

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

July 12, 2018

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

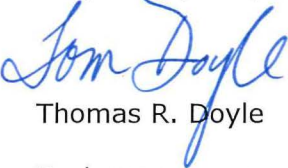
Re: Appeal of Juniper Ridge Landfill Order #S-020700-WD-BL-A

Dear Mr. Parker:

Please find enclosed the Response to Appeal of Edward Spencer from Bureau of General Services and NEWSME Landfill Operations, LLC.

Thank you for your continued attention to this appeal 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

**RESPONSE TO APPEAL OF EDWARD SPENCER FROM BUREAU
OF GENERAL SERVICES AND NEWSME LANDFILL OPERATIONS, LLC**

Pursuant to Section 24(C)(4) of Chapter 2 of the Department's rules, co-applicants BGS and NEWSME provide this response to the appeal filed by Edward Spencer. Mr. Spencer's appeal raises a variety of arguments challenging the Commissioner's decision granting partial approval of BGS and NEWSME's application to continue to accept MSW for disposal at the existing JRL. Although we have filed our own appeal challenging this same decision, we will explain in this filing why Mr. Spencer's challenges are unfounded and should be rejected.

ARGUMENT

Mr. Spencer's arguments about how the Commissioner erred are, at times, somewhat difficult to follow. Some of his arguments lack technical support on technical issues, others overlap with one another, and others do not appear to raise a direct challenge to anything specific in the Commissioner's decision. Still other arguments raise issues, such as approval requirements under the City of Old Town's ordinances and the activities of the Municipal Review Committee, which are wholly outside the scope of this proceeding and were not addressed in the Commissioner's decision.

In an effort to focus only on the key issues, however, it appears that his principal claims boil down to concerns over compliance with approval standards related to traffic safety and the waste management hierarchy. He also argues that the applicants have not lived up to what he calls the “intent” of the 2013 amendment allowing disposal of MSW at JRL and that disposing of MSW at JRL somehow constitutes a broken promise by various governmental officials and Casella. In the discussion below, we will respond to these points.¹

I. The Commissioner’s Findings and Conclusions on Traffic Remain Valid.

Mr. Spencer challenges the Commissioner’s finding that traffic movement “is not expected to significantly change” because the application did not seek an increase in the volume of MSW to be disposed at JRL.² Instead, he contends that the number of trucks will increase, and thus that the Commissioner’s conclusion is incorrect that the application provides for “safe and uncongested traffic movement,” as required by Chapter 400, Section 4(D)(1), of the rules. *See* Spencer Appeal at 2.

Although he does not say so specifically, because he raises the issue of packer trucks and increased traffic, Mr. Spencer’s argument appears to relate solely to the short (9-month) period

¹ We recognize that the Department and the Board have previously granted Mr. Spencer “aggrieved person” status in matters related to JRL. We respectfully disagree with those decisions and assert that he lacks standing to pursue this appeal. Without belaboring the point, but in order to preserve the issue in the event that further appeals are necessary, we do not believe that someone who lives 1.75 miles from JRL and not on the same road is aggrieved by a licensing decision that does not expand the boundaries of the landfill, make it taller, or even meaningfully change its operation, but simply extends the time period during which it can accept MSW, a waste type approved at JRL since 2004, for disposal. *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 10, 953 A.2d 378, 382 (appellant has burden of proving a particularized injury).

² Specifically, the Commissioner found that traffic movement would continue to be safe:

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....

of time when the Interim Waste Disposal Agreement (aka the “Waste Swap Agreement”), dated March 30, 2018, is in effect because the Fiberight 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 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 after April 1, 2018.

An analysis from traffic engineers at Gorrill Palmer, which the Chair has admitted as supplemental evidence, demonstrates that 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 level “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. *See* Letter from T. Gorrill & R. Dunton to D. Meagher, May 25, 2018, at 1. Gorrill Palmer concludes that the JRL driveway “will continue to be uncongested and operate safely.” *Id.* at 2. Mr. Spencer did not provide any evidence to refute this analysis.

