 8(E) on page 34 of the 2018 Amendment includes the following, “[t]he Department also finds that the applicant’s proposal to remove the March 31, 2018 date resulting in acceptance of MSW until horizontal and vertical licensed disposal capacity is attained is not consistent with the applicable State laws and Rules relating to the solid waste management hierarchy, as there may be future capacity for all or some of the 81,800 tons per year of non-bypass, in-state MSW that could be directed to facilities that operate at a higher level on the hierarchy.”

- c. JRL Diversion Efforts. Although BGS/NEWSME stated that it has diverted more than five times the MSW it disposed at JRL over the three years, the Board concurs with the Department that some of the MSW that Casella specifies as being diverted from JRL may have already been destined and/or contracted to other Maine landfills (see 2018 Amendment, Section 8(B)(2), page 17). Additionally, some of this waste was from out-of-state sources which JRL cannot accept.

Regarding BGS/NEWSME’s assertion that the waste agreements are the applicant’s “best efforts to divert MSW to facilities like

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PERC and CRM,” the Board reviewed the record and agrees with the Department that not all of the MSW taken to facilities higher on the hierarchy was necessarily destined for disposal at JRL, and therefore may not constitute diversion from JRL.

Many of the current contracts in place are contingent on the Department’s approval of the applicant’s timeframe extension and BGS/NEWSME states without full approval of the Amendment application it no longer needs a license amendment and the contracts are no longer needed. The Board recognizes that contracts are in place, but also recognizes the potential for contracts to be renegotiated as entities and situations change. Additionally, the waste disposed under the current contracts will always need to be reduced, reused, recycled, processed, or disposed of at an appropriate facility. Furthermore, BGS/NEWSME’s argument of linking the contracts to the amendment implies that JRL will always need to have MSW approval in place to continue waste flow to the PERC and CRM facilities.

- d. Solid Waste Management in Maine. BGS/NEWSME contends that it does not generate the MSW and therefore should not be required to resolve the MSW disposal problems. However, in order to comply with the hierarchy, BGS/NEWSME was initially required in the 2013 Amendment to “make its best effort to divert MSW from landfilling at JRL” (Condition 5, page 43). Additionally, the term of the license was limited to the time period during which capacity remains available for disposal in the existing landfill or until March 31, 2016, whichever came sooner. The 2014 Board Order on Appeal modified the date to March 31, 2018 giving BGS/NEWSME additional time to plan for MSW diversion. These conditions underscore the Department’s and Board’s intent that disposal of non-bypass MSW at JRL was to be temporary. Much like the 2013 Amendment, the issuance of the 2018 Amendment again allowed more time based on the uncertainty in the near-term with the solid waste landscape in Maine, but requires BGS/NEWSME to “develop and prepare to implement measures that eliminate the need for non-bypass, in-state MSW disposal at JRL” (Condition 6 of the 2018 Amendment). The Board states that this condition does not require JRL to solve the state’s problems, but is focused on implementing options within BGS/NEWSME’s control, such as additional MSW diversion and modifying contracts and contracting procedures. The

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Board states that providing BGS/NEWSME with additional time beyond the date of March 31, 2019 specified in Conditions 5, 6 and 7 of the 2018 Amendment is appropriate to allow BGS/NEWSME time to develop, prepare to implement and implement options within their control to eliminate the need for non-bypass, in-state MSW disposal at JRL.

