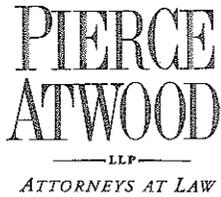


**APPLICANTS RESPONSE TO
DOLAN/SPENCER/LEITHISER APPEAL**

310



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October 18, 2010

Ms. Susan Lessard, Chair
Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

RE: Appeal of Mary Dolan, Edward Spencer and Charles Leitheiser
In the matter of State of Maine/State Planning Office
DEP Order #S-020700-WU-AJ-N

Dear Madam Chair:

I enclose the Joint Response of the State Planning Office and NEWSME Landfill Operations, LLC to the appeal of Mary Dolan, Edward Spencer and Charles Leitheiser.

As explained in the Joint Response, the Appellants have failed to establish, as they must in their Notice of Appeal, that they have suffered a particularized injury as a result of the Department's decision to authorize the disposal of up to 5000 tons per year of treated biomedical waste at JRL, and therefore lack standing to appeal this JRL license. Their appeal should be dismissed for this reason alone.

Although the Appellants lack standing to appeal, if the merits are addressed, SPO and NEWSME respectfully request that the Board deny the appeal and affirm the DEP-issued JRL license. The annual disposal limit of 5000 tons of treated biomedical waste is reasonable and appropriate and can be safely accommodated by JRL, and the treated biomedical waste approved for disposal at JRL is in-state solid waste generated by the Associated Health Resources DEP- licensed facility in Pittsfield, Maine.

Thank you very much for your attention to this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Tom Doyle".

Thomas R. Doyle

cc: Service List

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

APPEAL IN THE MATTER OF

STATE OF MAINE, ACTING THROUGH THE STATE PLANNING OFFICE OLD TOWN, PENOBSCOT COUNTY, MAINE TREATED BIOMEDICAL WASTE #S-020700-WU-AJ-N (APPROVAL WITH CONDITIONS)	MAINE HAZARDOUS WASTE, SEPTAGE AND SOLID WASTE MANAGEMENT ACT NEW LICENSE
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**JOINT RESPONSE OF THE STATE PLANNING OFFICE AND
NEWSME LANDFILL OPERATIONS, LLC
TO APPEAL OF
MARY DOLAN, EDWARD SPENCER, AND CHARLES LEITHISER**

The State Planning Office (“SPO”), the owner of the Juniper Ridge Landfill (“JRL”), and NEWSME Landfill Operations, LLC (“NEWSME”), the operator of JRL, jointly file this response to the appeal submitted by the Mary Dolan, Edward Spencer, and Charles Leithiser (the “Appellants”) challenging the Department permit authorizing the disposal of up to 5,000 tons per year of treated biomedical waste at JRL. This treated biomedical waste is generated at Associated Health Resources, Inc.’s (“AHR’s”) facility in Pittsfield, Maine.

Appellants object to the disposal of any treated biomedical waste at JRL and request that the Board vacate Department Order S-020700-WU-AJ-N (the “JRL License”). In the alternative, Appellants seek to limit the volume of this solid waste disposed at JRL and request that the Board attach additional conditions to the JRL License. Appellants argue that no treated biomedical waste should be accepted at JRL because there is no need for disposal of this type of solid waste at JRL and that there are unacceptable health and environmental risks associated with the disposal of treated biomedical waste generated by AHR. In support of their alternative argument, Appellants assert that a portion of the treated biomedical waste JRL is authorized to receive is “out of state waste” and this portion is prohibited from disposal at the landfill.

As discussed in greater detail below, (1) the Appellants lack standing to appeal the JRL License, (2) the annual disposal limit of 5,000 tons of treated biomedical waste is reasonable and appropriate and can be safely accommodated by JRL, and (3) the treated biomedical waste approved for disposal at JRL is in-State solid waste generated in Pittsfield, Maine.

I. Background

A. Associated Health Resources, Inc. – Maine’s Biomedical Waste Treatment Facility

In 1992, the Maine Hospital Association, a statewide not-for-profit association in which all 39 Maine hospitals are members, created AHR. The association is the sole shareholder of AHR. AHR owns and operates a facility in Pittsfield, Maine that sorts and treats biomedical waste. The facility is licensed by the Department. (O-221-BD-B-M (the “AHR License”).) Most of Maine’s hospitals use the facility, as do other generators of biomedical waste, including doctors’ and dentists’ offices. (AHR License at 2-3.)

Biomedical waste arriving at AHR’s facility is divided into one of two categories:

(1) human pathological, trace chemotherapy, and non-hazardous cytotoxic wastes and animal carcasses, or (2) non-anatomical human wastes from surgery, autopsy and patient care, microbiological laboratory wastes, and sharps. (AHR License at 6.) The first category of biomedical waste is frozen and sent out-of-State for incineration and disposal. (AHR License at 6.) There are no biomedical waste incinerators in Maine licensed to receive and dispose of this category of biomedical waste, so historically the first category of biomedical waste received at AHR’s facility has been shipped to Maryland or North Carolina. The second category of waste is treated at the Pittsfield facility in an autoclave. The autoclave “uses steam, pressure and time to render the waste non-infectious.” (AHR License at 4.) The treated sharps portion of this second category of waste is shredded and rendered unrecognizable. (AHR License at 5.) The treated biomedical waste is then stored for disposal at a licensed landfill. (AHR License at 8.)

B. The Regulation of Solid Waste and Biomedical Waste in Maine

Maine's solid waste management laws, 38 M.R.S.A. §§ 1301-1316-P, govern the handling and disposal of solid waste within the State. "Solid waste" is defined as:

useless, unwanted or discarded solid materials with insufficient liquid content to be free-flowing, including, but not limited to rubbish, garbage, refuse-derived fuel, scrap materials, junk, refuse, inert fill material and landscape refuse, but does not include hazardous waste, biomedical waste, septage or agricultural wastes.

