

**Juniper Ridge Landfill  
Department Order #S-020700-WD-W-M**

**Appeal to the Board of Environmental Protection**

**Response by Licensee**

**(dated November 15, 2010)**

**Jointly Filed by Maine State Planning Office**

**and**

**NEWSME Landfill Operations, LLC**



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November 15, 2010

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

RE: Appeal of the Municipal Review Committee, Inc. ("MRC") and Penobscot Energy  
Recovery LP ("PERC")  
DEP Order #S-020700-WD-W-M

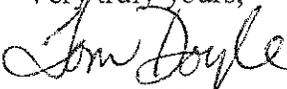
Dear Madam Chair:

I enclose the Joint Response of the State Planning Office and NEWSME Landfill Operations, LLC to the appeal of MRC and PERC in this matter.

As explained in the Joint Response, the MRC and PERC have not suffered a particularized injury as a result of the Department's action they seek to challenge, and thus their appeal should be denied for lack of standing. They also have failed to substantiate any of their claims. Consequently, should the Board consider the merits of the Appellants' claims, SPO and NEWSME request that the Board affirm the Department's well reasoned decision approving a minor revision to allow the Juniper Ridge Landfill ("JRL") to use MSW bypass, a waste stream JRL already is licensed to accept, as the protective layer for the JRL liner. As the record shows, this is what is best for protection of the environment and is consistent with what the Department has allowed for the protective layer at other operating landfills in the State licensed to receive MSW.

As no reply from MRC or PERC is permitted by the Department's Rules for appeals, briefing in this matter is now complete.

Thank you very much for your attention to this matter.

Very truly yours,  
  
Thomas R. Doyle

Enclosure  
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 JUNIPER RIDGE LANDFILL CHANGES IN MSW BYPASS LIMIT #S-020700-WD-W-M (APPROVAL WITH CONDITIONS)
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SOLID WASTE ORDER  
MINOR REVISION

**JOINT RESPONSE OF  
THE STATE PLANNING OFFICE AND  
NEWSME LANDFILL OPERATIONS, LLC  
TO APPEAL OF  
THE MUNICIPAL REVIEW COMMITTEE, INC. AND  
PENOBSCOT ENERGY RECOVERY COMPANY, LP**

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 Municipal Review Committee, Inc. (“MRC”) and Penobscot Energy Recovery Company, LP (“PERC”) (collectively the “Appellants”). In their appeal, Appellants challenge the Department’s approval of a minor revision to the existing license authorizing operation of JRL. This revision order allows the use of municipal solid waste (“MSW”) bypassed from any of Maine’s four solid waste incineration facilities, including PERC, to be used as the required “soft layer” in the recently constructed Cell #6 at JRL and in the future cells approved for construction under the existing license for the landfill.<sup>1</sup>

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<sup>1</sup> Appellants do not object to use of MSW bypass for the soft layer in JRL’s Cell #6, provided it is installed in a manner that is not dangerous to the liner and leachate collection system. (MRC/PERC Appeal at 10.)

As explained in the minor revision order, the Department favors the use of MSW as the soft layer. This is because the Department has found in the course of permitting and evaluating the performance of landfills throughout the State that this material best fulfills the purpose of the soft layer – protecting the landfill liner from puncture and frost damage and, after compaction by the solid waste disposed on top of the soft layer, remaining porous enough to allow leachate from the landfill to drain into and through the leachate collection system that is interconnected with the liner. In authorizing the use of MSW as the soft layer at JRL, the Department approved the practice it has found best protects the environment by ensuring proper function of landfill liners and leachate collection systems, and the practice commonly in place at other landfills in the State that accept municipal solid waste.

Appellants present six different arguments in their challenge to the minor revision. Each, as is explained below, lacks a legal basis in statute, rule, or common law. Additionally, running through these arguments is the assertion that MRC and PERC are somehow adversely impacted by this minor revision and the suggestion that the minor revision establishes Maine Energy (which is one of the four incineration facilities in Maine) as the sole source of MSW bypass that may be used as the soft layer at JRL. Neither is accurate. In no way is MRC or PERC injured by the minor revision. As a result, they lack standing to file this appeal. Further, nothing in the minor revision limits the MSW bypass that may be used as the soft layer at JRL to bypass from any one facility. In fact, prior to Appellants' filing of the present appeal, NEWSME discussed with PERC the possibility of obtaining, at a premium to be paid by NEWSME, authorized MSW bypass from PERC for the soft layer in cell #6. PERC declined this opportunity.

The inability of NEWSME and PERC to negotiate a mutually beneficial agreement, however, is not a basis for the intervention from the Board the Appellants now seek. The Department acted rationally, in the best interest of the environment, and in accordance with all applicable legal requirements when it approved the minor revision. There is no reason for the Board to disturb the Department's decision.

## **I. Background**

### **A. The Existing JRL License and Operation of the Landfill**

In the April 9, 2004 license issued to SPO, S-020700-WD-N-A, the Department authorized an increase in the vertical elevation of JRL and disposal of additional waste streams at the landfill, including MSW bypass. This license – the “JRL License” – is the principal license under which JRL operates. The minor revision to this license, S-020700-WD-W-M, is the subject of the present appeal.