- e. Higher Standard Set for JRL. BGS/NEWSME asserts that JRL is held to a higher standard than other facilities, but the record shows that both the CRM facility and City of Bath licenses sufficiently addressed the hierarchy. Additionally, the CRM facility, as a processing facility, is a step higher on the hierarchy compared to landfilling. The CRM facility is required to report member communities' initiatives or new or expanded organic diversion programs and shall not unreasonably withhold approval of requested organic diversion programs. The City of Bath continues its waste reduction measures and had a 54% cumulative recycling rate in 2015. The City of Bath's strategies include curbside collection of single stream recycling, a pay-as-you-throw program, operation of a transfer station and bargain barn, higher tipping fees for unsorted waste loads, household hazardous waste collection events, collection of leaf and yard wastes biannually, and curbside collection of Christmas trees. The City of Bath's landfill was originally designed, and continues to operate, for the MSW disposal needs of a select number of surrounding member municipalities while JRL was originally designed for the disposal of special waste with defined limitations on MSW disposal. The CRM facility and the City of Bath demonstrated compliance with the hierarchy; however, the facts and circumstances of each situation are distinct.
- f. Waste Audit and Out-of-State Options. Mr. Spencer requests that the State conduct an audit of waste flow into JRL to ascertain which MSW is flowing into JRL. Although the Department and Board can specify the amount of MSW allowed to be disposed of at JRL, neither it nor the Department have the authority to specify where the in-state MSW destined for JRL comes from. The Board concurs with the Department's analysis that the applicant appropriately evaluated out-of-state options, which are higher on the hierarchy, including incineration and processing for the management of Maine MSW.

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- g. Uncertainty in the Solid Waste Management Landscape. The record shows that near-term uncertainty exists in the solid waste management landscape in Maine and is due to many factors and not just one entity. These factors include, but are not limited to, the start-up of the CRM facility, PERC’s ability to adapt to its new operating model, and the fulfillment of the terms of the waste agreements between Casella, Pine Tree Waste, Inc., PERC, MRC, NEWSME, the CRM facility or WMDSM as applicable. The Board concurs with the Department’s analysis that near-term uncertainty exists in the solid waste management landscape in Maine. Further, the Board recognizes that additional uncertainty exists beyond the near-term to warrant additional time beyond the date of March 31, 2019 specified in Conditions 5, 6 and 7 of the 2018 Amendment to allow sufficient time for the resolution of these uncertainties.

- h. Definition of Bypass. Mr. Spencer takes issue with the use of the term bypass. The record shows that the term bypass is specifically defined in Rule, licenses and waste agreements, regardless of how it is used by others. 06-096 C.M.R. ch. 400, § 1(V) defines bypass as “any solid waste that is destined for disposal, processing, or beneficial use at a solid waste facility, but which cannot be disposed, processed, or beneficially used at that facility because of malfunction, insufficient capacity, inability of the facility to process or burn, down-time, or any other reason.” The record further shows that the acceptance of MSW by WMDSM from MRC participating communities from April 1, 2018 to the start of commercial operations of the CRM facility is defined as ‘bridge capacity waste’⁴ and not bypass which is consistent with a solid waste disposal agreement between MRC and WMDSM, dated August 25, 2015.

- i. Cost Considerations. Regarding BGS/NEWSME’s argument that additional tonnage sent to the PERC and CRM facilities would have required an uneconomical tip fee, the Board states that the Department considered this financial burden in the analysis of near-term capacity and currently available options that are higher on the hierarchy. As stated in the 2018 Amendment, “included in the Department’s review was the evaluation of tipping fees established

⁴ See Department license #S-022458-WK-A-N, issued July 14, 2016.

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in the current agreements between various solid waste management facilities” (Section 8(D)(6), page 32). Further, regarding BGS/NEWSME’s argument that operating costs will increase if MSW cannot be used as pre-grading and shaping material, the Board affirms that cost is a relevant consideration in the determination of whether solid waste has been reduced, reused, recycled, composted and/or processed to the “maximum extent practicable” prior to disposal. The Board concurs with the Department that “although MSW may be technically appropriate and economical for filling, grading and bulking purposes, there are other materials, including other waste and soil, that can be utilized successfully for these purposes” (Section 8(E)(6), page 34).

