

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

**Petition to Modify and Request for Public Hearing
filed with the Board of Environmental Protection**

Response by Permittee

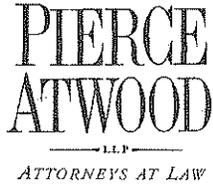
(dated July 6, 2011)

jointly filed by Maine State Planning Office

and

NEWSME Landfill Operations, LLC

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July 8, 2011

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

RE: Joint Response to Petition to Modify filed by the Municipal Review Committee, Inc.
(MRC) and Penobscot Energy Recovery Company, LP (PERC)
#S-020700-WD-W-M

Dear Chair Lessard:

I enclose the Joint Response of the State Planning Office (SPO) and the NEWSME Landfill Operations, LLC (NEWSME) to the Petition to Modify filed by MRC and PERC.

The MRC/PERC Petition should be dismissed in its entirety. The Petitioners' claims and basic arguments are the same as those advanced in the recent MRC/PERC appeal on MSW bypass, which the Board denied unanimously just over four months ago. Petitioners could have, but chose not to pursue those arguments on appeal to the Superior Court. The Petition presents no new information. Petitioners should not now be permitted to present the same arguments simply by repackaging them in a Petition to Modify. Petitioners' rehash of the same issues and claims and their attempt to introduce evidence previously rejected are an inappropriate drain on the time and resources of the Board, the Department, SPO, and NEWSME.

We respectfully request that the MRC/PERC Petition be dismissed.

Very truly yours,

A handwritten signature in cursive script that reads "Tom Doyle".

Thomas R. Doyle

TRD/dcu
Enclosure

cc: Service List

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF

STATE OF MAINE, ACTING THROUGH THE STATE PLANNING OFFICE OLD TOWN, PENOBSBOT COUNTY, MAINE JUNIPER RIDGE LANDFILL CHANGES IN MSW BYPASS LIMIT #S-020700-WD-W-M (APPROVAL WITH CONDITIONS)

SOLID WASTE ORDER
MINOR REVISION

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

For the third time in just over seven months, the Municipal Review Committee, Inc. (“MRC”) and Penobscot Energy Recovery Company, LP (“PERC”) (collectively the “Petitioners”) have submitted a filing with the Board questioning the use of municipal solid waste (“MSW”) bypass as the protective base layer in new cells constructed at the Juniper Ridge Landfill (“JRL” or the “Landfill”). Why Petitioners initiated this challenge in their October 2010 appeal and why they continue to press the same arguments in their latest filing is unclear. What is clear, however, is that reiteration of the same issues and claims is an inappropriate drain on the time and resources of the Board, the Department, the State Planning Office (“SPO,” the owner of the Landfill), and NEWSME Landfill Operations, LLC (“NEWSME,” the operator of the Landfill).

As discussed below, Petitioners’ latest filing – their May 27, 2011 Petition to Modify Portions of Solid Waste License #S-020700-WD-W-M Issued to the State Planning Office Regarding Juniper Ridge Landfill (the “Petition”) – should be dismissed in its entirety, without

consideration of its merits. The Petition presents no new information. The factual claims and basic arguments advanced in the Petition have been addressed previously and rejected by the Board. Petitioners could have, but chose not to pursue these arguments on appeal to the Superior Court. They should not now be permitted to present the same arguments simply by repackaging them in a petition to modify. Should the Board decide to consider the merits of the Petition, however, review of this most recent filing reveals there are none.

SPO and NEWSME, in this joint response, respectfully request that the Board dismiss the Petition without consideration of the arguments Petitioners present. Alternatively, if the Board reaches the merits of the Petition, the outcome should be no different. The Petition should be dismissed; it offers no basis for the Board to exercise its discretion and modify the Order it affirmed just over three months ago.

BACKGROUND

I. Petitioners' Prior Attempts to Stay or Modify JRL's License

On September 10, 2010, the Department issued Minor Revision Order #S-020700-WD-W-M (the "Order") authorizing the use of MSW bypass¹ as the protective base layer in new cells at the Landfill. This base layer, also referred to as the "soft layer," provides required protection for the Landfill's liner and leachate collection system. (Order at 5.) MSW has been successfully used as a base layer material at other secure landfills in the State, prompting the Department to suggest to SPO and NEWSME that that they use this material for the softer layer at JRL. (*Id.* at

¹ "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).)