(38 M.R.S.A. § 1303-C(29).) This definition establishes that solid waste is one of five main categories of waste: (1) solid waste, (2) hazardous waste, (3) biomedical waste, (4) septage, and (5) agricultural wastes. Solid waste and biomedical waste are coequal categories of waste, meaning that neither is a subcategory of the other.

How a waste is categorized is not just a matter of semantics, but reflects the need to handle and dispose of different categories of waste in different ways. This is evident, for example, in the definition of "biomedical waste:"

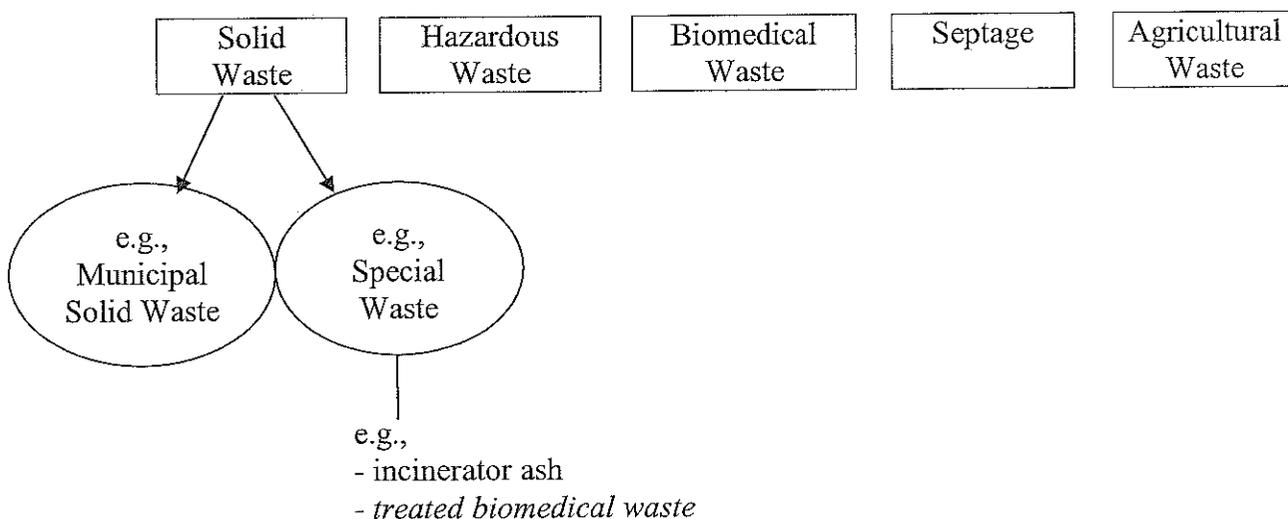
waste that may contain human pathogens of sufficient virulence and in sufficient concentrations that exposure to it by a susceptible human host could result in disease or that may contain cytotoxic chemicals used in medical treatment.

(*Id.* § 1303-C(1-A).)

Treated biomedical waste, despite what its name might suggest, is not a biomedical waste, but rather is a solid waste. Thus, biomedical waste and treated biomedical waste are two different categories of waste. This distinction is established by a Board-adopted rule and reflects the reality that treated biomedical waste no longer presents the exposure risks of *untreated* biomedical waste. As a result, treated biomedical waste, as designated by the Board, is "special waste." (DEP Rules, Ch. 900(19)(E) ("Pursuant to its authority under 38 M.R.S.A. §1303-C(34)(K), the Board designates treated biomedical waste that results from non-incineration

treatment¹ technologies approved under this rule as special waste.”) Special waste is a sub-category of “solid waste.” (38 M.R.S.A. § 1303-C(34) (“Special waste’ means any solid waste generated by sources other than domestic and typical commercial establishments” that meet certain criteria.)) Figure 1 below helps illustrate the different categories of waste, including solid waste and biomedical waste, and shows that untreated biomedical waste is not solid waste, and that treated biomedical waste is a solid waste, and not a biomedical waste.

Figure 1.



C. Disposal of AHR-Generated Treated Biomedical Waste to Date

The difference between a solid waste and other categories of waste – e.g., the difference between treated biomedical waste and biomedical waste – is critical. Maine law and Department regulations allow the disposal of solid waste, including special waste, at landfills licensed under the Solid Waste Management Rules. Such landfills, however, may only accept solid waste. The result is that treated biomedical waste may be landfilled, while biomedical waste may not.

¹ The treatment of biomedical waste in an autoclave at AHR’s Pittsfield facility is a type of non-incineration treatment. (See, e.g., DEP Rules, Ch. 900(6)(W) (defining “incineration” as having as its purpose “the efficient thermal oxidation and/or conversion of combustible material into noncombustible residues (ash) and product gases”) and Ch. 900(19)(A) (identifying “steam sterilization,” which is what the autoclave achieves, as a non-incineration treatment technology).)

The solid waste generated at AHR previously was disposed at Pine Tree Landfill in Hampden, Maine until that landfill stopped accepting solid waste at the end of 2009. Subsequently, the Department approved a onetime disposal of AHR's solid waste at the Crossroads Landfill in Norridgewock, Maine. That approval expired on June 30, 2010. (JRL's License at 1.)

To fill AHR's need for a landfill to dispose of the solid waste generated at AHR's Pittsfield facility, SPO applied to the Department for approval to accept this treated biomedical waste at JRL.

D. The Order Authorizing Disposal of Treated Biomedical Waste at JRL

By order dated June 30, 2010, the Department approved SPO's application to accept AHR's solid waste at JRL. The JRL License authorizes the disposal of up to 5,000 tons per year of treated biomedical waste from AHR. Although this 5,000 ton limit represents an increase from the approximately 2,000 tons per year cap that previously applied to Pine Tree Landfill, the Department found this new limit appropriate in light of the quantity of solid waste presently generated by AHR, the facility's capacity to generate 7,000 tons per year, the potential for growth, and the potential for an event such as a pandemic outbreak to trigger a rapid increase in the treated biomedical waste produced by the facility. (JRL License at 4.) Further, the Department concluded that the permitted volume of treated biomedical waste could be safely handled at JRL without adversely impacting human health or the environment. (JRL License at 8.)