#### **1. Cell Construction and the Soft Layer**

The JRL License authorizes the construction of additional cells at the landfill. (JRL License at 20.) In accordance with the license, a new cell is constructed at the landfill approximately every year. Recently, the construction of cell #6 was completed.

In order to protect the environment, the Department's Rules require, among other things, that each landfill cell be lined and contain a leachate collection system. (DEP Rules, Ch. 401(2)(D)(1) & (4).) The Rules also establish: “A protective system must be provided for the primary liner and the leachate collection system.” (*Id.* Ch. 401(2)(D)(4)(a)(vii).) The purpose of this protective system is to shield the liner from being punctured, insulate the liner and leachate collection system from the effects of freezing and thawing, control erosion, and

otherwise ensure proper operation of the liner and leachate collection system. (*Id.*; Minor Revision at 4-5.)

A common form of protective system is a “soft layer” – a layer of solid waste with the properties necessary to provide the required protection. Not all solid waste, however, is suitable for use as a soft layer. For example, construction and demolition debris can puncture the liner and ash (or other fine material) when compressed can create a film over the leachate collection system drains or otherwise block the system. (*See, e.g.*, SPO’s Minor Revision Application (“M.R. App.”) at 4 (Dec. 9, 2009); Minor Revision at 6.)

At JRL, different solid wastes have been used to create the soft layer in different cells. (M.R. App. at 4.) For example, in one cell front end process residue (“FEPR”)<sup>2</sup> and ash from PERC and Maine Energy were mixed with other solid waste to create the soft layer. In another cell, wood chips and bark were initially used to create the required frost protection system prior to placement of FEPR as the principal soft layer. As noted in SPO’s minor revision application, “experience has proven that those materials eventually (through compaction and decomposition) impede leachate flow to drainage systems within the landfill.” (*Id.*) As a result of this experience, and at the Department’s suggestion and request, SPO sought approval to use MSW bypassed from Maine solid waste incinerators for the soft layer in cell #6 and in the future cells constructed at the landfill pursuant to the existing JRL License. (*Id.*; Minor Revision at 4-5.) Other landfills currently operating in Maine and licensed to receive MSW, including Crossroads Landfill in Norridgewock, the City of Bath Landfill, Tri-Community Landfill in Fort Fairfield, Presque Isle Landfill in

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<sup>2</sup> FEPR is “solid waste removed by processing prior to incineration or landfilling, including but not limited to ferrous metals, glass, grit and fine organic matter.” (DEP Rules, Ch. 400(1)(FFF).)

Presque Isle, and Hatch Hill Landfill in Augusta, use MSW as the primary component of their soft layer.

**2. Disposal of Municipal Solid Waste at JRL**

JRL is one of the landfills in Maine licensed to receive MSW. Pursuant to the terms of the existing JRL License, JRL may only receive MSW that is bypassed by any one of the four solid waste incineration facilities in Maine: PERC in Orrington, Maine Energy in Biddeford, ecomaine in Portland, and Mid-Maine Waste Action Corporation in Auburn.

(JRL License at 59 (Condition 16(A)).) “Bypass” is defined in the Department’s Rules as:

[A]ny 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.

(DEP Rules, Ch. 400(1)(V).)

A condition in the JRL License limits the amount of unprocessed MSW bypass that may be disposed at JRL. This condition groups together and collectively applies to three solid waste facilities controlled or operated by Casella Waste Systems: (1) JRL<sup>3</sup> (formerly referred to as the West Old Town Landfill or WOTL), (2) Pine Tree Landfill in Hampden, and (3) the waste-to-energy facility, Maine Energy. Specifically, the JRL License provides:

- 16. With regard to the acceptance of MSW for disposal, consistent with its proposal, the applicant [SPO]:

.....

- C. shall limit the total amount of (a) unprocessed MSW incinerated at Maine Energy and (b) MSW bypassed from Maine Energy for disposal at the WOTL and Pine Tree Landfill’s Secure III Landfill expansion to no more than 310,000 tons in any calendar year, unless changes in conditions

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<sup>3</sup> NEWSME, the operator of JRL, is a subsidiary of Casella Waste Systems.

or circumstances occur that cause the Department to revise this cap; . . . .

(JRL License at 59-60 (Condition 16(C).)

The purpose of this cap was to allow operation of Maine Energy, which needs to incinerate municipal solid waste in order to generate electricity, while preventing the potential for continual and ongoing bypass of MSW from this facility to JRL or Pine Tree Landfill. (Minor Revision at 6.) Today, because Pine Tree Landfill is closed for disposal and thus no longer accepts solid waste, this 310,000 tons per year cap applies only to JRL and Maine Energy. No other Maine incinerator, including PERC, is required to operate under such a cap. In addition, the limitation in the JRL license allowing only the disposal of incinerator bypassed MSW does not exist in any other license for any other Maine landfill authorized to accept MSW.