6.) In response to this suggestion, SPO and NEWSME sought and obtained approval to use MSW bypass for the soft layer at the Landfill. The Order specifies that the MSW bypass used for this purpose does count against the 310,000 ton cap² that collectively applies to two solid waste management facilities controlled or operated by Casella Waste Systems – JRL³ and Maine Energy. (*Id.* at 7-8.)

On October 13, 2010, Petitioners appealed the Order to the Board requesting modification of portions of the Order and further technical analysis by the Department of whether MSW is an appropriate material for the soft layer at JRL. (PERC/MRC Appeal at 10 (October 13, 2010) (the “Appeal”).) Petitioners also requested a public hearing, expressing a desire to present testimony from Michael Mains of Eden Environmental and Denis S. Peter of CES Inc. (*Id.* at 8-9.)

On the evening of February 28, 2011, three days before the Board was scheduled to hear the Appeal, Petitioners filed a request to stay the Order and supplement the record. (Letter from J. Talbert, Counsel to PERC and MRC, to S. Lessard, Chair BEP, regarding “Request to Stay

² The Landfill’s license contains a condition that groups together and collectively applies to: (a) JRL (formerly referred to as the West Old Town Landfill or WOTL), (b) Pine Tree Landfill in Hampden, and (c) the waste-to-energy facility, Maine Energy. Pine Tree Landfill no longer accepts waste, so effectively this condition now only applies to JRL and Maine Energy. Specifically, the condition 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 or circumstances occur that cause the Department to revise this cap;

(Department Order, #S-020700-WD-N-A, Condition 16(C) (April 9, 2004).)

³ NEWSME, the operator of JRL, is a subsidiary of Casella Waste Systems. (W2497253.3)

Solid Waste Permit Revision Order re Juniper Ridge Landfill #S-020700-WD-W-M and Supplement the Record” (Feb. 28, 2011) (the “Request to Stay and Supplement the Record”).) The stated basis of the Request to Stay and Supplement the Record, like the argument advanced in the Appeal, was that further analysis of the appropriateness of MSW as the soft layer material was needed. (*Id.* at 3-5.) Petitioners also presented affidavits of Michael Mains and Denis St. Peter asking that the affidavits be made part of the record and citing them in support of their stay request. (*Id.* at 3.)

In a letter ruling dated March 2, 2011, the Chair denied Petitioners’ request to stay the Order and their request to supplement the record with the Mains and St. Peter affidavits. The next day, the Board unanimously voted to deny the Appeal, including Petitioners’ request for a hearing. (Board Order, #S-020700-WD-W-M (March 3, 2011) (the “Board Order”).) Petitioners did not appeal the Board Order to Superior Court.

Petitioners remain undeterred by the Board’s prior decisions. Less than three months after an unsuccessful attempt to stay the Order, an unsuccessful attempt to supplement the record, and an unsuccessful appeal in which they attempted to modify the Order and require further analysis of the use of MSW as a soft layer, Petitioners effectively present the same issues and advance the same claims in their Petition.

II. The Management and Accounting of Maine Energy’s MSW Bypass

A. Incineration and Storage of Solid Waste at Maine Energy

Maine Energy in Biddeford incinerates solid waste to generate power. Solid waste is delivered by truck to the facility and deposited on the tipping floor, where the waste is stored until it is incinerated. Because of the way the facility is configured, the first waste delivered to the facility is the last waste burned.

As part of its efforts to control odor at the facility, Maine Energy attempts to zero (*i.e.*, clear) the tipping floor at the end of every week. The age of MSW, which influences organic composition of the waste, is a significant factor in the generation of odor. By its practice of zeroing the tipping floor at the end of each week, no solid waste is stored at the facility for more than a week. Each Monday the process begins again.

Maine Energy seeks to generate and sell as much power as the facility can produce and the market demands. To do this while simultaneously achieving its goal of zeroing the tipping floor each week, Maine Energy has to carefully monitor and manage the volume of waste it accepts at the facility. It must have enough waste on hand to fully operate the facility, but does not have the luxury of stockpiling waste.

Maine Energy receives most of its waste pursuant to disposal agreements, through which it seeks to obtain enough solid waste to enable full operation of the facility. The volume of solid waste Maine Energy is obligated to receive, on a daily or weekly basis, does not always exactly match the volume of waste the facility can incinerate. This is the case for a variety of reasons. For example, the facility might experience technical problems or have to conduct maintenance resulting in reduced operations or a complete shutdown. This can make it impossible for Maine Energy to burn all the solid waste it is obligated to receive. Central Maine Power Company also may order curtailed operations or a complete shutdown. In addition, because Maine Energy does not control the volume of solid waste generated by customers in its service area, even if operating at maximum capacity, the volume of solid waste Maine Energy is obligated to receive may exceed the facility's capacity to incinerate it.

