ATTACHMENT A

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PAUL R. LEPAGE
GOVERNOR

DARRYL N. BROWN
COMMISSIONER

BOARD ORDER

IN THE MATTER OF

BERWICK IRON & METAL RECYCLING, INC.	)	PETITION TO REVOKE, MODIFY
YORK COUNTY	)	OR SUSPEND AIR LICENSE
BERWICK, MAINE	)	
PERMIT A-1041-71-A-N (SM)	)	DISMISSAL

Pursuant to the provisions of the Department of Environmental Protection's ("Department") Major and Minor Source Air Emission License Regulations, 06-096 CMR 115 (as amended), and the Department's Rules Concerning the Processing of Applications and Other Administrative Matters, 06-096 CMR 2 (as amended), the Board of Environmental Protection ("Board") has considered by petition filed by Jeanette and Doug Seivwright, Robert and Donna Duffy, Tom and Carol Planche, and Joyce and Raymond Provencher ("Petitioners") to revoke, modify or suspend air emission license A-001041-71-A-N (SM) ("Air License") issued to Berwick Iron & Metal Recycling, Inc. ("BI&MR") on October 27, 2010.

Based on the materials in the Department's files, the Petition documents, and the Licensee's Response to the Petition, the Board finds the following facts:

1. HISTORY:

BI&MR is a small, family-owned metal recycling facility located on Route 326 in Berwick.

In September 2009, BI&MR purchased a used hammer-mill metal shredder, manufactured by Texas Shredder, Inc., which was delivered to the facility in March 2010. The shredder is to be powered by a 3600 horsepower, direct drive, diesel engine, and will be used to process scrap metal, including crushed cars and other large items, into six inch pieces. The shredded materials will be sorted into ferrous and non-ferrous components using a large eddy-current electromagnet, and sold for further processing off-site.

In January 2010, prior to delivery of the shredder and diesel engine, BI&MR representatives met with Department staff at the Portland Regional Office to discuss permitting requirements for the operation of the shredder. Department staff informed BI&MR it was their opinion permits would not be required to install the shredder and diesel engine, and that BI&MR would require DEP waste processing and air emission licenses before operating the shredder.

BERWICK IRON & METAL RECYCLING, INC.	2.)	PETITION TO REVOKE, MODIFY OR SUSPEND AIR LICENSE
YORK COUNTY	)	
BERWICK, MAINE	)	
PERMIT A-1041-71-A-N (SM)	)	DISMISSAL

In June 2010, BI&MR applied to DEP for a minor source air emission license for the shredder and diesel drive engine, stating "BI&MR ... does not propose to operate any electric generating units at this time".

On September 9, 2010 Civil Consultants, on behalf of BI&MR, submitted an application for conditional use and site plan approval for the shredder to the Berwick Planning Board, which conducted meetings, hearings and site visits to consider the application.

On September 17, 2010, BI&MR submitted a solid waste processing facility application for the shredder, to the Department.

The Air Emission License ("License") was issued on October 27, 2010, which was appealed by the Petitioners on November 26, 2010.

On March 3, 2011, Civil Consultants, on behalf of BI&MR, submitted to the Berwick Planning Board, a draft of the Spill Prevention, Control and Countermeasure ("SPCC") Plan for the facility. On March 3, 2011, the Planning Board voted to grant BI&MR a Conditional Use and Site Plan permit.

On March 17, 2011, the Petitioners' appeal of the Air Emission License was denied by the Board of Environmental Protection.

2. BASIS FOR PETITION AND LICENSEE'S RESPONSE:

The Petitioners request revocation, modification or suspension of the Air License pursuant to 06-096 CMR 2 § 27 based upon the following criteria:

A. The licensee has violated any law administered by the Department (06-096 CMR 2 § 27(G));
B. BI&MR obtained its Air License by misrepresenting or failing to disclose fully all relevant facts (06-096 CMR 2 § 27(B)); and/or
There has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license (06-096 CMR 2 § 27(F)).