**B. The Minor Revision**

In the minor revision, the Department authorizes the use of 31,400 cubic yards of MSW bypass for the soft layer in the recently constructed cell #6 at JRL. (*Id.* at 7.) Based on the size of this cell, this is the volume of MSW needed to create a four to five foot soft layer, the thickness necessary for a soft layer in order to provide the required protection. (*Id.* at 6-7.) The minor revision also establishes that MSW bypass may be used for the soft layer in future cells at JRL, with the exact volume of MSW bypass to be used in these future cells subject to Department approval and limited to the volume necessary to produce a four to five foot soft layer. (*Id.* at 6-8.) Finally, the minor revision clarifies that if MSW bypass from Maine Energy is used to create the soft layer, either in cell #6 or a future cell, this MSW bypass will not be counted against the 310,000 ton cap set by the Department in the JRL

License. (*Id.* at 7-8.) Thus, the minor revision approves what already is the preferred practice in Maine – the use of MSW as a soft layer. The minor revision does not introduce a new waste stream to the landfill, does not alter the landfill’s size or capacity, and does not alter any findings in the existing JRL License related to licensing criteria.

## **II. PERC and MRC Lack Standing to Appeal**

### **A. The Legal Requirement: To Appeal a Department Order the Order Must Adversely and Directly Affect a Party’s Property, Pecuniary, or Personal Rights**

The Department’s Rules establish that not just anyone has standing to appeal a Department order and that simply because an entity operates in the same sector of the economy with, or contracts with, the license holder does not mean that such an entity automatically has standing to appeal revisions to the license. 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).) 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 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.”).

### **B. MRC Only Alleges that it is Indirectly Impacted by the Minor Revision, Which is Insufficient to Establish Standing**

As justification for why MRC is aggrieved by the minor revision, Appellants rely solely on MRC’s relationship with PERC. By virtue of the alleged impact on PERC,

Appellants claim MRC also is impacted. Appellants state:

MRC is a non-profit corporation organized under Maine law. It consists of over 175 member municipalities, which transport MSW to the waste-to-energy facility owned and operated by PERC in Orrington, Maine. MRC's member towns and cities collectively own a minority interest in PERC. This ownership interest, and its existing disposal contracts, provides MRC communities with a direct financial and strategic interest in PERC. Therefore, any adverse impacts to PERC also impact MRC and its members.

(MRC/PERC Appeal at 1.) Thus, Appellants claim that PERC is directly affected by the minor revision and that MRC is indirectly affected.

Maine courts have made clear that the type of indirect effect alleged here does not give MRC standing. For example, in *Duchaine v. Town of Gorham*, 2001 WL 1710592 (Me. Super. June 15, 2001), the court addressed the claim advanced by individual plaintiffs that by virtue of being shareholders in the corporate plaintiffs they had standing. These individual plaintiffs argued that since the corporate plaintiffs had suffered a particularized injury, so too had they. *Id.* at \*2. The court rejected this argument, explaining:

The Individual Plaintiffs' positions as shareholders do not override the requirement that they sustain particularized injury. While the Individual Plaintiffs did make personal payments to the corporations, the Town's conduct did not directly affect their personal pecuniary interest as required to demonstrate a particularized injury.

*Duchaine*, 2001 WL 1710592 at \*2 (internal citations omitted). Appellants apply this same failed argument that MRC has standing by virtue of its relationship with PERC, because PERC, they claim, will be directly impacted by the minor revision. For the same reason the individual plaintiffs in *Duchaine* lacked standing – the absence of a direct impact on their property, pecuniary or personal rights – MRC lacks standing in the present appeal.

*Mason v. Town of Readfield*, 1998 ME 210, 715 A.2d 179, is another case illustrating that a particularized injury is one that directly affects a party's property, pecuniary, or

personal rights. In that case, Mason attempted to obtain a tax abatement for property owned by the Sawyers. What motivated Mason to seek this abatement was that she was contractually obligated to pay the taxes on the Sawyers' property. The town denied the abatement request and Mason appealed. The court, however, determined she lacked standing, explaining:

The requirement of a particularized injury is met when the judgment adversely and directly affects the party's property, pecuniary or personal rights. We cannot conclude that the Town's denial of Mason's abatement request *directly* affects her pecuniary interests. Mason sought an abatement of taxes that had been assessed against the Sawyers. The effect of the Town's denial of her request is that the Sawyers still owe property taxes to the Town. The provision of the land installment contract between Mason and the Sawyers that obligates Mason to pay all taxes assessed upon the property renders her only indirectly affected by the denial of her abatement request.

*Id.*, 1998 ME 210, ¶ 6, 715 A.2d at 181 (emphasis in original) (internal quotations and citations omitted). The alleged impact to MRC by virtue of its relationship with PERC is even less direct than the impact in *Mason*, further demonstrating that MRC has not suffered a particularized injury as a result of the minor revision and lacks standing to appeal.

**C. The Minor Revision Does Not Adversely and Directly Affect PERC's Property, Pecuniary, or Personal Rights.**

Appellants claim the minor revision "directly injures PERC" in three ways.<sup>4</sup> (MRC/PERC Appeal at 2.) Review of each of these three alleged injuries, however, reveals that each is either completely contrived or, at most, an indirect impact. Further, Appellants fail to establish how the alleged injuries affect a property, pecuniary, or personal right.

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<sup>4</sup> Appellants also claim the minor revision "directly injures" MRC in the same three ways. (MRC/PERC Appeal at 2.) In discussing these three "ways," however, Appellants make no reference to MRC, instead focusing solely on PERC. Thus, and as discussed in Section II.B of this response, the alleged impacts to MRC are indirect, as opposed to direct. Regardless, as explained in Section II.C of this response, the three bases Appellants offer as to why they should be granted standing all fail to establish that either Appellant is an aggrieved party as required by Chapter 2 of the Department's Rules.