(6) Board Findings – Hierarchy

- a. Closure of MERC. The Board concurs with the Department’s findings in the 2018 Amendment in Section 8(E)(1) on page 33 that “the intent of the 2013 amendment license was for MERC waste to be disposed of at JRL temporarily and to ensure that activities at JRL support, and do not subvert, the hierarchy.”
- b. Current and Future Available Capacity in Maine for Management of MSW. The Board finds that the Department’s findings in the 2018 Amendment are valid and that the waste tonnages utilized to make the findings and conclusions appropriately illustrate that there is sufficient disposal capacity for Maine generated MSW based on current operating conditions. The Board further finds that information exists in the record to support the Department’s finding that sufficient MSW incineration and processing capacity exists in the future provided that the PERC and CRM facilities are operational at their planned level (PERC at 210,000 tons per year and the CRM facility at 105,000 tons per year or greater). The Board supports the Department’s findings that these solid waste management options of incineration and processing are preferred over disposal at JRL in accordance with the hierarchy. The Board finds that it was appropriate for the Department to limit the disposal of non-bypass, in-state MSW at JRL. The Board concurs with the Department’s finding that allowing continued disposal of non-bypass, in-state MSW beyond the uncertainty period will potentially subvert the hierarchy by allowing more landfill disposal capacity for in-state MSW than is needed. The Board also finds that, given

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capacity information in the record, the continuing uncertainty with the start-up of the CRM facility and PERC’s ability to adapt to its new operating model, and the fulfillment of the terms of the waste agreements, additional time for disposal of MSW at JRL beyond that authorized in the 2018 Amendment is warranted.

- c. JRL Diversion Efforts. The Board concurs with the Department’s analysis that it is not appropriate to define the practices of disposal of MSW already destined and/or contracted to other Maine landfills as diversion from JRL. The Board further finds that the Department appropriately considered the financial burden that may be caused by taking MSW to solid waste disposal facilities other than JRL under the near-term options currently available.
- d. Solid Waste Management in Maine. The Board finds that in order to ensure consistency with the hierarchy, it was appropriate that both the 2014 Board Order on Appeal and the Department’s 2018 Amendment set limits on the amount on non-bypass, in-state MSW that could be disposed at JRL. However, the Board finds that the continuing uncertainty which exists with the start-up of the CRM facility, PERC’s ability to adapt to its new operating model, and the fulfillment of the terms of the waste agreements warrants additional time beyond the date of March 31, 2019 to provide sufficient time for the resolution of these uncertainties.
- e. Higher Standards Set for JRL. The Board finds that the Department’s licenses conclude that the City of Bath and the CRM facility appropriately addressed and complied with the hierarchy. The Board further finds that the Department applied the hierarchy to the 2018 Amendment consistent with the above noted licensing decisions within the framework of State law and Rule requirements.
- f. Waste Audit and Out-of-State Options. The Board finds that neither it nor the Department have the authority to specify where the in-state MSW destined for JRL comes from, although the Department can specify the amount allowed to be disposed of at JRL to ensure compliance with the hierarchy. The Board further finds that the applicant has demonstrated that out-of-state disposal options for Maine MSW, which are higher on the hierarchy, are not viable given current capacity constraints and/or economic considerations.

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- g. **Uncertainty in the Solid Waste Management Landscape.** The Board finds that the Department appropriately determined that near-term uncertainty exists in the solid waste management landscape. The Board further finds that the current uncertainty in the solid waste management landscape in Maine is due to many factors, including, but not limited to, operations at the PERC and CRM facilities and fulfillment of the terms of the waste agreements among the various entities. The Board also finds that additional uncertainty exists beyond the near-term to warrant additional time beyond the date of March 31, 2019 specified in Conditions 5, 6 and 7 of the 2018 Amendment to allow sufficient time for the resolution of these uncertainties.
- h. **Definition of Bypass.** The Board finds that the terms ‘bypass’ and ‘bridge capacity waste’ are appropriately defined in Rule, licenses and waste agreements as applicable.
- i. **Cost Considerations.** The Board finds that the Department appropriately considered cost in its analysis of compliance with the hierarchy. The requirements in Conditions 5, 6, and 7, as modified by this Order, will not cause an unreasonable financial burden, and will not cause an unreasonable increase in facility operating costs or unreasonable impacts on other aspects of the facility’s operations.