B. Bypass of MSW from Maine Energy to JRL

When the volume of solid waste Maine Energy is obligated to manage exceeds the facility's capacity, Maine Energy initiates a bypass. The excess in-State MSW – *i.e.*, bypass – is sent to JRL.⁴ JRL's license specifies that the Landfill only may receive MSW bypass if it has been provided:

verifiable authorization from either the owner/operator of an incinerator or from a regulatory entity with jurisdiction over the incinerator that a bypass has been called or, for holders of interruptible contracts, the contracts have been interrupted in accordance with the contractual provisions[.]

(Department Order, #S-020700-WD-N-A, Condition 16(B) (April 9, 2004) (the "JRL License").)

In accordance with this license condition, when Maine Energy initiates a bypass event it prepares a bypass authorization letter that it sends to JRL. An example of such a letter is attached as Attachment A.⁵

MSW is delivered to Maine Energy primarily from three privately operated transfer stations located in South Portland, Waterville, and West Bath. When a bypass is initiated, rather than haul MSW from one of these transfer stations south to Maine Energy's facility in Biddeford, knowing the MSW would then have to be hauled north to JRL in West Old Town, the MSW subject to the bypass event is transported directly from the transfer station to JRL and tracked as such.⁶ Maine Energy coordinates the direct delivery of bypass to JRL by notifying the individual transfer stations, by e-mail, that a bypass has been initiated and instructing that MSW otherwise destined for Maine Energy should be hauled to JRL. This notification is provided on a transfer station-by-transfer station basis. For example, Maine Energy may be able to continue to accept

⁴ All MSW bypass received at JRL is in-State waste.

⁵ Maine Energy sends the bypass authorization letters to the Environmental Manager at JRL. The Environmental Manager's physical office is located in Hampden at the Pine Tree Landfill, thus, the Hampden address on the letter attached as an example and provided as Attachment A.

⁶ A small amount of additional MSW is delivered to Maine Energy from smaller, municipally-operated, tractor-trailer transfer stations. MSW from these municipalities is not bypassed directly to JRL.

(W2497253.3)

MSW from the South Portland transfer station, but bypass the MSW that would have been delivered from the transfer stations in West Bath and Waterville.

In sum, when Maine Energy initiates a bypass, in-State MSW may be transported to JRL from up to four locations: (1) Maine Energy’s tipping floor in Biddeford, (2) the South Portland transfer station, (3) the Waterville transfer station, and (4) the West Bath transfer station.

This sensible approach to solid waste management and the handling of Maine Energy MSW bypass is well known by the Department. The Department understands that Maine Energy’s MSW bypass sent to JRL does not all originate at Maine Energy. This is illustrated by the fact that in the Order Department staff recommended that Casella Waste Systems attempt to schedule delivery of MSW bypass for use as the soft layer “from its Maine transfer stations to Juniper Ridge.” (Order at 6.)

Petitioners also should understand that Maine Energy MSW bypass sent to JRL may be hauled directly from the three transfer stations. First, NEWSME has received PERC MSW bypass at JRL directly from a transfer station serving PERC. That Maine Energy similarly bypasses MSW should not surprise PERC or MRC. Second, in their prior Appeal of the Order, Petitioners addressed this very issue. They argued that the delivery of MSW bypass to JRL from a transfer station violated the requirement in the JRL License that only bypass from one of Maine’s four incinerators may be accepted by the Landfill. (Appeal at 7.) In other words, Petitioners argued that to qualify as bypass acceptable at JRL the MSW had to be shipped directly from the incinerator’s tipping floor. This argument was expressly rejected by the Board. (Board Order at 17 (“The Board further finds that the reference to MSW bypass coming from Maine transfer stations is based on Department Staff experience gained since issuance of the amendment license; it ensures out of State MSW does not go to JRL.”).) To the extent

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Petitioners ever had any uncertainty about the potential for Maine Energy's MSW bypass to be shipped directly from one of three transfer stations to JRL, this was resolved in March with the Board Order denying the Appeal. (Board Order at 17.) Petitioners ignore this determination by the Board in their latest filing.

