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August 12, 2016

James W. Parker, Chair
Board of Environmental Protection
c/o Ruth Ann Burke
#17 State House Station
Augusta, ME 04333-0017

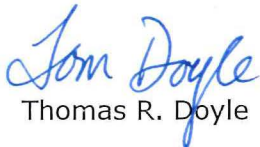
Re: Juniper Ridge Landfill Expansion
DEP #S-020700-WD-BI-N and #L-024251-TG-C-N

Dear Chairman Parker:

On behalf of the applicants, enclosed please find the Motion to Strike of State Bureau of General Services and NEWSME Landfill Operations, LLC and Incorporated Memorandum of Law.

Thank you very much for your attention to this.

Very truly yours,


Thomas R. Doyle

Enclosure

cc: Service List

**STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF:

STATE OF MAINE BUREAU OF GENERAL
SERVICES
JUNIPER RIDGE LANDFILL EXPANSION
CITY OF OLD TOWN, TOWN OF ALTON
PENOBSCOT COUNTY, MAINE
#S-020700-WD-BI-N
#L-024251-TG-C-N

APPLICATION FOR MAINE
HAZARDOUS WASTE, SEPTAGE AND
SOLID WASTE MANAGEMENT ACT,
and NATURAL RESOURCES
PROTECTION ACT PERMITS and
WATER QUALITY CERTIFICATION

**MOTION TO STRIKE OF STATE BUREAU OF
GENERAL SERVICES AND NEWSME LANDFILL OPERATIONS,
LLC AND INCORPORATED MEMORANDUM OF LAW**

The State Bureau of General Services (“BGS”) and NEWSME Landfill Operations, LLC (“NEWSME”) hereby file this motion to strike certain pre-filed direct testimony from Edward Spencer and his expert, Steve Coghlan, as irrelevant and unrelated to any licensing criterion and for not following the rules for pre-filed testimony.

DISCUSSION

As has been extensively discussed throughout the pre-hearing process in this matter, this is a licensing proceeding to determine whether BGS and NEWSME have met the statutory and regulatory criteria necessary to expand the Juniper Ridge Landfill (“JRL”). It is not a policy debate about how solid waste should be managed in Maine. *See e.g.*, Response of BGS and NEWSME to Spencer’s Appeal of the Third Procedural Order at 2-11. In fact, in the Third Procedural Order, the Board Chair has already ruled, and been upheld on appeal by the full Board, that certain issues were off-limits, thus following standard procedural rules that irrelevant evidence is not be admissible.¹ *See e.g.*, Third Procedural Order § 2(B) at 3-6 (ruling that some

¹ The Department’s rule on the conduct of hearings for applications provides: “[e]vidence which is irrelevant, immaterial or unduly repetitious will be excluded.” 06-096 CMR 3 § 20(A).

of Mr. Spencer's proposed issues were not relevant). In addition, the Board Chair has twice admonished the parties that the Board "will not accept links to documents; the documents, or relevant portions thereof, must be submitted as exhibits." Second Procedural Order § 6 at 5; Fourth Procedural Order § 2(C) at 2. These rules apply equally to the pre-filed testimony that Mr. Spencer has now provided both on his own behalf and from his expert, Mr. Coghlan.

I. Edward Spencer

Mr. Spencer submitted pre-filed testimony on an array of topics, three of which, or portions of them, should be struck from his testimony as irrelevant. These are: (1) testimony seeking to enforce a recommendation in the Public Benefit Determination ("PBD") to revise the terms of the Operating Services Agreement ("OSA") between NEWSME's ultimate parent company, Casella Waste Systems, Inc., and the State of Maine; (2) testimony seeking to "clarify" the role of the JRL Landfill Advisory Committee ("LAC"); and (3) testimony about the operation of the Old Town Mill's wastewater treatment system. Each will be discussed in detail below.