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 Fiberight facility is currently unable to facilitate the transfer of MRC communities’ MSW as originally contemplated. NEWSME entered into the Waste Swap Agreement to accommodate Fiberight and the MRC communities and save them time and significant transportation costs during this interim period.

Given that the Waste Swap Agreement will not significantly affect traffic movement into and out of JRL, Mr. Spencer's claim about the Commissioner's analysis of traffic is unfounded. On the contrary, given the limited impact on the number of trucks and the continued level of service into and out of JRL, the Commissioner's conclusion that the traffic standard has been met remains valid and should be upheld here. *See* Order, page 39, § 5 (concluding that "[t]he 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)").

II. Allowing Disposal of MSW at JRL Does Not Violate the Hierarchy.

Mr. Spencer also asserts, in different ways and under different topic headings, that the Commissioner erred by allowing even the short-term disposal of MSW at JRL because, from his perspective, even this violates the waste management hierarchy.⁴ His primary arguments on this point appear to be: (1) Casella caused the uncertainty in the solid waste management market that has led to the ongoing need to dispose of MSW at JRL; (2) the Commissioner should have required more under the hierarchy to prevent landfilling, promote source reduction, and require diversion from JRL; and (3) denying the application would have led to more incineration of MSW at PERC, and therefore promoted the hierarchy because incineration is higher on the hierarchy than landfilling. *See* Spencer Appeal at 4, 5, 7. Each of these arguments should be rejected.

⁴ As BGS and NEWSME have argued in our own appeal, the Commissioner's decision does not go far enough on this point and should be extended beyond the short term approved by the Commissioner. *See* BGS & NEWSME Appeal at 17-20 (explaining why limiting approval only to 12-18 months does not support the hierarchy).

A. Casella Did Not Cause the Uncertainty in the Solid Waste Market.

Mr. Spencer begins by rhetorically asking if Casella is to blame for the uncertainty in the solid waste market, because of its contracts with PERC and CRM to supply significant MSW tonnage to those facilities provided that JRL is authorized to accept 81,800 tons per year. This is off-base for multiple reasons.

First, as explained in the applicants' appeal, these contracts are a direct result of the requirement in JRL's 2013 license amendment and the current licensing process to *comply* with the waste management hierarchy, not to undermine it. That license amendment and Section 4(N) of Chapter 400 obligate the applicants to make their best efforts to divert MSW to facilities like PERC and CRM. Absent these requirements, Casella would have no need to enter these contracts, and so naturally they are contingent upon JRL's continued ability to accept MSW, as well. *See* BGS & NEWSME Appeal at 15-16.

Second, even with the volumes in the two contracts that Mr. Spencer relies upon – for up to 130,000 and 40,000 tons of MSW per year – there is still a significant shortfall in Maine's ability to handle MSW at levels on the hierarchy above landfilling. *See* BGS & NEWSME Appeal at 8. Without Casella's contracts with PERC and CRM, the shortfall will only get worse.⁵ Contrary to Mr. Spencer's assertion, therefore, these contracts are helping to reduce uncertainty, not the other way around.

Third, arguing that Casella's new contracts with PERC and CRM are creating market uncertainty is the tail wagging the dog. As described in the applicants' appeal, there are significant market forces at play already, including the fact that two of Maine's three incinerators are already at maximum capacity, while a third is in the process of reducing capacity in response

⁵ Interestingly, Mr. Spencer seems to agree with BGS and NEWSME that the Commissioner's evaluation of CRM's ability to open and operate the new Fiberight facility on time may be overly optimistic. *See* Spencer Appeal at 5 (stating "Fiberight's CRM is nowhere near being a functional facility.").

to low electrical prices and other factors, and that China's refusal, as of January 1, 2018, to accept recycled materials from the U.S., due to contamination, has thrown the international recycling market into disarray. Recyclers no longer profit from recycling; they are now forced to pay significant fees to manage recycled MSW materials, which are now often either incinerated or landfilled due to the turmoil in the market. *See* BGS & NEWSME Appeal at 7. Furthermore, neither of the applicants generates MSW, which has increased modestly in Maine over the last three years (2014-2016), and Maine Energy's capacity has been lost and cannot be replaced by another commercial incinerator under Maine law. *Id.* at 5, 7. All of these factors, and more, are well beyond the applicants' control.