The Board finds that the hierarchy is appropriately upheld through the requirements in Conditions 5, 6, and 7 of the 2018 Amendment as modified by this Order, including specification of a timeframe and quantity restriction for acceptance of non-bypass, in-state MSW, along with requirements to implement and prepare measures to eliminate the need for non-bypass, in-state MSW disposal at JRL. The modified timeframe extension includes the allowance of 81,800 tons per year of in-state, non-bypass MSW to be disposed of at JRL until March 31, 2020 with a one-time, six-month potential extension of 40,900 tons to September 30, 2020.

The Board concurs with the Department’s analysis that sufficient MSW disposal and processing capacity continues to be available provided that the PERC facility is operational at its planned reduction level of 210,000 tons per year and the CRM facility is operational at its currently contracted capacity of 105,000 tons per year or greater. Based on the hierarchy, these solid waste management options continue to be preferred over disposal at JRL.

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B. Contractual Issues – Mr. Spencer’s Appeal

- (1) Mr. Spencer takes issue with the language in Section 8(B) on page 15 of the 2018 Amendment which states that “there are 14 communities under long-term contracts with JRL which formally utilized MERC as a disposal option,” since JRL cannot sign contracts. Mr. Spencer states that any contracts between former MERC communities and Casella to dispose of MSW at JRL should not extend beyond March 31, 2018 (the deadline for JRL to accept non-bypass MSW), noting some of the contracts have end dates of 2022 or 2025.

Mr. Spencer also takes issue with the contracts Casella entered into with other waste disposal and processing entities where the contract is contingent upon the Department’s approval of the requested time extension amendment. Mr. Spencer asks if it is legal for contractual outcomes to be dependent on approval of an application by the Department, the regulatory overseer; or whether it is “arm twisting”, “blackmail”, or “antitrust”. Mr. Spencer requests clarity from the Attorney General’s Office, especially as it relates to antitrust law.

As part of the remedy sought, Mr. Spencer states that BGS/NEWSME should reveal what their plan was for MSW management on April 1, 2018 if the Department had not granted the 2018 Amendment for partial approval for extended non-bypass, in-state MSW deliveries to JRL.

- (2) Board Analysis and Findings – Contractual Issues

The Board acknowledges that the wording of the sentence in Section 8(B) on page 15 of the 2018 Amendment could have been clearer, stating that there are 14 communities under long-term contracts with Casella/Pine Tree Waste, Inc. (rather than JRL), and that the contracted municipalities utilize JRL for disposal.

The record shows that BGS and NEWSME responded to a Department comment regarding the post April 1, 2018 MSW waste disposal plan for the contracted municipalities if the requested amendment was not granted. The BGS/NEWSME March 1, 2018 response letter stated, “Casella will continue to provide solid waste management services for the customer municipalities listed in Table 1 [of the application associated with the 2018 Amendment]. Casella expects that the disposal option for their MSW, if the

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amendment application is not approved, is at a landfill other than JRL.” The Board finds that neither the Commissioner nor the Board is bound by Casella’s contractual obligations to provide MSW disposal for specific Casella clients including the municipalities identified in the application. The Board bases its decision on applicable State law and Rule requirements.

C. New Sources of MSW – Mr. Spencer’s Appeal

(1) Mr. Spencer asserts that the intent of the 2013 Amendment that authorized MSW deliveries to JRL was for waste to be disposed of on a temporary basis from the southern Maine MERC communities. Mr. Spencer states that as of April 1, 2018, a new source of MSW was added to the MSW delivered to JRL, namely MSW from local MRC communities, such as Bangor, Orono, and the University of Maine, with smaller packer trucks with curbside waste and roll-offs. Mr. Spencer asserts that this is a new waste stream destined for JRL which violates the 2013 Amendment and should necessitate a formal request by BGS/NEWSME to continue.