A. Testimony Seeking to Require A Revision of the OSA Is Not Relevant.

First, Mr. Spencer continues to seek to introduce testimony urging application in this proceeding of a recommendation made by the Commissioner in the PBD that the parties to the OSA should revise its provisions on construction and demolition debris ("CDD"). He offers testimony on what he continues to refer to as a "direction" by the Commissioner in the PBD that the OSA must be amended. *See* Spencer Testimony at 4. He then goes on to explain why, in his view, the Commissioner properly raised this issue in the PBD, given her concerns about the quantity of CDD and residues that were being disposed of at JRL. He concludes that Casella "refuses to comply" with the PBD on this point, and then, in the following paragraph argues that as a result the JRL Expansion "should be put on hold." *Id.*

The Chair has already ruled, however, that the terms of the OSA are not subject to review in this proceeding and that the Board has no authority to amend it. *See* Third Procedural Order at 4. Furthermore, the Chair also held that the PBD was relevant only to the extent that it “imposes conditions on any license that may be issued in this proceeding.” *Id.* Both of these rulings have been affirmed by the full Board on an appeal filed by Mr. Spencer.

The thrust of Mr. Spencer’s testimony on this point, therefore, hinges on whether the PBD establishes a condition of approval that can be applied to any license granted in this proceeding. Both the plain language and the structure of the PBD demonstrate that it cannot.

First, the provision that Mr. Spencer calls a “directive” is clearly nothing of the sort. Rather, the PBD states:

The Commissioner *recommends* SPO and Casella amend the OSA to address the significant quantity of CDD imported into Maine under the terms of the OSA, and the associated large volumes of processing residues delivered to the Juniper Ridge Landfill.

PBD at 29 (emphasis added). In stark contrast to a legal requirement, the word “recommend” means “to present as worthy of confidence, acceptance, use, etc.; commend; mention favorably,” or “to represent or urge as advisable or expedient.” *See* <http://www.dictionary.com/browse/recommend> (last visited on Aug. 2, 2016). Thus, by using the word “recommend,” the Commissioner was plainly making a suggestion, not establishing a legal requirement.

Second, this provision was not even included in the conditions of approval of the PBD. The conditions of approval follow immediately after her recommendation, in a different section of the document. This further demonstrates with the structure of the PBD that the recommendation about amending the OSA is not binding. *Compare* PBD at 28 (setting out her

conclusions based on the findings of fact) *with* PBD at 29 (approving the application, subject to specified conditions of approval).

For these reasons, Mr. Spencer's entire paragraph on the Commissioner's recommendation, why she made it, and how it should impact these proceedings should be struck from his testimony as irrelevant. *See* Spencer Testimony at 4 (second paragraph). Likewise, his statement in his "summary" discussion at the end of his testimony that a permit should not be granted until Casella has complied with the PBD by amending the OSA should also be struck for the same reasons. *Id.* at 9.

B. Testimony About the Role of the LAC Is Not Relevant.

Second, Mr. Spencer also provides testimony about the history and role of the LAC, stating that the owners of JRL have failed to inform the LAC "in a timely manner of planned events central to the landfill's operation," and suggesting that the role of the LAC needs to be clarified. *See* Spencer Testimony at 8.

Mr. Spencer did not propose this issue as one that he wished to address in this proceeding, as he was required to do by the Third Procedural Order. *See* Spencer Issues of Contention 1-7. More importantly, there is no permitting standard in the rules that applies to the LAC's role here, and the Board has no jurisdiction to clarify that role, as Mr. Spencer requests. Rather, the LAC is a creature of statute, and thus any proposed changes or clarifications must be made in that forum. *See* P.L. 2003, ch. 93, § 1(5) (providing that the municipal officers for the City of Old Town and the Town of Alton shall establish a joint citizen advisory committee), *amended by* P.L. 2005, ch. 341, § 2. Thus, the paragraph in Mr. Spencer's testimony about the LAC should be struck as irrelevant. *See* Spencer Testimony at 8 (first paragraph).