C. Recording the Weight and Origin of MSW Bypass Received at JRL

Maine Energy weighs each load of MSW bypass that leaves its facility and is transported to JRL. In its annual report to both the Department and SPO, Maine Energy identifies the number of tons of MSW bypass sent from its tipping floor to JRL. Other waste-to-energy facilities, including PERC, similarly record and report the amount of MSW bypass shipped from their respective tipping floors for disposal elsewhere. As described above, Maine Energy does not weigh, and therefore does not report the weight of, MSW bypass hauled directly from transfer stations to JRL during a bypass event. NEWSME, however, does specifically account for this bypass in both monthly and annual reports to the Department.

NEWSME tracks each load of waste it receives for disposal at the Landfill. Among the information recorded is the date of delivery and the type, weight, and generator of the solid waste. Thus, each truck load of MSW bypass the Landfill receives is specifically cataloged. Maine Energy's MSW bypass shipped from the tipping floor in Biddeford is identified as having been generated at "MERC." Maine Energy bypass shipped from one of the three transfer stations is separately identified. Each transfer station is assigned its own generator name: (1) Troiano (South Portland), (2) Capital City (Waterville), and (3) T&R Carter (West Bath). Bypass from PERC's tipping floor is assigned the generator name PERC.

NEWSME provides to the Department the load-by-load information it collects in monthly reports. These reports make completely transparent each truck load of MSW bypass

received at JRL, the weight of the MSW bypass, and which of the four Maine waste-to-energy facilities is bypassing the waste. As an example, excerpts from the monthly report for December 2009 are included as Attachment B.⁷ NEWSME's annual report filed with the Department also specifies the amount of MSW bypass received at JRL each year.

This system of accounting for the MSW bypass both by Maine Energy and NEWSME has been in place for years and is understood and accepted by the Department.

DISCUSSION

III. There is No Reason for the Board to Modify the Order

The Department's rules provide that the Board may modify a license if it finds any one of seven conditions is met, including:

- A. The licensee has violated any condition of the license;
- B. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;
- C. The licensed activity poses a threat to human health or the environment; [or]
-
- F. 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[.]

(DEP Rules, Ch. 27.) Even upon finding one of these conditions is met, the Board retains discretion whether to modify a license.

The Petitions argue that each of the four conditions listed above have been met. As explained below, they are incorrect.

⁷ Due to the length of the entire December 2009 monthly report, only the cover letter and first page of the report are provided in Attachment B, along with the page cataloging the MSW bypass received at JRL that month.

(W2497253.3)

A. NEWSME Operates JRL in Compliance with the Landfill's License

Petitioners allege that NEWSME operates the Landfill in violation of three different conditions of the JRL License, specifically Conditions 16(A), (B), and (D). (Petition at 3.) In support of these allegations Petitioners rely on Michael Mains' review of publicly available documents submitted by Maine Energy and NEWSME to both the Department and SPO, such as Maine Energy's annual reports and NEWSME's monthly reports. (*Id.* at 3-5; *see also id.* at Ex. 3 (containing the "Mains Affidavit").)

The Mains Affidavit and the argument it purports to support – that SPO and/or NEWSME have violated Conditions 16(A), (B), and (D) of the JRL License – should be dismissed, without consideration of the merits of the argument for two separate reasons.

First, the affidavit is the very same document submitted by Petitioners to the Board on February 28, 2011 with their Request to Stay and Supplement the Record. The affidavit was untimely then and was properly rejected. Consideration of this affidavit is no more appropriate now. Consideration of this same document at this juncture, in what amounts to a second appeal of the Order by Petitioners, would effectively allow Petitioners to do an end run around the requirements governing supplementation of the Department's permitting record and authorize a legally impermissible "do over" for PERC and MRC.

Second, the Mains Affidavit simply addresses information well known by the Department at the time it issued the Order. In fact, the information is from various reports held and reviewed by the Department. The only information available to and reviewed by Mains that was not available to the Department at the time it issued the Order in September 2010 was information in NEWSME's monthly reports for September through December 2010. Petitioners and Mains, however, do not allege any violations specific to this four month period. Thus, there is no reason

to consider the merit of their argument that NEWSME has violated Conditions 16(A), (B), and (D) of the JRL License. The facts Petitioners rely on in making this claim have long been known and the claim itself has been fully resolved. As stated in the March 3, 2011 Board Order:

Department staff track, by incinerator, the volume of unprocessed MSW bypass sent to JRL, the volume of refuse-derived fuel sent to JRL, and the annual refuse-derived fuel yield at Maine Energy. *No violations of Conditions #16, 17, or 19 of the amendment license [i.e., the JRL License] have occurred.*

(Board Order at 5 (emphasis added).) *Res judicata*, the legal doctrine that prevents repetition of the same issues and claims by the same party, applies here.⁸

If, for the sake of argument, the Board reaches the merits of Petitioners' claim, as explained below, its finding should be no different now than in March.