II. Mary Dolan, Edward Spencer, and Charles Leithiser Lack Standing to File this Appeal.

A. The Legal Requirement for Standing

The Department's Rules establish that only "an aggrieved person may appeal to the Board for review of the Commissioner's decision." (DEP Rules, Ch. 2(24(B)(1).) An

“aggrieved person” is defined as “any person whom the Board determines may suffer a particularized injury as a result of a licensing or other decision.” (*Id.*, Ch. 2(1)(C).) While the Department’s Rules do not specify what constitutes a particularized injury, the courts have established: “A particularized injury occurs when a judgment or order adversely and directly affects a party’s property, pecuniary, or personal rights.” *Nergaard v. Town of Westport Island*, 2009 ME 56 ¶ 18, 973 A.2d 735, 740; *see also Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 10 953 A.2d 378, 382.

B. Neither Dolan, Spencer, nor Leithiser Suffer a Particularized Injury as a Result of the JRL License.

The Department’s Rules establish that a person making an appeal “must include” in the written notice of appeal “evidence demonstrating the appellant’s standing as an aggrieved person.” (DEP Rules, Ch. 2(24)(B)(2).) In the present appeal, Appellants make no specific claim that any property, pecuniary, or personal right would be adversely or directly affected by the JRL License. They simply assert:

[1] As residents of Old Town, we are affected daily by [2] the number of trucks delivering refuse to and returning from the landfill, [3] the visual impact that the landfill has on the surrounding community, [4] the frequent odors emanating from the landfill, and [5] the associated noise of the daily operations there. [6] As residents of the State of Maine, we are stakeholders in the State-owned landfill . . .

(Appellants’ Brief (“A. Br.”) introduction; numbers added for clarity.)² Each of the six alleged grounds for standing are discussed below. None is sufficient.

1. Resident Status in Old Town and in Maine

Status as a resident in a particular municipality where a permitted activity would take place or in the State is not, by itself, sufficient to give an individual standing to challenge

² Appellants did not number the pages of their brief. The citations to the Appellants’ brief in this response are to: (a) the introduction (i.e., the material before the numbered sections), (b) the numbered sections, and (c) the conclusion (i.e., the material after the numbered sections).

the permit authorizing the activity. This is well established in Maine law. *Nelson*, 2008 ME 91, ¶ 10, 953 A.2d at 382 (“The injury suffered must be distinct from any experienced by the public at large and must be more than an abstract injury.”); *Chabot v. Sanford Zoning Board of Appeals*, 408 A.2d 85, 85 (Me. 1979) (“Here plaintiff pleaded only that he was a resident and property owner in the town of Sanford. He did not plead or prove any injury from the zoning board's decision, particular or otherwise.”); *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984) (where complaint only alleges an injury suffered by all of the citizens of the State, plaintiffs did not demonstrate “particularized injury”). In addition, resident status within a municipality or the State is insufficient to provide a resident standing to appeal a municipally-held or State-held permit. *Nergaard*, 2009 ME 56 ¶¶ 117-22, 973 A.2d at 740-742 (finding residents of the Town of Westport Island lacked standing to appeal the Town’s permit authorizing improvements to the Town’s boat ramp).

Accordingly, Appellants’ statement that they are residents of Old Town and residents of Maine makes them no different than any other Old Town resident or any other Maine resident. Their resident status does not provide them with standing. They still must establish a particularized injury.

2. Traffic Associated with the Transportation of AHR’s Treated Biomedical Waste

The trucks that haul the treated biomedical waste from AHR’s Pittsfield facility to JRL make most of the trip on I-95. To reach the landfill access road, which intersects Route 16 in Old Town, trucks from AHR’s facility take I-95 exit 199 in Old Town. This exit places traffic directly onto Route 16. In total, the trucks from AHR’s facility travel 0.4 miles northwest along Route 16 to reach the JRL access road.

The Appellants' residences do not abut the landfill and are not located along this route.³ To the extent the added traffic associated with the hauling of the treated biomedical waste to JRL will be noticeable to the Appellants, it could only be as a result of the trucks from AHR and the Appellants traveling along this 0.4 mile stretch of Route 16 at the same time, if this ever were to occur (and Appellants actually noticing the trucks). The Appellants will be situated no differently than the rest of the driving public that travels along Route 16 past the landfill.

In *Nergaard v. Town of Westport Island*, the Law Court addressed a virtually identical situation and determined that this type of traffic impact does not constitute a particularized injury. In *Nergaard*, two plaintiffs in the Town of Westport Island appealed a permit issued to the Town authorizing improvements to the Town's boat launch. The plaintiffs in that case were not abutters of the boat launch. They claimed they travelled past the boat launch daily and argued that they would suffer a particularized injury because of the increased traffic (an increase in daily trips to and from the site by thirty-six vehicles during the peak season) that would be associated with the improvements authorized in the permit. The Law Court rejected this argument, noting that the plaintiffs were no different than any other resident of the Town of Westport Island who travelled on Route 144 past the boat launch. The Law Court concluded the plaintiffs would not suffer a particularized injury and, therefore, lacked standing to appeal the Town's permit. *Id.* ¶¶ 117-22, 973 A.2d at 740-742.

The Appellants in the present matter are no different. Any traffic impacts associated with the JRL License will not result in any of the three Appellants suffering a particularized injury.

³ In fact, the appellant who lives nearest to the landfill, Mr. Spencer, lives over 1.7 miles west of the landfill, while the other appellants, Ms. Dolan and Mr. Leithiser, live on the other side of the City in residences over 4 miles from the landfill.