C. Testimony About the Operations of MFGR's Treatment Plant Is Not Relevant.

Third, Mr. Spencer provides testimony regarding the operation of the wastewater treatment plant at the former Old Town mill that is proposed as the primary option to treat leachate from the JRL Expansion (the other option being the City of Brewer's wastewater treatment plant). The purpose of this testimony is to question whether the leachate is being treated properly. *See* Spencer Testimony at 8 (questioning whether the leachate was treated prior to discharge to the river).

As Mr. Spencer acknowledges, however, the treatment plant is not owned or operated by BGS or NEWSME (or any other entity associated with the applicants), but rather by MFGR, LLC. That company holds a valid wastewater discharge license from the Department to manage the leachate from JRL. Given that there is no requirement that BGS or NEWSME itself operate a wastewater treatment plant to treat the leachate from the JRL Expansion, nothing more is required. If, as Mr. Spencer seems to imply, MFGR were violating its wastewater discharge license, that would be a matter for the Department to pursue through a potential enforcement action. The Board cannot, however, exercise jurisdiction over the operations of another entity's treatment plant in this proceeding. Thus, the paragraph in his pre-filed testimony on the treatment plant should be struck as irrelevant. *See* Spencer Testimony at 8 (second paragraph).

II. Steve Coghlan

Mr. Coghlan's testimony similarly includes irrelevant testimony that reads more like a lecture to his students on environmental policy than testimony intended to assist the Board in determining whether BGS and NEWSME have met the regulatory standards for approval. His testimony on the following topics should be struck as irrelevant: (1) biophysical economics; (2) climate change; and (3) alternative ways to value wetlands. In addition, Mr. Coghlan's

testimony is rife with citations to studies, YouTube videos, and websites that he does not provide as exhibits, as required. These citations should also be struck from his testimony.

A. Testimony about Biophysical Economics Is Not Relevant.

First, Mr. Coghlan spends several pages of his pre-filed testimony discussing what he calls a “different worldview” of economics “to better understand how our economy and the waste it generates relates to nature, and how that relationship in turn feeds back to affect our society.” Coghlan Testimony at 6. He then describes how neoclassical economics is “inadequate for identifying environmental problems and valuing non-human goods and services,” and proposes instead that we adopt biophysical economics (“BPE”) to “view economies as subsystems embedded within the environment.” *Id.* at 7. This leads him to a discussion of how BPE works, how it has been applied, and how it accounts for technology, which he then uses as a basis to urge the Board “to consider very carefully who benefits from the expansion and who bears the costs,” and to “think globally and act locally.” *Id.* at 9. Mr. Coghlan then concludes that society has already produced more than the planet can handle; that our economy is unsustainable because we produce waste and consume resources too fast; and that we need “to shrink our economy and its metabolic throughput to a size that is sustainable on a finite planet.” *Id.* at 10. At the end of this discussion, he notes the importance of waste reduction as part of the waste management hierarchy. *Id.*

Mr. Coghlan’s discussion of economics is almost entirely focused on global issues, as he presses the Board to “adopt a BPE view of our interconnected economic-environmental systems.” *Id.* His testimony, while passionate, says almost nothing about any applicable permitting standard relevant to the JRL Expansion. At best, he mentions the waste reduction prong of the hierarchy as being supported by BPE, but that rule already exists. Rather, this entire

discussion is a policy briefing on how society should re-think its approach to environmental issues through a particular economic lens. Mr. Coghlan ultimately says nothing about whether the application under review even meets the hierarchy, only how important (and inadequate) he thinks it is as a matter of policy. Thus, while entirely appropriate for a college lecture hall, the discussion of BPE is irrelevant to this particular proceeding and should be struck. *See id.* at 6-10 (beginning with the last paragraph on page 6).

