

THOMAS R. DOYLE

Merrill's Wharf
254 Commercial Street
Portland, ME 04101

P 207.791.1214
F 207.791.1350
C 207.776.9606
tdoyle@pierceatwood.com
pierceatwood.com

Admitted in: ME

June 1, 2018

Mr. James Parker, Chairman
Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017


Re: Appeal of Juniper Ridge Landfill DEP Order # S-020700-WD-BL-A

Dear Mr. Parker:

Please find enclosed the Comments of Bureau of General Services and NEWSME Landfill Operations, LLC on Evidentiary Issues.

Thank you for your attention to this matter.

Very truly yours,


Thomas R. Doyle

Enclosure
cc: Service List

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF:

STATE OF MAINE, ACTING THROUGH THE
BUREAU OF GENERAL SERVICES AND
NEWSME LANDFILL OPERATIONS, LLC
OLD TOWN, PENOBSCOT COUNTY, MAINE
JUNIPER RIDGE LANDFILL
DEP AMENDMENT APPLICATION
SOLID WASTE #S-020700-WD-BL-A

SOLID WASTE LICENSE AMENDMENT
PARTIAL APPROVAL

**COMMENTS OF BUREAU OF GENERAL SERVICES AND
NEWSME LANDFILL OPERATIONS, LLC ON EVIDENTIARY ISSUES**

Pursuant to Section 24 of Chapter 2 of the Department's rules, co-applicants Bureau of General Services ("BGS") and NEWSME Landfill Operations, LLC ("NEWSME") submit this response to two evidentiary issues raised in appeals of the Department's partial approval in this matter. First, BGS and NEWSME contend that the Department licenses that were cited in our appeal involving permits for the Fiberight facility and the City of Bath's landfill are admissible on multiple grounds. Second, BGS and NEWSME move to strike two of the four exhibits that Mr. Spencer proffers as supplemental evidence in his appeal – Exhibit 1 (truck delivery reports at JRL) and Exhibit 4 (2003 MRC's Louder letter to Cashman). Both of these points will be discussed in more detail below.

ARGUMENT

I. The Department's Licensing Decisions in Other Solid Waste Matters Are Admissible.

In its appeal, BGS and NEWSME cited to two recent Departmental licensing decisions that also apply the solid waste management hierarchy. One of those decisions involved the hierarchy's application to the Fiberight facility, in #S-022458-WK-A-N, and the other to the City of Bath's landfill, in #S-004991-WD-J-A. These decisions are admissible for multiple reasons.

First, the Department’s prior decisions applying the hierarchy are not presented here as new evidence intended to establish certain facts. Rather, they are precedent to support our legal argument about how the Department has applied the hierarchy disparately to Juniper Ridge Landfill (“JRL”). Just as a party is entitled to cite in a brief to other sources of precedent, such as case law, statutes, or rules, it can also cite to past Department decisions to support its legal arguments. Thus, these decisions do not need to be in the record for the parties to utilize them.

Second, even if the Board refuses to accept the Fiberright and Bath licenses as valid precedent, we respectfully ask that it take official notice of them. As established in the Maine Administrative Procedures Act:

Agencies may take official notice of any facts of which judicial notice could be taken, and in addition may take official notice of general, technical or scientific matters within their specialized knowledge and of statutes, regulations and *nonconfidential agency records*. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the substance or materiality of the facts noticed.

5 M.R.S. § 9058(1) (emphasis added).

The licensing decisions in the Fiberright and Bath matters are clearly nonconfidential agency records. There is little question that these decisions, which were issued in 2016 and 2017, respectively, are relevant, as they are two of the only examples of how the Department has applied the hierarchy to other solid waste facilities as a permitting standard. In addition, there can be no question about their official nature or their accuracy, given that they are decisions of the Department itself.