**1. The Minor Revision Does Not Place PERC at a Competitive Disadvantage**

Appellants claim the minor revision “grants Maine Energy with an unfair direct competitive advantage over PERC.” (*Id.* at 2.) This assertion is simply untrue. As a basis for this claim, Appellants state that the minor revision establishes Maine Energy as the “guaranteed” and “sole provider” of MSW for the soft layer at JRL. (*Id.*) This statement reflects a misreading of the minor revision order. The order allows JRL to obtain MSW bypass from any of the incineration facilities in Maine, including PERC. That NEWSME and PERC, prior to Appellants’ filing of this appeal, discussed using MSW bypass from PERC for the soft layer at JRL, makes the Appellants’ misreading of the order puzzling.

Equally surprising, and equally unfounded, is Appellants’ suggestion that the minor revision grants Maine Energy an unfair advantage over PERC by exempting MSW bypass from Maine Energy used for the soft layer from the 310,000 ton cap. Notably, Appellants do not attempt to explain what this alleged unfair advantage is or how it works. This is because no such advantage exists. Just as before the minor revision, PERC remains free to accept MSW, both from within Maine and from out-of-State, in whatever volume it wants. PERC is just as free today as it always has been to compete with Maine Energy or any other incinerator, whether inside or outside of the State. If anything, Maine Energy – the only incinerator in Maine with a cap on the amount of MSW it may accept – suffers from a competitive disadvantage. While Appellants may prefer that any Maine Energy MSW bypass used for a soft layer at JRL be subject to the cap, in no way is the fact that this MSW is not included in the cap anti-competitive or prejudicial to any of PERC’s property, pecuniary or personal rights. Nor is the alleged impact direct in any way.

## 2. The Capacity of JRL is Unaffected by the Minor Revision

Appellants speculate that the use of MSW bypass as the soft layer at JRL may result in the landfill reaching its capacity more quickly than it otherwise would, thereby potentially affecting SPO's and NEWSME's ability to accept and dispose of PERC's residuals at the landfill. (*Id.*) There is no basis for such a concern. The minor revision does not alter the capacity of JRL. The liner and leachate collection system in each cell will be protected by a four to five foot deep soft layer, whether that soft layer is MSW bypass or something else, such as bark or wood chips which have previously been used. While the material making up the soft layer has varied over the years, when entering into contracts to accept waste at JRL, NEWSME has always been well aware that each cell would have a four to five foot soft layer comprised of some type of material and has not oversubscribed the landfill through contractual obligations to accept certain wastes. NEWSME's ability to honor existing contracts, including PERC's, is in no way adversely affected by the use of MSW bypass, as opposed to some other material, for the soft layer, and the Department approval of MSW bypass as the material for this protective layer in no way reduces the capacity of the landfill.

Simply put, the use of MSW bypass as the soft layer at JRL will not impact PERC's ability to dispose of its waste at JRL or result in a particularized injury to PERC. None of PERC's property, pecuniary or personal rights is adversely affected by the minor revision order. If anything, the minor revision protects the interests of PERC and others who dispose of waste at JRL by best protecting the leachate collection system and liner and helping ensure the landfill will be able to operate as designed and to its full capacity.

**3. PERC Does Not Have a Right to Use its Residue as the Soft Layer at JRL**

Appellants note that PERC's finances are impacted by its ability to dispose of its solid waste. (*Id.* at 3.) SPO and NEWSME do not disagree with this general statement.

Appellants' further suggestion, however, that PERC will be adversely affected if its residue is not used as the soft layer at JRL and that this adverse effect provides PERC with standing to appeal the minor revision goes too far. (*See id.*) The fundamental flaw in this argument by Appellants is that PERC does not have a right – property, pecuniary, or personal – to have its residue used as the soft layer at JRL or at any future landfill. Since SPO acquired JRL and NEWSME assumed the role of operator, three cells have been constructed at JRL and protected with a soft layer, cells #3, #4, and #5. In all three cells, a mixture of residue ash and FEPR from PERC and Maine Energy and other solid waste was used as the soft layer. SPO/NEWSME's decision, with the Department's approval, to use PERC's waste in the soft layer of these cells does not obligate SPO/NEWSME to do so in the future and does not vest PERC with any right. That PERC residue will not be used as the soft layer at JRL going forward does not result in a particularized injury.

**III. The Department Properly Approved the Minor Revision**

Appellants offer six bases for their appeal. Each is discussed below in the same order presented by Appellants. None justifies disturbing the Department's decision to approve the minor revision.

**A. The Department Acted Within the Scope of Its Authority and in Accordance with its Rules when it Approved the Minor Revision**

Appellants claim the revision to the JRL License approved by the Department as a "minor revision" should have been processed as a license "amendment." (MRC/PERC

Appeal at 4.) The Department's Solid Waste Management Rules define "amendment" as:

[A] modification to a license that [1] would permit a solid waste facility to significantly increase capacity of the facility; [2] significantly alter the siting, design, construction or operation of the facility, or [3] significantly alter the nature of any activity to an extent that would require the Department to modify any findings with respect to any of the licensing criteria. Amendments do not include minor revisions and other alterations.