A. Violation of Any Law Administered by the Department

(1) Violation of Laws Administered by the Department: The Petitioners allege BI&MR has violated the following Air Laws administered by the Department:

(a) 06-096 CMR 115 § (1)(B) which states:

"Any person who emits, will emit, or causes to be emitted regulated pollutants from any existing or new source may not begin actual construction, operate, maintain, or modify the new or existing source without an air emission license from the Department."

(b) 38 M.R.S. § 590(1) which requires any source within a region with established air quality standards to obtain an air license.

(c) 06-096 CMR 115 § (4) which states:

"[i]f an applicant is applying for a Major or Minor Modification or a new major or minor source license, the license must be issued by the Department prior to beginning actual construction or the modification of the new source."

Petitioners' Argument regarding Alleged Violations:

The Petitioners allege BI&MR began construction of its new automobile shredding operation, including a Texas Shredder and diesel powered direct drive engine, prior to issuance of the air emission license.

BI&RM Response:

BI&MR acknowledges the shredder and diesel engine were installed without an Air Emission License, however this was done after DEP staff informed BI&MR licenses were not required for installation, and that licenses would be required for the operation of the equipment. Since BI&MR acted on advice from Department staff, any violation of DEP air licensing requirements was inadvertent.

(2) BI&MR has violated Chapter 2 Requirements administered by the Department: The Petitioners allege BI&MR has violated requirements of 06-096 CMR 2 § (10)(B) which states:

"A Pre-application meeting is required prior to submission to or acceptance by the Department of an application for the following:
... (7) Projects requiring new or amended licenses involving more than two bureaus.

An applicant with an application that requires a pre-application meeting pursuant to this section shall hold a public informational meeting in accordance with section 13 of this rule prior to filing the application."

The Petitioners further allege BI&MR has violated requirements of 06-096 CMR 2 § (13) which states:

> "An applicant intending to file an application that requires a pre-application meeting pursuant to section 10(B) of this rule must hold a public informational meeting prior to filing that application." and "The applicant must submit a signed certification attesting that a public informational meeting was noticed and held in accordance with this section."

Petitioners' Argument re Alleged Violations:

The Petitioners allege BI&MR's project requires a license from at least two bureaus – Bureau of Air Quality and the Bureau of Remediation and Waste Management, and that BI&MR did not hold a public informational meeting, nor did BI&MR submit a signed certification with either its Air Emission License Application or its Solid Waste Processing Facility License Application.

BI&MR Response:

While BI&MR's project requires licenses from "two bureaus", it does not require licenses from "more than two bureaus", which is the requirement for a pre-application meeting and a public information meeting. Requiring two licenses does not satisfy the requirement for "more than two" licenses.

B. Obtaining an Air Emission License by Misrepresenting or Failing to Disclose Fully All Relevant Facts, and/or
There Has Been a Change in Circumstance that Requires Revocation, Suspension or a Temporary or Permanent Modification of the Terms of the License.

The Petitioners allege BI&MR has violated 06-096 CMR 115 § 1(B) which states:

> "Once a source requires an air emission license, all emissions units which emit regulated pollutants at the source must be included on the license ..."
>
> and 06-096 CMR 115 § 4(B)(5) referencing 06-096 CMR 115 § 3(E)(1)(a) which states a license must include:
> "(a) A list of all emission units that are subject to licensing pursuant to Subsection 1(B) of this Chapter;"

Petitioners' Argument regarding Alleged Violations:

In July 2010, the Department received an application from BI&MR for an Air Emission License which listed two potential emission units – the 1967 diesel drive locomotive engine and the Texas metal shredder model 8104. No other emission units were listed on the application. The August 2010 amendment to the application listed no other emission units. The Air Emission License issued to BI&MR on October 27, 2010 includes only the diesel drive unit and the metal shredder.