(2) Board Analysis and Findings – New Sources of MSW

The Board finds that neither it, nor the Department have the authority to specify where the non-bypass, in-state MSW destined for JRL comes from per *Delivery of Solid Wastes to Specific Waste Facilities*, 38 M.R.S. § 1304-B, although the Department and Board can specify the amount allowed to be disposed of at JRL. Based on limitations associated with transfer and transportation infrastructure in the Bangor area, MRC, WMDSM, Pine Tree Waste, Inc, CRM and NEWSME entered into an Interim Waste Swap Agreement that involves delivery of MSW from MRC-contracted communities that is collected in packer trucks and container trucks from the greater Bangor area to JRL. Pine Tree Waste, Inc., in turn, delivers an equivalent amount of in-state MSW from Casella-owned transfer stations mostly in southern Maine to the Crossroads Landfill. The Board finds that the MSW waste stream is not a new waste stream requiring Department approval, as neither the 2013 Amendment, 2014 Board Order on Appeal, nor the 2018 Amendment specified the location of origin of the allowable MSW waste stream other than the requirement that it be in-state waste.

D. Traffic Study – Mr. Spencer’s Appeal

(1) Mr. Spencer states that the Department omitted consideration of extended MSW deliveries to JRL, specifically the statement in Section 6 on page 10

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of the 2018 Amendment: “Traffic movement is not expected to significantly change with the proposed amendment since the request does not include an increase in the volume of MSW delivered to the site from what is currently licensed.” Mr. Spencer asserts that this is a false statement due to the increase in the volume of trucks in and out of JRL due to the local MRC communities’ MSW deliveries to JRL, even if the volume of waste is not necessarily increasing. Mr. Spencer asserts that tractor trailers carry a much larger amount of waste per load compared to the local trash trucks, which are making more trips to JRL as a result of contracts in place, such as the Interim Waste Swap Agreement between MRC, WMDSM, Pine Tree Waste, Inc., CRM, and NEWSME. Mr. Spencer concludes that more local trash hauling trucks and less tractor trailer usage means more truck traffic. In support of his argument, Mr. Spencer submitted supplemental information on truck traffic for the month of April 2018, which was higher than previous months (i.e., 2,588 in April 2018 compared to 2,269 in April 2014). Mr. Spencer states the previous traffic study is inadequate based on the most recent truck traffic delivery information and requests further review.

- (2) BGS/NEWSME’s Response to Mr. Spencer’s Appeal. In response to the traffic concern raised by Mr. Spencer, BGS/NEWSME submitted a letter from Gorrill Palmer to Casella dated May 25, 2018 (Gorrill Palmer letter) as supplemental evidence. BGS/NEWSME contends that the driveway to JRL will continue to operate at a level A, which is the highest traffic level of service, even taking into consideration the interim Waste Swap Agreement that allows smaller waste hauling trucks from the greater Bangor area communities to haul their waste to JRL, rather than traveling the longer distance to the Crossroads Landfill in Norridgewock. The Gorrill Palmer peak design hour volumes collected at the JRL driveway for the 2014 analysis were increased by 14% and Gorrill Palmer reviewed the level of service at the revised peak design hour. The 14% increase was based on the April 2018 truck numbers (2,588) compared to April 2014 numbers (2,269), with an additional 10% added to account for seasonal variation in tonnage. The Gorrill Palmer letter states that the JRL driveway “will continue to be uncongested and operate safely.”
- (3) Board Analysis and Findings – Traffic Study

The Board finds that although truck vehicle numbers have increased since March 31, 2018, the applicant has demonstrated that the roads and intersections in the vicinity of JRL have the ability to safely and

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appropriately handle all of the traffic attributable to the handling of MSW into, out of, and within the facility pursuant to the applicable State law and Rule requirements. The Board further finds that the Gorrill Palmer letter verifies that even with this increase, Conclusion 5 on page 39 of the 2018 Amendment remains valid and “the applicant has provided sufficient provisions for safe and uncongested traffic movement of all types into, out of, and within the landfill pursuant to 06-096 C.M.R. ch. 400, § 4(D)(1); provided the facility continues to encourage waste haulers to use I-95 as a primary hauling route.”