Third, even if for some reason the Board is still reluctant to accept them as admissible on their own, the licenses are admissible as supplemental evidence.¹ In short, until the Department

¹ As noted in the Executive Analyst’s letter to the parties, dated May 2, 2018, supplemental evidence that is relevant and material is admissible if (a) the person seeking its admission “has shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time,” and (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 process. 06-096 CMR 2 § 24(D)(2).

issued its decision to grant only a limited extension of the municipal solid waste (“MSW”) disposal deadline, it was not apparent how the hierarchy would be applied to this application. As it turned out, the disparate treatment between how the Department applied the hierarchy at JRL and at Fiberight and Bath’s landfill is striking, thus raising the question of fundamental fairness identified in our appeal. Once it was clear in the final order that the Department was not applying the hierarchy evenly, BGS and NEWSME raised these decisions to the Department’s attention as part of this appeal. Thus, they are also admissible as supplemental evidence under Section 24(D)(2) of Chapter 2.

II. Two of Mr. Spencer’s Proffered Exhibits Are Inadmissible.

Two of the exhibits that Mr. Spencer proffers in his appeal – Exhibit 1, truck delivery data, and Exhibit 4, a 2003 letter from the Municipal Review Committee to the State – are inadmissible because they do not meet the standard for supplemental evidence.²

A. Exhibit 1 – Truck Delivery Data.

1. Exhibit 1 is Not Admissible.

Mr. Spencer’s first request for supplemental evidence, offered on page 2 of his appeal, is actually a request that the *Department* supplement the record with “the most recent truck delivery information” to JRL. The Department’s rules, however, make clear that the party proffering the supplemental evidence must provide it *with the appeal*. See 06-096 CMR 2 § 24(D)(1) (“If an appellant or respondent seeks to supplement the record, *that person shall provide copies of all proposed supplemental evidence with the written appeal or in response to the appeal . . .*”) (emphasis added). Mr. Spencer cannot, therefore, ask the Department to take on this burden for him. As a result, Mr. Spencer’s requested Exhibit 1 is inadmissible and his discussion of it should be struck from his appeal.

² We do not oppose admission of Mr. Spencer’s other proffered exhibits.

In an effort to correct his failure to offer “the most recent truck delivery information” with his appeal, in an email dated May 24, 2018, Mr. Spencer belatedly forwarded to the Chair and interested parties his proposed “Exhibit 1, April 2018 truck deliver (sic) reports at JRL.” The report is actually entitled the “April 2018 Special Waste Activity Report for Juniper Ridge Landfill,” and is provided monthly by NEWSME to BGS, with a copy to DEP. This report shows, among other things, the source and tonnage of all solid waste, not just MSW, delivered to JRL for the month of April 2018. Wholly apart from the problem that this proffered supplemental evidence is 24 days late, it is difficult to understand how this report is probative of anything relevant to this matter. Consequently, Mr. Spencer’s requested Exhibit 1 is still inadmissible and his discussion of it should be struck from his appeal.

2. If Exhibit 1, the April 2018 Truck Delivery Report, is Admissible, BGS and NEWSME Propose New Supplemental Evidence in Response to it.

If the Board were to determine that Mr. Spencer’s post-appeal truck delivery information at JRL were somehow admissible, BGS and NEWSME propose further supplemental evidence, attached hereto as Exhibit 4, in response. Mr. Spencer’s argument about traffic appears to relate solely to the short (9-month) period of time when the Interim Waste Disposal Agreement (aka the “Waste Swap Agreement”), dated March 30, 2018, is in effect because the Fiberright facility is not yet operational. Pursuant to the Waste Swap Agreement, smaller waste hauling trucks from greater Bangor area communities haul their MSW the short distance to JRL, rather than travelling the much longer distance to the Crossroads facility in Norridgewock.³ Under this interim agreement, scheduled to expire December 31, 2018 (unless extended by agreement of the parties), smaller waste hauling trucks (e.g., packer trucks) from the greater Bangor area

³ Because of equipment limitations and geographic distance, it is not economically feasible for greater Bangor area communities to deliver their MSW directly to the Crossroads Landfill. Additionally, the Fiberright facility is currently unable to facilitate the transfer of MRC communities’ MSW as originally contemplated. NEWSME entered into the Waste Swap Agreement to accommodate Fiberright and the MRC communities and save them time and significant transportation costs during this interim period.

communities displace at JRL larger tractor trailers of MSW from southern Maine communities that instead dispose of an equivalent amount of MSW at the Crossroads Landfill (the “waste swap”). No change in tonnage of MSW delivered to JRL results from the Waste Swap Agreement, and the agreement is contingent on BGS and NEWSME being licensed by DEP to continue to accept 81,800 tons per year of in-state MSW at JRL on an after April 1, 2018.