BERWICK IRON & METAL RECYCLING, INC.	5.)	PETITION TO REVOKE, MODIFY OR SUSPEND AIR LICENSE
YORK COUNTY	)	
BERWICK, MAINE	)	
PERMIT A-1041-71-A-N (SM)	)	DISMISSAL

The Petitioners state the Spill Prevention, Control and Countermeasure ("SPCC") Plan submitted to the Berwick Planning Board on March 3, 2011 states the facility will utilize a free-standing, separate diesel generator with an associated 900 gallon diesel fuel tank. This generator was not included in BI&MR's Air Emission License application, nor is it included in the final license issued by the Department. Specifics regarding type, size and use of this generator are not given, however, the size of the fuel tank associated with this generator speaks to its potential to emit regulated pollutants, and it should therefore have been included in the Air Emission License application and the Air License.

The Petitioners allege BI&MR's failure to obtain a license for this unit before construction is a violation of 06-096 CMR 115 § 1(B) and § 4.

The Petitioners also allege BI&MR obtained its Air Emission License by misrepresenting or failing to disclose fully all relevant facts, and/or there has been a change in circumstance that warrants revoking, suspending, or modifying the Air Emission License.

BI&MR Response:

BI&MR indicates its draft SPCC plan states an above ground diesel tank associated with the standby generator is "on the site"; it does not say the generator will be connected or operated.

The diesel generator referenced in the draft SPCC is a portable unit brought on site in November 2010; BI&MR does not own the generator and no decision has been made to use it. The portable generator has not been connected or otherwise installed and at present, BI&MR has no plans to connect or use the generator. The decision to connect and use the generator will depend on the economy, or lack thereof, of purchasing power from the grid. If BI&MR decides to use the generator, it will first apply for an amendment to its Air Emission License.

BI&MR did not include the generator in its Air Emission License application as it did not own the generator and had no intention of purchasing the generator at the time the Air Emission License application was submitted. BI&MR did not apply for an amendment to its Air Emission License when the generator was brought on site as BI&MR did not purchase the generator and has no current plans to use the generator. The generator is included in the draft SPCC only because of its fuel tank; this does not mean the generator is operational.

The generator, being on site, does not violate a law administered by the Department. 06-096 CMR 115 § 1(B) requires that once a source requires an air emission license, "all emissions units which emit regulated pollutants at the source must be included on the license," and any person who emits, will emit, or causes to be emitted regulated pollutants from any existing or new source may not begin actual construction, operate, maintain, or modify the new or exiting source without an air emission license from the Department ....". 06-096 CMR 115 § 4(B)(5), referencing 06-096 CMR 115 § 3(E) requires a license must include a "list of all emission units that are subject to licensing." These provisions do

not require inclusion of a unit that does not emit regulated pollutants because it is located at a facility but not connected or operated.

06-096 CMR 100 § 16. defines "Begin actual construction" as "initiation of physical on-site construction activities on an emission unit which are of a permanent nature." The BI&MR generator is a portable unit; the unit was not installed nor any physical on-site construction activities of a permanent nature undertaken to support the operation of the generator. BI&MR did not begin actual construction by bringing the portable unit on-site.

BI&MR did not misrepresent or fail to disclose all relevant facts, including the existence of the generator, because the generator was not on site at the time BI&MR submitted the air emission license application, and BI&MR did not and does not have any plans to connect or operate the generator. In its application, BI&MR clearly stated it "does not propose to operate any electric generating units at this time".

BI&MR has no plans to make permanent physical installations at the facility to support the generator, or to connect the generator so it will emit regulated pollutants, therefore, there has been no change in circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license. Such plans by BI&MR would not trigger the need for revocation, suspension or modification, but rather an amendment to the License.

3. DISCUSSION AND BOARD FINDINGS:

The Petitioners request revocation, modification or suspension of the Air Emission License issued to Berwick Iron & Metal Recycling, Inc., based upon: 1. the licensee has violated any law administered by the Department; 2. BI&MR obtained its Air Emission License by misrepresenting or failing to disclose fully all relevant facts; and 3. there has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license.

A. **Violation of Any Law Administered by the Department**

The Petitioners allege BI&MR began construction of its automobile shredder operation prior to issuance of the Air Emission License. BI&MR acknowledges the shredder and diesel engine were installed without an Air Emission License.