E. Odor and Erosion Considerations – Mr. Spencer’s Appeal

- (1) Mr. Spencer states concern for nuisance odor and soil erosion issues at JRL. Mr. Spencer states that the extension of MSW deliveries can pose odor issues and cites Section 7(C) on page 12 of the 2018 Amendment that “due to the composition and characteristics of the waste, MSW has the potential for odor generation.” Mr. Spencer states that “due to the lack of a third party independent odor assessor, Casella gets to control and minimize odor complaints” (Spencer appeal, page 3).

Additionally, Mr. Spencer asserts that Condition 3 on page 41 in the 2018 Amendment addressing soil erosion will be violated since the stormwater detention infrastructure design is only required to withstand a 25-year flood. Mr. Spencer claims that climate change will lead to increased precipitation and if overflow of spillways occur, which may be possible with a 100-year flood, then the overflow of storm waters would cut soil downhill and into the surrounding sensitive wetlands.

- (2) BGS/NEWSME’s Response to Mr. Spencer’s Appeal. BGS/NEWSME argues Mr. Spencer’s arguments lack technical support (BGS/NEWSME July 12, 2018 comment letter, page 1).

- (3) Board Analysis and Findings – Odor and Erosion Considerations

The Board finds that the discussion and findings presented in the 2018 Amendment regarding odor are appropriate and that the applicant has odor control mechanisms sufficient to control nuisance odors from the landfill as required by State law and the Rules. As described in the 2018 Amendment, measures for the minimization of odor associated with incoming odorous waste streams such as MSW include placement within a small area in the active cell, waste compaction, and placement of a cover layer of non-

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odorous material above the disposed waste at the end of each day along with the use of odor neutralizing spray systems. Further, the applicant minimizes odor by the installation of daily cover over active areas, intermediate and final cover over non-active areas, and operation of an active gas collection and control system. The applicant also maintains an odor complaint hotline, four off-site gas monitors and two on-site gas monitors.

The Board further finds that the use of the 25-year flood as a basis for stormwater detention infrastructure design meets the regulatory requirements in 06-096 C.M.R. ch. 400, § 4(M) which requires a solid waste facility to include a stormwater management system that controls run-on and run-off, and infiltrates, detains, or retains water falling on the facility site during a storm of an intensity up to and including a 25-year, 24-hour storm. The time extension at issue in this appeal does not impact the stormwater design standard for the facility.

F. Promises of No Out-of-State Waste and No MSW – Mr. Spencer’s Appeal

- (1) Mr. Spencer states two promises made by State, local, and Casella officials should be upheld to support the State’s hierarchy: no out-of-state waste and no MSW. Mr. Spencer notes that there is the potential that the CRM facility will not be fully functional until after the initial one-year extension expires and as a result, those working on behalf of the MRC communities may attempt to make MSW into JRL a permanent accommodation.
- (2) BGS/NEWSME’s Response to Mr. Spencer’s Appeal. BGS/NEWSME states the assertion by Mr. Spencer that allowing disposal of MSW at JRL violates promises made of no out-of-state waste and no MSW is a myth. BGS/NEWSME argues that MSW was publicly contemplated for disposal during June 2003 legislative hearings, in a 2003 license transfer application, in an application filed later in 2003, and JRL has been accepting putrescible wastes (i.e., MSW bypass, front-end processing residue, and treatment plant sludge) since 2005.
- (3) Board Analysis and Findings – Promises of No Out-of-State Waste and No MSW