3. Visual Impact of the Landfill on the Surrounding Community

The allegation that the landfill has an adverse visual impact on the surrounding community, even if accepted, is insufficient to establish a particularized injury. A particularized injury “must be distinct from any experienced by the public at large.” *Nelson*, 2008 ME 91, ¶ 10, 953 A.2d at 382. The alleged injury to an entire community is the exact opposite of a particularized injury.

Further, JRL is not visible from any of the Appellants’ property (and they make no claim that it is). Thus, there is no potential for them to suffer a particularized injury associated with visual impacts.

Finally, even if JRL were visible from Appellants’ property they still would not suffer a particularized injury providing them with standing to appeal the JRL License. To challenge the Department’s issuance of the JRL License the alleged particularized injury must result from the challenged license. *Storer v. DEP*, 656 1191, 1192 (Me. 1995) (“The agency’s action must operate prejudicially and directly upon a party’s property, pecuniary or personal rights.”). Here, any visual impact associated with operation of the landfill is a result of the original licensing decision authorizing operation of JRL in its present form (S-020700-WD-N-A). The JRL License challenged in this appeal does not impact, directly or otherwise, the size and/or shape of the landfill. Thus, the JRL License has no bearing on any visual impact the landfill may have. Appellants have no basis to argue that, due to visual impacts, they may suffer a particularized injury as a result of this license.

4. Landfill Odors

Appellants’ allegation of odors emanating from the landfill is insufficient to establish a particularized injury for a fundamental reason. As explained in the preceding subsection, a particularized injury providing Appellants with standing to appeal the JRL License must be

directly associated with activity authorized by the JRL License. The JRL License authorizes the disposal of treated biomedical waste. This is an odorless solid waste.

Appellants' generic statement about odors from the landfill does not establish a particularized injury.

5. Noise Associated with Daily Operations

The noise associated with daily operations at JRL will not change or otherwise be different as a result of JRL disposing of AHR's treated biomedical waste. Nor have Appellants made such an allegation. Appellants' generic statement that daily operation of the landfill generates noise does not establish a particularized injury providing them with standing to appeal the JRL License.

In sum, Appellants have failed to establish that the impacts they allege (e.g., visual, odor, and noise) are related to the JRL License they seek to appeal or, where the alleged impacts are associated with this license (e.g., traffic), that these impacts will affect Appellants differently than the public at large. As a result, Appellants will not suffer a particularized injury, are not aggrieved, and lack standing. Their appeal should be dismissed.

III. The Department Reasonably and Appropriately Authorized JRL to Receive up to 5,000 Tons of Treated Biomedical Waste Annually.

A. JRL Can Safely Accommodate the Treated Biomedical Waste Generated at AHR's Facility in Pittsfield.

Appellants contend that disposing of treated biomedical waste at JRL "poses serious health and safety risks" that have not been adequately addressed by the Department. (A. Br. § 3.) This is simply not the case.

The Department has adopted extensive rules regulating both the treatment of biomedical waste (see Ch. 900) and the disposal of all solid waste, including treated biomedical waste, at landfills (see Chs. 400-401, 405). The result is that, unlike many solid waste streams, both the

generator of the treated biomedical waste – AHR – and recipient of this solid waste – JRL – are licensed by the Department. With each licensing process comes Department scrutiny of whether the applicant meets the applicable statutory and regulatory requirements. The JRL License order challenged here is the fifth order in which the Department has determined that the treated biomedical waste generated at AHR’s Pittsfield facility is safe for disposal at a Maine landfill.⁴

In the JRL License, the Department concluded that the disposal of treated biomedical waste generated at AHR’s Pittsfield facility “will not pollute any waters of the state, contaminate the ambient air, constitute a hazard to health or welfare or create a nuisance.” (JRL License at 8.) The Department made this conclusion after considering both (1) the characteristics of the treated biomedical waste that will arrive at JRL and (2) the manner in which this solid waste will be handled once at the landfill. (JRL License at 3, 6-8.)

1. The Treated Biomedical Waste Generated by AHR at its Pittsfield Facility is Safe for Disposal in a Landfill.

The treated biomedical waste JRL is licensed to accept may come only from AHR. Pursuant to the terms of its license and the Department’s Rules, AHR must ensure that its treatment process achieves a 99.99 percent or greater reduction in *Bacillus stearothermophilus* spores, a level of reduction that demonstrates successful treatment. (AHR License at 17; DEP Rules, Ch. 900(19)(B).) AHR has demonstrated that its treatment process satisfies the Department’s stringent performance standards and, as a condition of its license, AHR must conduct monthly testing to continue to ensure this 99.99 percent level of reduction is achieved. (AHR License at 17.) The result, as the Department has determined, is that this process provides “an effective method of protecting the public and the environment from the hazards associated with biomedical waste.” (AHR License at 21.)

⁴ (1) O-221-BD-A-N (May 20, 2005); (2) S-01987-WU-NB-N (June 20, 2005); (3) O-221-BD-B-M (July 2, 2009); (4) S-10735-WT-WZ-N (Dec. 30, 2009); and (5) S-020700-WU-AJ-N (June 30, 2010).

Notably, Appellants do not contend that treated biomedical waste, *per se*, poses health and safety risks. Instead they question whether the treated biomedical waste generated by AHR will be adequately treated. (A. Br. at § 3(a)-(b).) The Department, in a separate licensing proceeding, has answered this question, not only determining that AHR's treated biomedical waste is safe for landfill disposal, but *requiring*, as a condition of approval, that AHR "dispose of all treated biomedical waste as a special waste in a licensed landfill." (AHR License at 23.)

As a procedural matter, in their appeal of the JRL License, Appellants essentially challenge the Department's findings and conclusions in the separate AHR License after the appeal period for that permit has run. This type of tardy appeal should not be allowed.