(DEP Rules, Ch. 400(1)(I).) None of these three elements are present here.

First, the minor revision does not authorize an increase, significant or otherwise, in JRL's capacity. Nevertheless, Appellants argue the first element that triggers the need for an amendment is met by asserting that the "use of MSW vis-à-vis other material at JRL" will increase. (MRC/PERC Appeal at 4.) In making this argument, however, Appellants ignore the plain language of the Rules, which focuses not on the relative volume of different waste streams at JRL, but rather on the overall "capacity of the facility." JRL's capacity will not change as a result of the minor revision.

Second, Appellants argue that approval of MSW bypass for the soft layer "alters the operation, construction and/or design of the landfill." (*Id.*) Appellants provide no discussion in support of their one sentence claim and make no effort to identify whether it is the operation, construction, design, or some combination of the three that they allege is altered by the use of MSW as the soft layer. The conclusory nature of this claim is telling. In fact, with adoption of the minor revision, operations at JRL will remain unchanged, the manner in which future cells at the landfill will be constructed will remain unchanged, and the design of the landfill will remain unchanged. For example, the minor revision does nothing to alter the type of liner or type of leachate control system to be used with future cells. Nor does the minor revision alter the need for a soft layer, a layer that historically has been made up of different materials from cell to cell.

All the minor revision does is to approve the use of MSW bypass as the soft layer in Cell #6 and in future cells. This is not the type of change that triggers the need for an amendment and in no way qualifies as “significant.” Notably, the type of material to be used in the soft layer is not even discussed in the original JRL License.

Third, the minor revision does not require the Department to modify any findings with respect to any of the licensing criteria. Appellants do not contest this point.

In addition to arguing the Department should have processed SPO’s application as a license amendment, Appellants claim the Department “inappropriately expands the definition of bypass” in the minor revision order. (*Id.*) “Bypass” is defined as:

[A]ny 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.

(DEP Rules, Ch. 400(1)(V).) The waste SPO and NEWSME will use as a soft layer at JRL is MSW generated in Maine that would be burned by an incinerator – either PERC, Maine Energy, or another in-State incinerator – except that the incinerator is shut down (e.g., due to scheduled maintenance or a malfunction) or operating at full capacity so that it cannot accept additional waste for incineration. Such MSW, by definition, is bypass and the minor revision establishes nothing different. The Department has reasonably interpreted and fairly applied its Rules.

**B. The Department’s Approval of the Minor Revision is Based on Sound Engineering and Experience**

Appellants argue there is no basis in the record for the Department to have authorized the use of MSW bypass for the soft layer at JRL. (MRC/PERC Appeal at 4-5.) They claim the Department’s decision is “arbitrary and capricious, an abuse of discretion, and not

grounded in fact or law.” (*Id.* at 5.) This is not the case. The Department’s decision to approve the minor revision is well reasoned, consistent with the Department’s rules, grounded in fact, and reflects the Department’s years of experience regulating landfills throughout the State.

In the minor revision application, NEWSME, which has experience operating both JRL and Pine Tree Landfill in Hampden, explained:

While both Pine Tree and Juniper Ridge Landfills have historically utilized other types of materials (such as FEPR, ash, contaminated soils, bark, etc.) for the required soft layer, experience has proven that those materials eventually (through compaction & decomposition) impede leachate flow to drainage systems within the landfill.

(M.R. App. at 4.) This assessment, based on NEWSME’s experience operating landfills, is part of the record.

The Department agreed with this assessment and did so justifiably. As explained in the minor revision order, the Department has observed the very problems NEWSME said it had experienced and as a result of these observations “at other secure landfills in Maine MSW has been found by staff to be the best material for the soft layer.” (Minor Revision at 6.) The Department explained in support of its decision to approve the use of MSW bypass for the soft layer at JRL:

The applicant has used other licensed wastes including front-end process residue from the incinerators, ash, contaminated soils, and bark for the soft layer. Staff note that it is possible these waste will cause problems with the leachate collection system because the wastes are either (1) too coarse and will allow finer material from the wastes disposed after the soft layer placement to shift down and “blind” the soft layer by filling all the voids, which will hinder leachate movement into the leachate collection system, or (2) the wastes themselves contain a large amount of fine material that they may inhibit leachate from getting into the leachate collection system.

(*Id.*) To avoid these undesired results and enable SPO and NEWSME to use the material it has found is the best solid waste for use in the protective soft layer, the Department approved the minor revision. In fact, SPO and NEWSME sought to use MSW bypass for the soft layer at the recommendation of the Department.<sup>5</sup> (*Id.*)

Appellants contend that, absent a “report” or “documented technical information” in the minor revision application file concerning the relative properties of MSW compared to other potential soft layer materials, there was no basis for the Department to accept as accurate NEWSME’s assessment in the application that FEPR, ash, contaminated soils, and bark are inferior materials for use in the soft layer. (MRC/PERC Appeal at 5.) In making this argument, Appellants would require the Department to approach each decision as though the agency has no institutional knowledge, no prior experience, and no expertise. Each time the Department reviews a matter, Appellants would require the agency (and applicant) to approach the matter with blinders on and to start from scratch. For example, applying Appellants’ line of reasoning, even after finding, based on years of experience, that a particular type of technology best controls the emission of certain air or water pollutants or that a particular best management practice (“BMP”) best controls stormwater runoff from