As indicated by the attached May 25, 2018, letter from traffic engineers Thomas Gorrill and Randy Dunton, at Gorrill Palmer (Exhibit 4), with the Waste Swap Agreement in place and even accounting for potential seasonal variation in MSW tonnage, the level of service at the JRL driveway will continue to operate at a level of service “A” (the highest traffic level of service), with little delay caused by any additional truck traffic that may be generated as a result of the interim Waste Swap Agreement. Gorrill Palmer concludes that the JRL driveway “will continue to be uncongested and operate safely.” This is directly relevant to Mr. Spencer’s claim that the Department erred in concluding that the applicants met the traffic standard.⁴

Given that Mr. Spencer is seeking to introduce supplemental evidence about truck traffic that was not attached to his appeal and was first forwarded to the Chair and parties on May 24, 2018, 24 days after his appeal, BGS and NEWSME have shown due diligence in bringing the attached Gorrill Palmer letter to the attention of the Department at the earliest possible time and as soon as they learned it might be relevant. 06-096 CMR 2 § 24(D)(2).

⁴ Thus, the Department findings and conclusions on traffic in its March 31, 2018, Order remain valid: “Traffic movement is not expected to significantly change with the proposed amendment since the request does not include an increase in the volume of MSW delivered to the site from what is currently licensed...[T]he applicant has demonstrated that the roads and intersections in the vicinity of JRL have the ability to safely and appropriately handle all of the traffic attributable to the handling of MSW into, out of, and within the facility pursuant to applicable State law and Rule requirements...The applicant has provided sufficient provisions for safe and uncongested traffic movement of all types into, out of, and within the landfill pursuant to 06-096 C.M.R. ch. 400 § 4(D)(1).” Department’s March 31, 2018, Order, pp. 10, 39.

B. Exhibit 4 – 2003 MRC letter to State.

Mr. Spencer also asks on page 6 of his appeal that the Board supplement the record with his proposed Exhibit 4, a letter written fifteen years ago from Greg Louder of the Municipal Review Committee (“MRC”) to Jack Cashman in the Governor’s office. BGS and NEWSME assert that this evidence does not meet the requirements for admission under Chapter 2 for three reasons.

First, the letter is not relevant to the question posed in this proceeding, which is whether the March 31, 2018, deadline for disposal of MSW should be extended. The *MRC’s* position on disposal of MSW *in 2003* has no bearing whatsoever in 2018 on whether BGS and NEWSME should be authorized to continue disposing of MSW at JRL under a permit granted in 2013. *See* 06-096 CMR 2 § 24(D)(2) (authorizing the Board to admit supplemental evidence, but only if it is “relevant and material”).

Second, Mr. Spencer has failed to show that this proffered evidence meets the requirements for supplemental evidence. He makes no attempt to argue that he is raising this letter at the earliest possible time or that it is somehow newly discovered and could not reasonably have been discovered earlier. In fact, the contrary seems to be true, given that the letter is fifteen years old and Mr. Spencer claims it was part of the record in another proceeding that he participated in, the 2016 licensing of the expansion of JRL.

Third, Mr. Spencer’s claim that the letter was part of the 2016 expansion proceeding for JRL is immaterial as that was a separate legal proceeding from this one, with a separate administrative record. The expansion proceeding, which required a public benefit determination before BGS and NEWSME could even file an application, began in 2014 and involved the 9.35 million cubic yard expansion of the landfill. That proceeding ended in 2017 with this Board’s decision to authorize the expansion after a two-day evidentiary hearing. Notably, that

application did not request approval to dispose of non-bypass MSW in the expansion. As a result, the expansion proceeding did not involve the central question at issue in this proceeding of whether disposal of MSW in *existing* JRL is consistent with the waste management hierarchy. Thus, the two proceedings – to expand JRL without MSW and to allow disposal of MSW in existing JRL – are distinct and have separate administrative records. Mr. Spencer cannot rely on evidence for this proceeding from the record of a separate proceeding.

Therefore, we request that Mr. Spencer’s Exhibit 4, and his discussion of it, be struck from his appeal.