Regardless, there is no merit to Appellants' claim. In support of their position, Appellants quote a letter from the Chief of the Penobscot Nation in which the Chief says he is not convinced biomedical waste can be successfully treated due to "human error and equipment malfunction." (A. Br. § 3(b).) The Department, however, has accounted for both. The AHR License requires employee training and adherence to the Biomedical Waste Management and Operations Plan, which establishes procedures and protocols designed with the goal of preventing human error, but also to catch any errors that may occur. (AHR License at 19.) The AHR License also requires AHR to have and implement a contingency plan for the treatment of biomedical waste should there be any outages or equipment issues at the Pittsfield facility. (AHR License at 23.) Additionally, the required monthly monitoring of the treated biomedical waste generated at the facility, noted above, provides another layer of protection.

Along with citing the thoughts of the Chief of the Penobscot Nation, Appellants express their own concern that the monthly testing AHR is required to conduct is inadequate to ensure successful treatment (A. Br. § 3(a)). Appellants list violations identified by the Department during an October 12, 2007 inspection of AHR's Pittsfield facility as justifying more frequent

testing. Apart from the fact that AHR's License and the conditions of that license are not the subject of the present appeal, as Appellants note, these past violations have been corrected (they were resolved in a 2008 Consent Agreement) and AHR has been in full compliance since that time. (A. Br. § 3(a).) In addition, none of these violations involved failure to treat biomedical waste in conformance with the Department's 99.99 percent performance standard; the Department considered these very violations when issuing the AHR License; and after this consideration the Department determined that monthly testing will ensure compliance with the Department's Rules. (AHR License at 3, 20.) Further, the Department acknowledged these past violations in the JRL License as well. (JRL License at 7.) The Department then concluded again – after consideration of the nature of these prior violations, AHR's overall compliance history, and the plans and procedures currently in place at the Pittsfield facility – that treated biomedical waste generated by AHR is safe for landfill disposal. (JRL License at 3, 7-8.) The reasoned judgment of the Department should not be disturbed.

Finally, a note on the manner in which Appellants present their argument is warranted in order to avoid any misconception about the soundness of the Department's reasoning. After acknowledging AHR's full compliance since correction of the violations discovered in 2007, Appellants state:

However, despite the statement that “medical errors due to faulty handling protocols are beyond the scope of review of the Department” we feel that given AHR's history, monthly efficacy testing “as a measure of successful disinfection of waste under normal operating procedures at the treatment facility” (Section 3A) is not adequate.

(A. Br. § 3(a).) By juxtaposing two quotes from the JRL License in this manner, Appellants suggest that the Department both (a) recognized that errors and faulty handling of biomedical waste occur at AHR's facility and (b) determined that these errors and this type of handling are

beyond the Department's scope of review, before concluding monthly testing is adequate to ensure that AHR is properly treating biomedical waste. This is grossly misleading.

The second of the two quotes, as indicated by Appellants, comes from Section 3.A of the JRL License in which the Department describes the treatment process. In this description, the Department made the factual statement: "Efficacy testing is conducted monthly as a measure of successful disinfection of the waste under normal operating procedures at the treatment facility." (JRL License at 3.) The first quote extracted by Appellants from the JRL License, without citation, comes four pages later in response to comments from interested parties. The Department noted that a party commented "that thousands of unintentional deaths in hospitals due to medical errors point to issues with waste handling protocols." (JRL License at 7.) Hospital errors resulting in death, and whether such errors in any way relate to a hospital's waste handling protocols, have nothing to do with the disposal of AHR's treated biomedical waste at JRL. In the JRL License, the Department tactfully responded to this irrelevant comment by stating that "medical errors due to faulty waste handling protocols are beyond the scope of review of the Department." (JRL License at 7.) Appellants' selective use of this quote, completely out of context, is misleading. This strategy reflects the lack of supporting evidence Appellants have for their claim that AHR's treatment and monitoring process should be altered and that additional testing of the treated waste, either at AHR's facility or at JRL, should be required.

2. NEWSME Employees Safely Handle the Treated Biomedical Waste Delivered to JRL.

Appellants express an interest in the safety of workers at JRL. (A. Br. § 3(d) & conclusion.) This is an interest they share with SPO and NEWSME.

The treated biomedical waste generated by AHR is "non-infectious" (JRL License at 2, 3) and only treated waste with an accompanying certification from AHR that "the waste has been

disinfected and poses no threat to human health or the environment” may be transported to JRL (AHR License at 8). This disinfection is the very point of the treatment process.

Landfill employees have been trained in proper handling and disposal methods and immediately cover treated waste when disposed of at JRL. (JRL License at 7.) Landfill employees also have been trained to recognize untreated biomedical waste and to prevent this type of waste from entering JRL. (JRL License at 7-8.)

A particular concern of Appellants is that workers might be stuck with needles. (A. Br. conclusion.) Appellants claim that detailed mapping of the exact location where treated biomedical waste is disposed should be added as a condition to the JRL License to help address this alleged worker safety issue. (A. Br. conclusion.) AHR, however, is required, as a condition of its permit and by the Department’s Rules, to shred all sharps so that they are rendered unrecognizable. (AHR License at 5-6, 23.) The process AHR follows with regard to sharps, which was updated last year, is described in its license. (AHR License at 5-6.) This process ensures that the sharps component of the biomedical waste treated by AHR does not pose a “sticking” risk to landfill workers. NEWSME and SPO believe this process works well and have no intent to seek any modification. In addition, as noted above, all treated biomedical waste disposed at JRL is immediately covered, greatly limiting any potential exposure. (JRL License at 7.) Further, the treated biomedical waste is located in areas of the landfill (e.g., away from gas collection pipes) where future excavation is not anticipated. (JRL License at 8.) These factors, along with the training landfill employees receive, ensure the safety of workers at the landfill. The mapping requested by Appellants is unnecessary