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<sup>5</sup> As explained by the Department in response to a comment from an interested person during its review of the minor revision application:

The request [to use MSW bypass for the soft layer] is being made at the Department staff’s suggestion. The Department requires a layer of ‘soft’ waste be placed in a new cell to protect the leachate collection and liner systems. Landfill owners/operators have used various wastes as the soft layer, and we have found that only MSW works well. The other wastes tend to solidify, bind, decompose, etc, and become too impervious over time, and eventually may impede leachate from making it into the leachate collection system. If an area begins to show signs of problems, the area has to be dug up (causing odor and gas issues), the ‘soft’ layer replaced, and the waste replaced. The staff engineers strongly support the use of MSW as the soft layer.

(Email from C. Darling, DEP, to L. Sanborn, “Regarding Minor revision or Amendment” (Dec. 21, 2009).)

particular types of sites, the Department could not approve the use of such control technology or BMP without either including itself, or requiring the applicant to include, in the application file a report or documented technical information demonstrating what already is known. This makes no sense, is not required by statute or rule, and would dramatically alter the license application, amendment, and minor revision processes, forcing the Department to completely revamp the way it operates.

Here, the Department reviewed NEWSME's application, took into consideration its experience regulating landfills, and concluded the application was accurate and that use of MSW bypass for the soft layer at JRL satisfied the regulatory requirement that each landfill have a protective system. Contrary to Appellants' contention, there is nothing arbitrary and capricious or otherwise improper with the Department's reasoned decision.

**C. The Minor Revision Satisfies All Applicable Licensing Criteria**

Appellants argue that the Department improperly concluded that (1) MSW bypass would not "impact the environment, public health or welfare, or create a nuisance," and (2) that "'MSW bypass' is the best material for use as protective soft layer." (MRC/PERC at 6 (citing Ch. 400(3)(B)(2)(b) and Ch. 401(2)(D)(4)(a)(vii) as the respective standards).) In making this argument, Appellants do not contend that MSW poses an environmental, health, or safety risk when used as a soft layer or that MSW is not an adequate soft layer protective system. Rather, Appellants contend there is insufficient basis for the Department to have made the conclusions it did.

With regard to the first contested conclusion, since the issuance of the JRL License in 2004, JRL has been approved to accept MSW bypass. The Department has previously found JRL can accept this type of solid waste safely and time has proven this finding to be

warranted. There is no need for the Department to have redone the analysis it went through in 2004 to make a duplicative finding with regard to the landfill's ability to continue to accept MSW bypass safely.

With regard to the second contested conclusion, that MSW is the best material for use as soft layer, as is explained in Section III.B above, the Department properly relied on its experience regulating landfills and observation of the performance of different soft layer materials at these landfills in determining that MSW bypass is the best suited material for the soft layer at JRL.

**D. The Department Rationally Determined it is Appropriate to Exclude Maine Energy MSW Bypass Used for the Soft Layer at JRL from the 310,000 Limit**

The Department has determined that MSW is the preferred material for use as a soft layer because it best protects landfill liners and leachate collection systems. (Minor Revision at 6. JRL is licensed to accept MSW that has been bypassed from any of the four incinerators in Maine, making it a candidate for use of MSW as a soft layer. (JRL License at 59-60.) However, because JRL may only accept this one category of MSW, the other Maine incinerators rarely bypass MSW to JRL, and the amount of MSW bypass JRL may accept from Maine Energy is subject to the 310,000 ton cap that jointly applies to JRL and Maine Energy, the use of MSW bypass for a soft layer at JRL has not been feasible. This is because Maine Energy typically processes and burns nearly the entire 310,000 ton allotment. If additional MSW were bypassed by Maine Energy and sent to JRL for the soft layer, and this additional MSW were counted toward the cap, power production at Maine Energy would be adversely affected as a result of Maine Energy having less fuel (i.e., less MSW) to combust and produce electricity. (See Minor Revision at 4.)

Appellants contest this fact, arguing that there is no basis in the record for the Department to have concluded that subjecting MSW bypass from Maine Energy<sup>6</sup> used in the soft layer at JRL to the cap restriction would adversely impact power production at Maine Energy. Appellants are wrong. If Maine Energy burns less MSW it will produce less power and the record data show that if the cap were applied to the MSW bypass used for the soft layer at JRL, Maine Energy would burn less waste. The 310,000 ton cap was set in order to allow Maine Energy to operate at or near full capacity, while also preventing automatic, ongoing bypass from the facility to JRL. (Minor Revision at 4, 6.) At the time the JRL License was issued, 310,000 tons was the amount of MSW Maine Energy was estimated to be able to process and incinerate in one year. (*Id.* at 4.) Time has shown that, if anything, this cap is low. Maine Energy processes and incinerates nearly this entire allotment.<sup>7</sup> (*Id.* at 5 (table listing tons of MSW bypass accepted at JRL annually).) The total amount of MSW bypass accepted annually at JRL is less than the amount needed for this protective layer (*id.* at 5, 7) and, as importantly, the bypass that is accepted at JRL does not all arrive during the typically short fall window when the soft layer must be created – the period after construction of a new cell during the summer-fall construction season and before the winter frost (*id.* at 6). Thus, as the Department reasonably concluded, if the MSW bypass needed for the soft layer were counted against the 310,000 ton cap, Maine Energy would have to