B. Testimony About Climate Change Is Not Relevant.

Second, Mr. Coghlan next argues that a “glaring and inexcusable omission throughout the entirety of the Application is the failure to acknowledge and consider anthropogenic climate change (ACC or ‘global warming’).” *Id.* at 10. He then explains the severity of the situation, which he calls the “most consequential hazard that human civilization has ever faced,” and seems genuinely shocked that “this Application does NOT account for the effects of ACC.” *Id.* at 11.

Mr. Coghlan may be unaware that nothing in the applicable laws for this proceeding requires any such analysis whatsoever, and, just as importantly, there is not a single permitting standard that directly addresses ACC. ACC may well have impacts on systems like floodplains and wetlands, as he says. *Id.* (arguing, for example, that flooding will likely increase due to ACC). Even if Mr. Coghlan is correct that ACC is potentially catastrophic, however, BGS and NEWSME must demonstrate compliance with the rules that exist today, and he has offered no opinion as to how such considerations should be factored into determining whether those rules have been met. Therefore, the entire discussion on ACC should be struck as irrelevant here. *Id.* at 10-12 (under the heading “The Elephant in the Landfill: Climate Change”).

C. Testimony About Alternative Wetland Valuation Strategies Is Not Relevant.

Third, building on his critique of neoclassical economics, Mr. Coghlan offers testimony regarding the failure of traditional methods for valuing wetlands and the functions and values that they provide. *Id.* at 12. This again involves a discussion of economic principles, including the shortcomings of existing market-based analyses when analyzing ecological impacts. With this background, Mr. Coghlan next explains that he would prefer an alternative method – called “eMergy” – to value wetlands, deriving something called “eMdollars,” as a representation of the eMergy “that goes to support one dollar of gross domestic product.” *Id.* 12-13. Eventually, he opines that “[i]f the applicants were to conduct such a synthesis, we would have very useful information with which to value the impacted wetlands, and perhaps even to value the service provided by the landfill as well.” *Id.* at 14.

What Mr. Coghlan omits, however, is any discussion whatsoever of how this can be reconciled with the existing rules that apply to this project. There is no requirement to conduct any such analysis, nor is it at all clear how that information could be used to demonstrate compliance with the rules that are already in place for wetland compensation. In other words, much like his discussions of BPE and ACC, Mr. Coghlan’s discussion of an alternative way to value wetlands is a public policy discussion better reserved for another forum. The Board does not have the authority to attempt to apply anything like it here. Thus, this discussion should also be struck from his testimony. *Id.* 12-14 (under the heading “How shall we value wetlands?”).

D. Mr. Coghlan’s Citations Should Be Struck For Failure To Comply With the Rules On Exhibits.

Finally, Mr. Coghlan refers throughout his testimony to numerous sources that are not included as exhibits, including various academic articles, websites, and a YouTube video. While it is clear that parties may rely on scientific papers or expert reports, they are required to provide

them as exhibits. This directly contradicts, therefore, the Board Chair's direction that "[t]he Board will not accept links to documents; the documents, or relevant portions thereof, must be submitted as exhibits." Second Procedural Order § 6 at 5; Fourth Procedural Order § 2(C). As a result, all of these references should be struck from his testimony.

CONCLUSION

As has been explained multiple times by the Chair and Board staff in pre-hearing conferences and procedural orders, there are basic rules to submitting testimony and evidence that must be followed. These rules do not exist simply as a trap for the unwary or as mere technicalities that can be ignored when inconvenient. Rather, they help to ensure an efficient and fair hearing for all parties and the Department staff by focusing testimony and evidence only on applicable licensing criteria and providing evidence in a manner that allows ready review by all involved. Based on the foregoing, we respectfully request that the Chair strike the portions of the testimony submitted by Mr. Spencer and Mr. Coghlan, as discussed above.

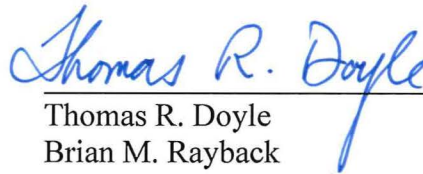
Dated: August 12, 2016



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