In sum, the existing processes and protocols in place and approved by the Department, both at AHR’s Pittsfield facility and at JRL, ensure that the treated biomedical waste generated by AHR is safe for handling and disposal at JRL, that landfill employees have been trained to

safely and properly dispose of this solid waste, and that this solid waste is disposed of safely and properly and in accordance with DEP Rules.⁵

B. The Volume of Treated Biomedical Waste JRL is Licensed to Receive is Reasonable and Consistent with State Law.

Appellants claim there is “no reason” for any treated biomedical waste to be disposed of at JRL (A. Br. § 1(c)) and, in the alternative, that the 5,000 ton per year limit is excessive. (A. Br. § 2.) The reason SPO and NEWSME sought DEP approval to accept AHR’s treated biomedical waste is that the only landfill previously licensed to accept this solid waste, Pine Tree Landfill in Hampden, no longer accepts any waste. There is a clear need for this solid waste to be disposed of somewhere and JRL satisfies this need, replacing Pine Tree Landfill as the only landfill in Maine licensed to accept this treated biomedical waste. While Appellants point to the fact that another landfill could be licensed to dispose of AHR’s treated biomedical waste, this possibility is not material to determining whether JRL satisfies the applicable licensing criteria.

The 5,000 ton annual limit was approved by the Department after careful consideration. As the record reflects, the Department questioned the applicant about the appropriateness of this limit. (Letter from M. Parker, DEP to T. Gilbert, NEWSME, regarding DEP Application #S-20700-WU-AJ-N and requesting additional information (Feb. 9, 2010).) In its response, NEWSME presented information from AHR concerning the volume of treated biomedical waste historically generated at the Pittsfield facility as well the facility’s increased operating capacity resulting from a 2009 upgrade in its treatment process. (Letter from T. Gilbert, NEWSME, to M. Parker, DEP responding to additional information request and attaching letter from AHR (March

⁵ Appellants claim the transportation of untreated biomedical waste is dangerous. (A. Br. § 3(c).) Untreated biomedical waste will be transported to AHR’s facility for sorting and treatment. Untreated biomedical waste also will be transported from AHR’s facility for out-of-State for disposal. This transportation of untreated biomedical waste within Maine, whether to or from AHR’s facility, is licensed by the Department to ensure that it is done safely and properly. (DEP Rules, Ch. 900(14).) The U.S. Department of Transportation also regulates the transportation of medical waste.

3, 2010).) This response explained that the requested 5,000 ton annual limit allows for growth from current generation levels, but reflects only a portion of AHR's total capacity since the 2009 upgrades. As the Department explained in the JRL License:

Both the Department and several interested parties asked for an explanation for the increased amount of waste proposed in current application. In response, AHR provided figures for December 2009 that showed the facility was treating 257 tons per month of biomedical waste. In April 2010, the WMDSM Crossroads Landfill received 231 tons of treated waste from the AHR facility. Annualized, these figures translate into 3,090 and 2,770 tons per year, respectively. This is consistent with the facility's current operational schedule of two 8-hour shifts working six days a week, potentially generating up to 3,900 tons of treated waste. Further, as currently configured, and assuming the facility operated 24 hours per day and 365 days per year, AHR stated that the facility could process up to 7,000 tons per year waste. The proposed 5,000 tons reflects 71% of the potential maximum treatment capacity of the facility and allows for potential fluctuations in the amount [of] waste accepted at the facility. Finally, in the event of a pandemic outbreak, the AHR facility may see a rapid increase in the amounts of biomedical waste needing treatment prior to disposal, necessitating the need for the increased disposal capacity of treated waste at the Juniper Ridge Landfill.

(JRL License at 4.)

Appellants assert that this reasoning is inconsistent with the State's solid waste management hierarchy contained in 38 M.R.S.A. § 2101. (A. Br. § 2(f).) They claim the hierarchy requires greater recycling of biomedical waste at the source (e.g., at hospitals) (A. Br. § 2(f)) and incineration of treated biomedical waste at a waste-to-energy facility (A. Br. conclusion.)

The JRL License is fully consistent with the solid waste management hierarchy and State policy. The hierarchy, as its name and the related statutory text make clear, applies to *solid waste* management. While there may be good policy reasons for encouraging hospitals and other generators of biomedical waste to reuse or recycle materials before disposing of them, if medically safe to do so, the biomedical waste generated by hospitals is not a solid waste. The hierarchy does not serve as a policy framework for the management of this separate category of waste. Further, unlike a solid waste processing facility that receives construction and demolition

debris, for example, AHR cannot reuse or recycle a portion of the biomedical waste it receives. The treated biomedical waste AHR generates is a solid waste and, thus, falls within the hierarchy. NEWSME and SPO, however, are not aware of any recycling options for this solid waste and none is identified by Appellants.

One suggestion offered by Appellants is that the treated biomedical waste generated by AHR should be incinerated. (A. Br. conclusion.) This, however, would be inconsistent with long-standing State policy. As summarized by the Department in the AHR License:

In 1999 the Natural Resources Committee of the Maine Legislature instructed the Maine Hospital Association and the Department to work together with other interested parties including the Natural Resources Council of Maine and Health Care without Harm, to examine options for expanding in-state treatment and disposal methods for biomedical waste. The consensus of that group was that steam sterilization and microwaving are appropriate technologies for the safe treatment of biomedical waste. It was also the consensus of the group that biomedical waste should be classified as a special waste with final disposal in a DEP licensed special waste landfill. Several parties in the group expressed a strong desire that the treated waste not be incinerated in a municipal solid waste incinerator. Scientific evidence supports the contention that the incineration of polyvinyl chloride (PVC) based plastics, which comprise a significant percentage of biomedical waste, generates dioxins, especially in the ash.

(AHR License at 2.)