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<sup>6</sup> MSW from Casella Waste Systems' transfer stations is delivered to Maine Energy (a Casella Waste Systems-owned entity) for incineration. When Maine Energy does not have capacity to accept this MSW (e.g., the facility is operating at capacity or down for maintenance or repairs) this waste is MSW bypass. Appellants claim that in recommending that Casella Waste Systems schedule delivery of MSW from its transfer stations to JRL for the soft layer that the Department is authorizing non-bypass MSW to be sent to JRL. (MRC/PERC Appeal at 7.) In fact, the Department is recommending nothing more than the delivery of MSW *bypass* from these transfer stations. As the minor revision makes clear, only MSW bypass may be used in the soft layer. (Minor Revision at 8.)

<sup>7</sup> Not only does Maine Energy process and incinerate nearly the entire 310,000 ton allotment, but since 2004 Maine Energy has improved the efficiency of the Biddeford facility so that it could process and incinerate additional MSW if permitted to do so.

modify considerably its operations and be left with less fuel to burn, with an attendant loss in power generation, on an annual basis.

The cap was never intended to limit power production at Maine Energy; in fact, it was set by the Department at its present level with the goal of avoiding such a result. The decision by the Department in the minor revision not to subject the soft layer material to the cap is consistent with the Department's intent in creating the cap in the first place, and is a rational decision that will facilitate the use of the material in the soft layer at JRL that the Department has determined is best for environment – MSW.

**E. Appellants' Claim that the Minor Revision is Anticompetitive is False and Misleading**

Both in support of their argument that they have standing and that the Board should reverse the Department's decision to approve the minor revision, Appellants claim the minor revision is anticompetitive. (MRC/PERC Appeal at 2, 7.) As already discussed in Section II.C.1 above, there is no merit to this claim. Three primary misconceptions underlie Appellants' claim.

First, Appellants suggest the minor revision requires the use of MSW bypass from Maine Energy. (*Id.*) This is not the case. The Department's order allows SPO/NEWSME to use MSW bypass from any of the four incinerators in Maine for creation of the soft layer at JRL. In fact, prior to Appellants' filing of this appeal, NEWSME discussed with PERC its interest in obtaining MSW bypass from PERC, and paying PERC a premium for this material.

Second, Appellants suggest that excluding MSW bypass from Maine Energy that is used for the soft layer at JRL from the 310,000 ton cap is fundamentally unfair to PERC and

“distorts free market competition.” (*Id.* at 7.) How can this be so? Maine Energy is the only incinerator in the State with a cap on the amount of MSW it may accept. PERC, on the other hand, is free to accept as much MSW, whether from in-State or out-of-State, as it can handle. In no way does the minor revision impact PERC’s ability to compete in the marketplace. If anything, the cap – which remains in place – provides PERC with a competitive advantage.

Third, Appellants suggest that PERC is entitled to have landfills, such as JRL, use its FEPR and ash for the soft layer and that the use of a different material, such as MSW bypass, impermissibly comes at the “expense of PERC.” (*Id.*) Just because PERC previously has provided a solid waste material to JRL or any other landfill for use in its soft layer does not entitle PERC to be able to do so in the future, especially if the previously used material provides inferior environmental protection. The Department, as it has here, may authorize use of an alternative material that it finds provides the necessary protection of the liner and leachate collection system.<sup>8</sup> Contrary to Appellants’ claim, there is nothing anticompetitive about the use of an alternative or superior material in the soft layer.

**F. The Use of MSW Bypass for the Soft Layer at JRL is Consistent with the Solid Waste Management Hierarchy**

The State’s Solid Waste Management Hierarchy, 38 M.R.S.A. § 2101, is a policy statement reflecting the priority with which the State would like to see solid waste managed. For example, the reuse of waste is favored over the land disposal of waste.

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<sup>8</sup> The Department, in licensing landfills and approving amendments and minor revisions to these licenses, must comply with the statutory and regulatory standards governing its review of solid waste disposal facilities. While the applicable regulations require the Department to evaluate whether a landfill’s protective system (e.g., soft layer) will function as required, the Department is not required or even authorized to consider the potential impact on market competition of the use of one type of protective system as oppose to another. The evaluation of market impacts is beyond the scope of the Department’s review.

The Department's Rules require that a "protective system must be provided for the primary liner and the leachate collection system." (DEP Rules, Ch. 401(2)(D)(4)(a)(vii).) This protective system may be constructed with virgin, non-waste material. (*Id.*) The minor revision allows the use of MSW bypass for this protective system. This is a reuse of this solid waste, which is favored by the hierarchy.