CONCLUSION

We respectfully request that the Board: (1) accept as admissible the Department’s licensing decisions involving Fiberright and the City of Bath; and (2) reject as admissible and strike any discussion of Mr. Spencer’s proffered Exhibits 1 and 4. In the alternative, if the Board finds that Mr. Spencer’s Exhibit 1 is admissible, we propose that the Board find our new Exhibit 4 in response is admissible, as well.

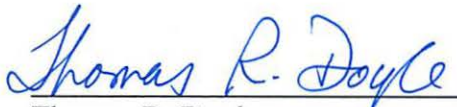
Dated: June 1, 2018



William H. Laubenstein

DEPARTMENT OF ATTORNEY GENERAL
6 State House Station
Augusta, ME 04333-0006
(207) 626-8570

Attorney for Bureau of General Services



Thomas R. Doyle
Brian M. Rayback

PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
207-791-1100

Attorneys for NEWSME Landfill
Operations, LLC

EXHIBIT 4

Gorrill Palmer May 25, 2018 letter on traffic



707 Sable Oaks Drive, Suite 30
South Portland, Maine 04106
207.772.2515

May 25, 2018

Mr. Don Meagher
Manager of Planning and Development
Casella Waste Systems, Inc.
385 Emerson Mill Road
Hampden, ME 04444

**Re: Coastal Resources Swap Agreement
Traffic Impact**

Dear Don,

It is Gorrill Palmer's understanding that NEWSME Landfill Operations, LLC has entered into an interim waste disposal agreement with Coastal Resources of Maine LLC (CRM), the Municipal Review Committee and Waste Management Disposal Services of Maine, Inc. This agreement allows Juniper Ridge Landfill (JRL) to accept some Municipal Solid Waste (MSW) until CRM's facility, which is currently under construction in Hampden, Maine, is completed and becomes operational. This agreement allows for the MSW generated by communities in the greater Bangor area to be delivered to the JRL. In exchange, an equivalent amount (tons) of MSW originating in Maine that would otherwise be delivered to JRL is instead to be delivered to the Waste Management Crossroads Landfill in Norridgewock. Prior to this interim agreement, the MSW was being delivered to the JRL in tractor trailer trucks. While the interim agreement does not change the total MSW tonnage being transported to the JRL, it is likely to result in some additional traffic since the MSW from the local communities will be transported by smaller trucks called "packer trucks," which will result in more trucks to transport an equivalent tonnage. The purpose of this letter is to evaluate the potential impact of these additional trucks on traffic flow and safety at the JRL driveway.

The interim agreement took effect April 1, 2018 and expires December 31, 2018, unless extended by the parties. You have provided a summary of the total trucks entering JRL for April 2014 before the agreement took effect and for April 2018, the first month when JRL began receiving trucks under the interim agreement. A comparison of this information showed that the April total of entering trucks increased from 2269 to 2588 from 2014 to 2018, respectively, an increase of 14%.

Based on this comparison, we have increased the peak design hour volumes collected at the Juniper Ridge driveway in 2014 by 14% plus an additional 10% to account for the seasonal variation in tonnage. This results in 31 AM and 27 PM peak hour trip ends, respectively. A truck delivery results in 2 trip ends; one inbound and one outbound. Using these trip ends, the level of service at the driveway will continue to be level of service "A" with little delay caused by the additional truck traffic generated as a result of the interim agreement.



Levels of service rankings are similar to the academic ranking system where an "A" is very good with little control delay and an "F" represents very poor conditions. If an unsignalized intersection falls below a level of service "D", the intersection is further evaluated to determine if mitigation is needed. Following is a summary of the level of service criteria:

Level of Service	Control Delay per Vehicle (sec)
A	Up to 10.0
B	10.1 to 15.0
C	15.1 to 25.0
D	25.1 to 35.0
E	35.1 to 50.0
F	Greater than 50.0

It is the opinion of this office, based on this assessment, the driveway will continue to be uncongested and operate safely. Please feel free to contact us if you have any questions.

Sincerely

Gorrill Palmer

Randy Dunton, PE, PTOE
Project Manager

Thomas Gorrill, PE, PTOE
Project Engineer