Accordingly, the Department required AHR to dispose of the treated biomedical waste it generates in a licensed landfill (AHR License at 23), and as described above, the volume of this solid waste JRL is licensed to receive is reasonable and consistent with State law.

IV. The Treated Biomedical Waste Generated at AHR's Pittsfield Facility is Waste Generated Within the State

The remaining issue presented by Appellants is whether, under State law and the Department's Rules, the treated biomedical waste generated at AHR's Pittsfield facility, is a waste generated within the State. (A. Br. § 1.) This question is important because JRL is a State-owned landfill. State law, specifically 38 M.R.S.A. § 1310-N, requires the licensing of all

solid waste facilities in Maine, such as landfills, by the Department. Within this statutory section is a provision establishing that “a solid waste disposal facility owned by the State may not be licensed to accept waste that is not waste generated within the State.” (*Id.* § 1310-N(11).) This restriction applies solely to JRL, the only State-owned solid waste disposal facility in Maine.

The same statutory provision, while not stating precisely what is and what is not “waste generated within the State,” identifies three categories of waste considered in-State for regulatory purposes, noting: “‘waste generated within the State’ includes [1] residue and bypass generated by incineration, processing and recycling facilities within the State or [2] waste, whether generated within the State or outside the State, if it is used for daily cover, frost protection or stability or [3] is generated within 30 miles of the solid waste disposal facility.” (*Id.*)

A portion of the biomedical waste accepted by AHR is transported to the Pittsfield facility from out-of-state. (JRL License at 2.) This waste, along with biomedical waste transported to Pittsfield from Maine hospitals and other locations in Maine, is treated at AHR’s facility. The resulting treated biomedical waste is what the Department authorized JRL to accept.

In approving the disposal of AHR’s treated biomedical waste at JRL, the Department, interpreting Maine’s solid waste management laws and its rules, concluded this material is waste generated within the State. (JRL License at 6.) The Appellants disagree, focusing on the statutory language in Section 1310-N(11) that clarifies that certain solid waste generated out-of-State, transported to Maine, and processed in Maine is considered waste generated within the State. The Appellants attempt to distinguish treatment from processing and note that AHR “treats” biomedical waste, but does not “process” this waste. As a result of not being processed, Appellants claim, the treated waste that leaves AHR is out-of-State waste prohibited from disposal at JRL. (A. Br. § 1.)

The errors in the Appellants' interpretation of the controlling statutory and regulatory provisions are discussed in section IV(B) below. More fundamentally, however, Appellants' focus on whether the "treatment" of biomedical waste by AHR is the same as the "processing" of waste is misplaced. While as explained by the Department in the JRL License, the treatment of biomedical waste by AHR is akin to the in-State processing of solid waste that the Legislature has established qualifies solid waste with out-of-State origin as waste generated within the State, understanding the correlation between treatment and processing is not necessary in order to determine that the solid waste generated at AHR's Pittsfield facility is waste generated within the State. Why this is the case and why the Appellants' focus is misplaced is discussed below in section IV(A).

A. The Solid Waste Approved for Disposal at JRL is Generated in Maine at AHR's Pittsfield Facility

JRL is a solid waste disposal facility. Such facilities may only accept solid waste. As explained above, biomedical waste is not a solid waste. Biomedical waste, whether originating in Maine or beyond the State's borders, may not be disposed of at JRL or any other solid waste facility in Maine.

Consistent with State law, the JRL License does not authorize the disposal of biomedical waste. Rather, the license permits JRL to accept a different category of waste, a solid waste, specifically treated biomedical waste. This solid waste is generated in Pittsfield, Maine at AHR's facility. The biomedical waste arriving at this facility, regardless of its origin, is sorted into one of two categories (see the discussion of the categories in Section I) and the material falling within the second of the two categories goes through a treatment process. What emerges from this treatment process is solid waste. This solid waste is generated here in Maine and, consistent with the requirement of Section 1310-N(11), this "waste generated within the State" is what the Department authorized SPO to accept at JRL.

No further analysis is needed to conclude that the Department's determination in the JRL License is correct.

B. AHR's Treatment Facility and Maine Solid Waste Processing Facilities Both Generate In-State Waste

In the JRL License, the Department supports its determination that the solid waste generated at AHR's Pittsfield facility is "waste generated within the State" by noting the parallels between the treatment of biomedical waste and the processing of solid waste. (JRL License at 5-6.) The similarities are significant because the in-State processing of waste, even if that waste has out-of-State origins, makes the resulting waste "waste generated within the State." The in-State treatment of biomedical waste, even if the biomedical waste originates outside of Maine, is analogous.

As noted above, Section 1310-N(11) clarifies that residue and bypass⁶ generated by incineration, processing, or recycling facilities within the State is "waste generated within State." "Residue" is defined as "waste remaining after the handling, processing, incineration or recycling of solid waste including, without limitation, front end waste and ash from incineration facilities." (38 M.R.S.A. § 1303-C(25).)

The following hypothetical example in which Section 1310-N(11) is applied is illustrative. A building in Massachusetts is knocked down in order to accommodate new development. Construction and demolition debris ("CDD") that remains is hauled to Maine. This CDD is solid waste and when it crosses the border and enters Maine is out-of-State waste. This solid waste could not be hauled directly to a State-owned landfill for disposal because of its out-of-State status. Instead, this waste is hauled to a Maine processing facility where the CDD is screened,

⁶ "Bypass" means any solid waste that is destined for disposal, processing or beneficial use at a solid waste facility but that cannot be disposed of, processed or beneficially used at that facility because of the facility's malfunction, insufficient capacity, inability to process or burn, downtime or any other comparable reason." 38 M.R.S.A. § 1303-C(1-C). Biomedical waste cannot ever qualify as bypass since bypass must be a solid waste and untreated biomedical waste, by definition, is not solid waste.

separated, and ground. The components of the waste that can be recycled and beneficially used (such as the wood that can be burned as an alternative fuel; metal that is recycled; fines reused as alternative daily cover; and asphalt, brick, and concrete that are recycled) are removed and the remaining material is hauled to a State-owned landfill for disposal in accordance with the landfill's license. The portion of the CDD disposed at the State-owned landfill is the residue. This residue is a solid waste and as established by Section 1310-N(11) is "waste generated within the State." This is the case even though the CDD has out-of-State origin.