In addition, the particular type of solid waste approved for creation of the protective system – MSW – is favored by the Department because, based on the Department's experience and observations, this type of waste provides the best soft layer protection for the liner and leachate collection system. Contrary to Appellants' assertion, nothing in the hierarchy prohibits the Department from authorizing the use of the type of solid waste in a soft layer that it deems best protects the landfill liner and leachate control system and, therefore, best protects the environment. The minor revision is consistent with both the hierarchy and the Department's Rules governing the design and operation of landfills. Any other result, such as use of an inferior protective layer that may impair effective operation of a leachate collection system and landfill liner, would weaken Maine's solid waste management program.

#### **IV. There is No Need for the Board to Hold a Public Hearing on this Routine Permitting Matter**

Chapter 2 of the Department's Rules requires an appellant who desires a public hearing to make the request in writing (DEP Rules, Ch. 2(24)(B)(1)) and to provide "summaries of all proposed testimony" (*id.* Ch. 2(24)(B)(5)). Then the Board, at its discretion, may hold a public hearing on the appeal. (*Id.* Ch. 2(7)(B).) Chapter 2 provides helpful guidance, noting that the Board:

will hold public hearings in those instances where the [Board] determines there is credible conflicting technical information regarding a licensing criterion and it is likely that a public hearing will assist the decision maker in understanding the evidence.

*(Id. Ch. 2(7)(B).)*

Here, Appellants have requested a public hearing, claiming such a hearing is necessary for them to show the record was not sufficient to support the Department's approval of the minor revision. (MRC/PERC Appeal at 8-9.) They propose to present the testimony of Greg Louder, Executive Director of MRC, on what documents he found in the record in the course of his review. (*Id.* at 9.) This is not sufficient ground for a public hearing. The Board, with the assistance of Staff or on its own, is just as capable of reviewing the record documents as Mr. Louder. If Appellants want to argue about the sufficiency of the record and what information the record documents contain, they can do so (and have attempted to do so) in their appeal papers.

In their filing, Appellants also "reserve the right to introduce evidence" on two additional subjects: (1) "the subject of current soft layer materials utilized at landfills, both in-state and out-of-state, in order to educate the Board on current landfill practices and to discuss those materials' properties and historical uses as protective soft layer" and (2) "the subject of the 310,000 ton annual limit." (*Id.*) Beyond the statements quoted here, which identify the proposed topics of testimony, and listing a witness who might testify on each of these two topics, Appellants offer nothing further about the proposed testimony. They have not provided a "summary" of the testimony, as required by Chapter 2, nor have they presented, or even claimed that their experts will present, "conflicting technical information

regarding a licensing criterion.” In short, Appellants have not provided any justification for a public hearing.

Finally, Appellants’ request for a public hearing is an attempt to supplement the record, long after the record has been closed. They wish to provide, or reserve the right to provide, supplemental evidence in the form of oral testimony. The Rules establish:

The Board may allow the record to be supplemented on appeal when it finds that the evidence offered is relevant and material and that:

- (a) the person seeking to supplement the record has shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time; or
- (b) the evidence is newly discovered and could not by the exercise of reasonable diligence, have been discovered in time to be presented earlier in the licensing process.

(DEP Rules, Ch. 2(24)(B)(5).)

Appellants have not explained how or why this testimonial evidence is relevant and material, and have not satisfied either of the two prongs. On August 27, 2010, the day after NEWSME representatives meet with representatives of PERC to discuss SPO’s and NEWSME’s desire to use MSW bypass for the soft layer at JRL, Casella Waste Systems provided PERC with a draft of the minor revision order. PERC could have, but chose not to comment on the draft order, instead waiting for the Department to finalize the order and then waiting until the final day of the appeal period to seek to “reserve its right” to potentially present supplemental evidence in the future.

In addition to not summarizing the alleged evidence they propose to offer, based on Appellants' description of the two topics they intend their witnesses to cover, witness testimony is completely unnecessary. A factual listing of the materials presently and historically used in landfills for a soft layer, both in Maine and out-of-State, easily could be provided in written form without the need for examination of a witness and could have been provided prior to final approval of the minor revision. None of the information is new or previously undiscoverable. Similarly, if Appellants wanted to provide evidence "on the subject of the 310,000 ton annual limit" – a limit created by the Department for public policy and not technical reasons – they could have done so previously, in writing, without the need for witnesses. No new or previously undiscoverable information has recently emerged on this topic, nor do Appellants make a claim to the contrary.

In sum, not only have Appellants not explained how granting their request for a public hearing would benefit the Board, but when their call for a public hearing is reviewed in light of the Department's rules, there is no justification for granting the request.

## **V. Conclusion**

When it approved the minor revision, the Department authorized JRL to use MSW bypass – a waste stream JRL already is licensed to accept – as a soft layer. In doing so, the Department authorized JRL to do what other landfills in the State licensed to receive MSW already do, use this category of solid waste for this required

protective layer. As explained above, this minor change was properly reviewed by the Department as a minor revision and properly approved in accordance with all applicable laws and regulations. MRC's and PERC's appeal, while highlighted with bold statements, upon review is revealed to lack merit. Not only have Appellants failed to identify that they have suffered a particularized injury as a result of the Department action they seek to challenge, but they also have failed to substantiate any of their claims.

Accordingly, Appellants' appeal should be denied for lack of standing. However, should the Board consider the merits of Appellants' claims, SPO and NEWSME request that the Board affirm the reasoned decision of the Department and approve the minor revision.

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