Thus, Mr. Spencer's contention that Casella is somehow creating the uncertainty driving the need to dispose MSW at JRL is misguided. In fact, as BGS and NEWSME have demonstrated in their appeal, that uncertainty actually goes well beyond the short-term approval that the Commissioner granted, and supports extension of the MSW disposal license through at least December 31, 2023. *See* BGS & NEWSME Appeal at 13-17.

B. Mr. Spencer's Arguments That the Commissioner's Decision on the Hierarchy Did Not Go Far Enough Ignore Both the Law and the Facts.

Mr. Spencer next challenges in several ways the Commissioner's conclusion that the applicants have met the waste management hierarchy standard, at least in the short term. His arguments, however, ignore both the language of the hierarchy standard and the reality of the solid waste market.

Mr. Spencer first claims that any delivery of MSW to JRL necessarily subverts the hierarchy. *See* Spencer Appeal at 5. This, of course, is too simplistic. The hierarchy merely establishes a priority for solid waste management, expressly allowing (and, frankly, relying upon) landfilling if the waste has been "reduced, reused, recycled, composted, and/or processed

to the maximum extent practicable prior to incineration or landfilling.” 06-096 C.M.R. 400 § 4(N)(2)(a). Thus, the plain language of the rule makes clear that Mr. Spencer’s view that *any* landfilling of MSW automatically violates the hierarchy cannot prevail.

Mr. Spencer also notes that none of the applicants’ efforts to comply with the hierarchy go toward source reduction. *See* Spencer Appeal at 5. He again fails to acknowledge, however, that BGS and NEWSME do not generate the MSW at issue. Source reduction must be implemented by those who generate the waste, namely, the residents, visitors, and businesses of Maine. Accordingly, source reduction is beyond the applicants’ control under the rules. 09-096 C.M.R. 400 § 4(N)(2) (limiting the Department’s review under the hierarchy to activities “sufficiently within the control of the applicant to manage or facilitate”).

Mr. Spencer next argues that “DEP has the power to say where MSW cannot go, which is into the State-owned Juniper Ridge Landfill,” thus apparently advocating a form of flow control. *See* Spencer Appeal at 5. This is premised upon his view that JRL should be held to a higher standard under the hierarchy because it is owned by the State. As the applicants discuss in detail in their appeal, however, nothing in the hierarchy supports such a distinction. In fact, it is unlawful for the Commissioner to discriminate against JRL under the hierarchy based on the identity of its owner. Even more fundamentally, forcing MSW diversion from one landfill to another, which is what will happen here, does *nothing* to promote the hierarchy. *See* BGS & NEWSME Appeal at 17-20. Adopting Mr. Spencer’s view that the hierarchy would somehow have allowed the Commissioner to deny the application completely would only compound the problem.

C. Denying the Application Would Not Result in the MSW Going to PERC.

Toward the end of his appeal, Mr. Spencer also asserts that denying the application would increase incineration because “surely most of that waste would end up at PERC instead.” *See*

Spencer Appeal at 7. There is no evidence in the record to support this assertion, and, in fact, the record evidence demonstrates just the opposite. Casella's contracts to supply PERC and CRM with significant MSW tonnage will end if JRL is no longer authorized to accept 81,800 tons per year of MSW. *See* BGS & NEWSME's Response to Department's March 12 Follow-up Comments, pages 7-8 (March 15, 2018). Mr. Spencer's suggestion also ignores PERC's own assertion that it could not accept the additional MSW, even if it were available. *See* BGS & NEWSME Appeal at 7 and note 5. Nothing in the hierarchy allows the Department to ignore that reality. 06-096 C.M.R. 400 § 4(N)(2) (limiting the hierarchy to a "maximum extent practicable" standard that specifically accounts for factors such as whether non-landfilling capacity to handle the MSW even exists).