The example above is significant because it clearly highlights that a waste originating out-of-State may become "waste generated within the State" if it undergoes transformation at an in-State facility. The transformation biomedical waste undergoes at AHR's Pittsfield treatment facility is analogous and another example of how a waste with out-of-State origin can become "waste generated within the State." The biomedical waste arriving at AHR's facility is sorted and a portion of the waste is then treated. What emerges from the treatment process is a solid waste that is appropriate for disposal at a landfill. This treated portion of the waste is akin to the residue produced by the processing of CDD. In the case of the treated waste from AHR's facility, compared to the processed CDD, however, it is even clearer that the treated waste is generated within the State since an entirely new category of waste, solid waste, is produced at the AHR treatment facility.

The Appellants fail to recognize the treatment of biomedical waste with out-of-State origin and the processing of solid waste with out-of-State origin as analogous. Instead, Appellants contend that because "treatment" is not "processing" the treated biomedical waste generated at AHR's Pittsfield facility is not "waste generated within the State." (Appellants § 1.) The central flaw in Appellants' reasoning is that a waste's status as "waste generated within the State" does not hinge on whether it is processed. While Section 1310-N(11) clarifies that a

waste with out-of-State origin may become in-State waste through processing, this provision does not limit “waste generated within the State” to only waste processed in Maine.

Further, as explained by the Department in the JRL License:

Clearly, while *processing* refers to solid waste and *treatment* refers to hazardous waste, waste oil or biomedical waste, the terms are synonymous in that the waste is undergoing some form of physical, chemical, biological or stabilization transformation. Any distinction in the two terms is administrative to distinguish between the types of waste being handled, not the action of converting, processing, treating or transforming the waste.

(JRL License at 6 (emphasis in original).)⁷ Thus, any distinction between processing and treatment does nothing to detract from the analogy between the treatment of biomedical waste at

⁷ The term “treatment” is defined in statute to mean:

any process, including but not limited to incineration, designated to change the character or composition of any hazardous waste, waste oil or biomedical waste so as to render the waste less hazardous or infectious.

38 M.R.S.A. § 1303-C(39).

The term “processing” is not defined in either statute or rule, however, the term “processing facility” is defined in rule:

A processing facility is any land area, structure, equipment, machine, device, system, or combination thereof, other than licensed incinerators, that is operated to reduce the volume or change the chemical or physical characteristics of solid waste. Processing facilities include but are not limited to facilities that employ shredding, baling, mechanical and magnetic separation, or other stabilization techniques to reduce or otherwise change the nature of solid waste. Processing facilities include, but are not limited to, facilities that:

- (1) Shred automobiles, white goods, scrap metal, machinery, vehicles, tires, demolition debris, wood waste or other similar materials;
- (2) Shred, separate, or otherwise increase the heat input value of municipal solid waste to produce refuse-derived fuel;
- (3) Aerobically digest, anaerobically digest, air dry, heat dry, heat treat, lime stabilize, pelletize, chemically treat, irradiate, pasteurize, or otherwise reduce pathogens or stabilize residuals, including dewatered septage, to render the residual suitable for agronomic utilization in accordance with the standards of Chapter 419;
- (4) Process solid waste to render the waste suitable for beneficial use in accordance with the standards of Chapter 418.

(DEP Rules, Ch. 409(1)(A). See also DEP Rules, Ch. 400(1)(Gg) (also defining “processing facility”).)

AHR's Pittsfield facility and the processing of solid waste at a Maine facility – both transform waste and produce “waste generated within the State.”

C. Application of the Solid Waste Management Laws and Rules to Treat Biomedical Waste

The Department's reading of Section 1310-N(11), specifically, and the solid waste management laws and Solid Waste Management Rules, more generally, is both consistent with the statutory and regulatory text, and reasonable. The result of this application of the laws and rules is that biomedical waste cannot be disposed at Maine solid waste disposal facilities, including Maine landfills. This is because biomedical waste is not a solid waste. Treated biomedical waste, because it is a different category of waste, a solid waste, may be disposed in Maine landfills if the receiving landfill is licensed to receive this particular type of solid waste. JRL, because it is owned by the State, is subject to the additional restriction contained in Section 1310-N(11) and may only accept treated biomedical waste that is “waste generated within the State.” This means biomedical waste treated in Massachusetts, New Hampshire, or elsewhere outside of Maine may not be disposed of at JRL. Only treated biomedical waste that is treated in Maine may be accepted at this State-owned landfill.

IV. Conclusion

The laws and rules governing solid waste handling and disposal in Maine are detailed and technical. The regulation of out-of-State waste is no exception. While Appellants lack standing to appeal, if the merits are addressed, recognizing the distinction made in laws and rules between biomedical waste and treated biomedical waste is central to the evaluation of the JRL License. Despite the similarity in name, treated biomedical waste is an entirely separate category of waste – a solid waste. When this solid waste is generated in Maine, as it is at AHR's Pittsfield facility, treated biomedical waste is “waste generated within the State.” This reading of Section 1310-

N(11) is wholly consistent with the statutory text, the text of the related rules, and the regulation of solid waste processed in Maine.

Equally appropriate is the disposal of AHR's treated biomedical waste at JRL and the 5,000 ton per year cap the Department placed on this disposal.

Accordingly, the State Planning Office and NEWSME respectfully request that the Board deny Appellants' appeal and affirm the Department-issued JRL License.

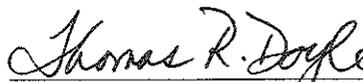
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