MSW bypass can be accepted for disposal at JRL in accordance with Department license #S-020700-WD-N-A, issued April 9, 2004, and subsequent licenses. Regarding Mr. Spencer’s argument of no MSW, the Board finds that the 2013 Amendment, as revised in the 2014 Board Order

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on Appeal, appropriately limited the amount of non-bypass, in-state MSW that can be taken to JRL to no more than 81,800 tons per year until March 31, 2018 based on circumstances at that time. Further, the Board finds that the 2018 Amendment as modified by this Order is appropriate based on the continuing uncertainty with the solid waste landscape in Maine.

G. Air Emissions – Mr. Spencer’s Appeal

- (1) Mr. Spencer makes a number of assertions related to air emissions. Mr. Spencer states that BGS/NEWSME’s argument that sending MSW from MRC-contracted communities directly to JRL rather than Crossroads Landfill in Norridgewock results in reduced vehicle emissions has not been explained, PERC has the capacity to incinerate wastes reducing the pollution produced, Crossroads has a gas-to-energy capacity that JRL does not have, and overall greenhouse gas emissions should be considered not just a one-year local snapshot of MSW movement.
- (2) BGS/NEWSME’s Response to Mr. Spencer’s Appeal. BGS/NEWSME does not specifically address the issues raised other than to state on page 2 of its July 12, 2018 comment letter that Mr. Spencer’s arguments “lack technical support on technical issues, others overlap with one another, and others do not appear to raise a direct challenge to anything specific in the Commissioner’s decision.”
- (3) Board Analysis and Findings – Air Emissions

The Board states that Mr. Spencer does not include direct supporting facts regarding his concerns of “emissions hypocrisy” and the relevant issue before the Board on appeal is the volume and the time extension for disposal of MSW at JRL not vehicular air emissions. The Board affirms that BGS/NEWSME has sufficiently demonstrated that the 2018 Amendment will not adversely affect air quality pursuant to 06-096 C.M.R. ch. 400, § 4(G)(1).

H. Old Town’s Chapter 24 Regulations

- (1) Mr. Spencer’s Appeal. Mr. Spencer states that the local garbage trucks, including roll-offs, brought to JRL are in conflict with Old Town’s Chapter 24, Section 14 K ordinance, which states that solid waste transported to the facility [JRL] shall be in completely enclosed containers or vehicles to prevent litter or spillage.

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(2) BGS/NEWSME’s Response to Mr. Spencer’s Appeal. BGS/NEWSME states that the approval requirements under the City of Old Town’s ordinances are wholly outside of the scope of this proceeding and were not addressed in the Department’s license decision.

(3) Board Analysis and Findings – Old Town’s Chapter 24 Regulations

The Board finds that neither it nor the Department has jurisdiction over implementation of, or compliance with, the City of Old Town’s rules and regulations, which were not considered as part of the licensing decision. The Board makes no findings regarding the applicant’s compliance with the City’s ordinances.

BASED on the above Findings of Fact, the BOARD makes the following CONCLUSIONS:

1. BGS/NEWSME and Mr. Spencer have standing as aggrieved persons and have made timely appeals of Department license #S-020700-WD-BL-A, issued on March 31, 2018.
2. The hierarchy was appropriately upheld through the requirements in Conditions 5, 6, and 7 of the 2018 Amendment as modified by this Order, including specification of a timeframe and quantity restriction for acceptance of non-bypass, in-state MSW, along with requirements to implement and prepare measures to eliminate the need for non-bypass, in-state MSW disposal at JRL.
3. Sufficient MSW disposal and processing capacity continues to be available provided that the PERC facility is operational at its planned reduction level of 210,000 tons per year and the CRM facility is operational at its currently contracted capacity of 105,000 tons per year or greater. Based on the hierarchy, these solid waste management options continue to be preferred over disposal at JRL.
4. The applicant has made adequate provisions for safe and uncongested traffic movement of all types into, out of, and within the landfill pursuant to 06-096 C.M.R. ch. 400, § 4(D)(1); provided the facility continues to encourage waste haulers to use I-95 as a primary hauling route.
5. The applicant has odor control mechanisms sufficient to control nuisance odors from the landfill as required pursuant to 06-096 C.M.R. ch. 400, § 4(G)(1)(b).