The Board finds commencing construction prior to issuing of the Air Emission License is not an action that requires the extreme measure of revocation, suspension or a temporary or permanent modification of the terms of the license. This is an enforcement matter subject to the discretion of the Commissioner.

The Petitioners allege BI&MR violated requirements for a pre-application meeting required prior to submission or acceptance by the Department of projects requiring new licenses involving more than two bureaus. Further, the Petitioners state the application violated the requirement that a public informational meeting be held before the pre-application meeting and certification of this pre-application meeting be submitted with the applications.

BI&MR was required to apply for an Air Emission License from the Bureau of Air Quality, and a Solid Waste Processing Facility License from the Bureau of Remediation and Waste Management. Although this project will require a stormwater Construction General Permit and/or Multi-Sector General Permit, those permits require only the filing of a notice of intent to comply for coverage. The Board does not interpret the mere filing of a notice of intent in connection with a general permit to constitute the "involvement" of a licensing Bureau pursuant to 06-096 CMR 2 § (10)(B). Therefore, BI&MR's project requires two licenses; it does not meet the test for requiring "more than two" licenses.

The Board finds there has been no violation of requirements for a pre-application meeting, nor for a public information meeting and public notice, as BI&MR requires licenses involving only two bureaus, not more than two bureaus. Additionally, the Board notes that even if it had been shown that a third Bureau had been "involved" for the purposes of 06-096 CMR 2 § (10)(B), and therefore a pre-application meeting had been required, this procedural omission by itself would not rise to the level of a "violation of law" that would justify the extreme remedy of license revocation.

B. Obtaining an Air Emission License by Misrepresenting or Failing to Disclose Fully All Relevant Facts, and/or
There Has Been a Change in Circumstance that Requires Revocation, Suspension or a Temporary or Permanent Modification of the Terms of the License.

The Petitioners allege BI&MR installed a diesel generator without obtaining a license or a license amendment for the generator in violation 06-096 CMR 115 § 1(B) and (4). The Petitioners also allege BI&MR obtained its Air Emission License by misrepresenting or failing to fully disclose all relevant facts and/or there has been a change in circumstance that warrants revoking, suspending or modifying the Air Emission License.

BI&MR did bring a generator onto its site in November 2010, however it is not operational. The generator is a portable unit, and as such, does not require activities of a "permanent nature", such as installation of building supports and foundations, et cetera, as defined in 06-096 CR 100 § 16.

The Board finds BI&MR did not misrepresent or fail to disclose all relevant facts regarding the generator on its Air Emission License application, as the generator was not acquired until after the Air Emission License was issued on October 27, 2010.

BERWICK IRON & METAL RECYCLING, INC.	8.)	PETITION TO REVOKE, MODIFY OR SUSPEND AIR LICENSE
YORK COUNTY	)	
BERWICK, MAINE	)	
PERMIT A-1041-71-A-N (SM)	)	DISMISSAL

The Board finds the change in circumstance is the generator on site; an amendment to the Air Emission License is necessary prior to operation of the unit.

BASED on the above findings, the Board concludes that:

(1) A Petition for revocation, modification or suspension of the Air Emission License is an extraordinary remedy that requires the Petitioners to bring forth new and compelling evidence that necessitates action by the Board.

(2) The Petitioners' arguments and offers of evidence are not sufficient to justify an exercise of the Board's discretion to revoke, modify or suspend Air Emission License A-1041-71-A-N(SM).

THEREFORE the Board DISMISSES the petition of Jeanette and Doug Seivwright, Robert and Donna Duffy, Tom and Carol Planche, and Joyce and Raymond Provencher to revoke, modify or suspend Air Emission License A-1041-71-A-N(SM).

DONE AND DATED AT AUGUSTA, MAINE, THIS 21st DAY OF April 2011.

BOARD OF ENVIRONMENTAL PROTECTION

By: Susan M. Lessard

Susan M. Lessard, Chair

Date of Initial Receipt of Petition: 11 March 2011