III. The Applicants Have More than Met the "Intent" of the 2013 License Amendment.

Stepping away from the merits of the Commissioner's decision, Mr. Spencer asserts that the applicants have not done enough to comply with what he characterizes as the intent of the 2013 license amendment, which authorized disposal of Maine MSW at JRL until March 31, 2018. On the contrary, as discussed in detail in the applicants' appeal, Casella has taken significant steps to comply with the hierarchy throughout all of its operations, such as by operating recycling and composting businesses; managing waste efficiently at JRL to save valuable landfill space; and diverting substantial volumes of MSW to other facilities, including the remaining Maine incinerators. *See* BGS & NEWSME Appeal at 9-11. These kinds of actions are precisely the kinds of things that the Department intended by approving the 2013 license amendment, as they vigorously promote the hierarchy.

Further, and perhaps most importantly when considering the "intent" of the 2013 license amendment, the applicants have diverted more than five times more MSW to other solid waste facilities than it disposed of at JRL and never even came close to disposing of the 81,800 tons of

MSW authorized by the Department. *See id.* at 6. To suggest that this level of compliance with the clear requirements of the approval is somehow out-of-step with the approval's "intent" makes no sense. Any other result would require an applicant to guess as to the underlying intent of the regulators who wrote a particular license, as if the license were not clear enough on its face.⁶

IV. Mr. Spencer's Argument that Accepting MSW Violates "Core Promises" is False.

Mr. Spencer also contends that allowing disposal of MSW at JRL violates what he calls "core promises" made by state, local, and Casella officials that the landfill would never accept putrescible wastes. *See* Spencer Appeal at 5-6. This is a myth.

BGS and NEWSME have previously demonstrated in proceedings involving Mr. Spencer that he is wrong about his oft-repeated broken promises claim. Ever since the State and Casella became involved at JRL, MSW was publicly contemplated for disposal. For example, as BGS and NEWSME detailed during the initial MSW proceedings in 2013:

- During the June 2003 legislative committee hearings on the legislative resolve that authorized the State to acquire JRL, George McDonald of the State Planning Office provided a list of the State's goals, including to provide long-term disposal for mill wastes and to "[p]ermit the delivery of other acceptable wastes to the site."
- Shortly thereafter, in September 2003, the State Planning Office explained to the Department in a license transfer application that it intended to accept additional waste streams, including MSW.
- The Department's order approving the license transfer in October 2003 acknowledged that the State Planning Office planned to apply for approval to accept additional waste streams, including MSW.
- As promised, the State Planning Office and NEWSME applied to the Department for permission to accept MSW in an application filed later that month.

⁶ Contrary to Mr. Spencer's suggestion, nothing in the 2013 Department approval required that only MSW from former MERC communities be disposed at JRL. While closure of the MERC incinerator was the precipitating event for that licensing action, JRL is the State-owned landfill, and Maine MSW may properly be disposed there. Mr. Spencer's perspective also ignores the reality that the applicants do not generate the MSW that must be managed in Maine, and those that do are beyond their control.

- JRL has been accepting what Mr. Spencer calls putrescible wastes, in the form of MSW bypass, front-end processing residue, and treatment plant sludge, since 2005.

See BGS and NEWSME's Response to Public Comments, Jan. 18, 2013, at 2 (describing these steps and attaching exhibits documenting each claim).

In fact, the Department itself predicted as far back as 2004 that if one of the incinerators in Maine were to close (which is exactly what happened when MERC closed in 2012) that the State might wish to take MSW to the landfill "because one of the stated purposes . . . is to provide capacity for Maine wastes." *Id.* Thus, it is clear that MSW has been publicly discussed as a potential waste stream at JRL dating all the way back to the very first days of the State's and Casella's involvement. Mr. Spencer's broken promises argument is demonstrably false and the Commissioner properly ignored it in his decision.

CONCLUSION

Based on the foregoing, Mr. Spencer's appeal should be rejected and the points raised in the applicants' appeal should be adopted instead.

Dated: July 12, 2018



William H. Laubenstein, III



Thomas R. Doyle

Brian M. Rayback

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

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

Attorney for Bureau of General Services

Attorneys for NEWSME Landfill
Operations, LLC