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6. The applicant has appropriately demonstrated compliance with 06-096 C.M.R. ch. 400, § 4(M) which requires a solid waste facility to include a stormwater management system that controls run-on and run-off, and infiltrates, detains, or retains water falling on the facility site during a storm of an intensity up to and including a 25-year, 24-hour storm.
7. The applicant has demonstrated that out-of-state disposal options for Maine MSW, which are higher on the hierarchy, are not viable given current capacity constraints and/or economic considerations.
8. BGS/NEWSME has sufficiently demonstrated that the 2018 Amendment will not adversely affect air quality pursuant to 06-096 C.M.R. ch. 400, § 4(G)(1).
9. The Board has no jurisdiction over the applicant's compliance with the City of Old Town's rules and regulations.
10. All other conclusions remain as set forth in Department license #S-020700-WD-BL-A.

THEREFORE, the Department DENIES the appeals of the State of Maine BGS and NEWSME Landfill Operations, LLC and of Mr. Edward S. Spencer and AFFIRMS the Department's partial approval with conditions of the amendment as described in Department license #S-020700-WD-BL-A, with the following modifications:

1. Condition 5 is modified to read:

Acceptance of Non-bypass, In-state MSW at JRL

- A. BGS and NEWSME shall accept no greater than 81,800 tons per year of non-bypass, in-state MSW at JRL, limited to the following periods of time:

- (1) From April 1, 2018 up to and including March 31, 2019; and

- (2) From April 1, 2019 up to and including March 31, 2020.

- B. A possible one-time, six-month extension beyond March 31, 2020 may be requested of no greater than 40,900 tons of non-bypass, in-state MSW based on a demonstrated need as stated in the modified Condition 7 below. The MSW restriction does not limit the authority of the applicant to accept MSW bypass and soft layer material for cell construction after March 31, 2020, provided that such acceptance is consistent with the relevant terms of Department licenses #S-020700-WD-N-A and #S-020700-WD-W-M.

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2. Condition 6 is modified to read: During the extension period, scheduled to occur from April 1, 2018 through March 31, 2020, BGS and NEWSME shall develop and prepare to implement measures that eliminate the need for non-bypass, in-state MSW disposal at JRL. On or before March 31, 2020, these measures shall be implemented unless the six-month extension referenced in the modified Condition 7 below is granted by the Department.
3. Condition 7 is modified to read: If a demonstrated need exists, BGS and NEWSME may submit a one-time request for a six-month potential additional extension from April 1, 2020 to September 30, 2020 to the Department for review and approval under the following conditions:
 - A. The one-time request shall be limited to no greater than 40,900 tons of non-bypass, in-state MSW over the six-month extension period; and
 - B. The one-time request shall be submitted no later than November 30, 2019 as a Condition Compliance submittal with a specific plan detailing the need for the extension based on the then-current solid waste landscape in Maine, with emphasis on the operational status of other solid waste management facilities in Maine which are higher on the hierarchy. This submittal must also include information sufficient for the Department to determine how the approved non-bypass, in-state MSW under this amendment will be handled after September 30, 2020 without utilization of JRL for disposal.

DONE AND DATED AT AUGUSTA, MAINE THIS 10 DAY OF OCTOBER, 2018.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: _____


James W. Parker, Board Chair

PLEASE NOTE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

Date of initial receipt of application: November 27, 2017

Date of application acceptance: December 15, 2017

Date issued and filed with the Board of Environmental Protection: March 31, 2018

Date of initial receipt of appeal: April 30, 2018