1. NEWSME Operates JRL in Compliance with Condition 16(A)

⁸ Long recognized in Maine:

The doctrine of *res judicata* is a court-made collection of rules designed to ensure that the same matter will not be litigated more than once. The doctrine has developed two separate components, issue preclusion and claim preclusion. Issue preclusion, also referred to as collateral estoppel, prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and ... the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding. Claim preclusion bars relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action.

Macomber v. MacQuinn-Tweedie, 2003 ME 121, ¶ 22, 834 A.2d 131, 138-139 (internal citation and quotation omitted). *Res judicata* applies to administrative decisions such as the Board Order:

The processes used in our administrative agencies are now substantially similar to those employed by courts, and their decisions may be accorded the finality that attaches to judicial judgments. The rules of *res judicata* may be applied to agencies with respect to their own adjudications.

Maines v. Secretary of State, 493 A.2d 326, 328 (Me. 1985). Both issue and claim preclusion apply here. Additionally, some of the reasons to apply *res judicata* are to "prevent harassing and repetitious litigation, to avoid inconsistent holdings which lead to further litigation, and to give sanctity and finality to judgments." *Beal v. Allstate Inc. Co.*, 2010 ME 20, ¶ 14, 989 A.2d 733, 739 (internal citation and quotation omitted). These reasons apply here, as well.

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Condition 16(A) of the JRL License establishes that the Landfill only may receive MSW bypass from one of the four waste-to-energy facilities in Maine, including Maine Energy and PERC. Petitioners advance two reasons why they claim this condition has been violated.

First, as they already did in their unsuccessful Appeal, Petitioners claim that the Maine Energy MSW bypass transported directly from a transfer station to JRL is not “bypass.”⁹ (Petition at 3-5.) As discussed in the background section above and already addressed by the Board in its rejection of Petitioners’ Appeal, this argument reflects a misunderstanding of the management of Maine Energy’s bypass. (Board Order at 13-14, 17.) When Maine Energy initiates a bypass, rather than the three transfer stations shipping MSW to Biddeford, only for that MSW to then be hauled to JRL, MSW that would have been destined for Maine Energy is transported directly to JRL. This is Maine Energy bypass.

⁹ In the Appeal, Petitioners argued:

Moreover, the license mandated that the “MSW bypass” sent to JRL had to be from the following Maine-based sources: PERC, Maine Energy, and “other MSW incinerators in Maine.” See License #2-020700-WD-N-A [sic] at § 16(A). In contrast, the Order recommends that CWS [Casella Waste Systems] schedule the delivery of MSW required for the soft layer directly from its Maine *transfer stations*. See Order at page 6, Section 3 (emphasis added). Therefore, the sources of waste listed in the Order differ substantially from those specifically allowed in the underlying license, in violation of Section 16(A).

(Appeal at 7.) The Board rejected this argument. (Board Order at 13-14, 17.) Nevertheless, Petitioners argue once again:

SPO has violated Condition 16(A) of the License Amendment by: (1) allowing the disposal of unprocessed MSW at JRL that is not bypass in violation of Condition 16(A) of the License Amendment; and (2) allowing the disposal of unprocessed MSW from a source other than (a) the PERC incinerator in Orrington; (b) the Maine Energy incinerator in Biddeford; (c) waste delivered under an interruptible contract with PERC; or (d) waste delivered in excess of processing capacity at other MSW incinerators in Maine.

(Petition at 3.) This argument is no different than the one they previously made and that the Board previously addressed. This repetition of arguments should not be permitted. This is just another example of why dismissal of the Petition, without consideration of the arguments it presents, is appropriate. PERC and MRC should not be allowed to continually waste the time of Department staff, the Board, SPO, NEWSME, and Maine Energy with the same, inaccurate arguments over and over again.

(W2497253.3)

Second, Petitioners contend that deliveries of Maine Energy MSW bypass to JRL are too regular for this waste to be bypass. (Petition at 4.) This argument also reflects a misunderstanding of how Maine Energy operates. Maine Energy strives to zero its tipping floor at the end of each week in order to control odor. PERC, which indefinitely stores MSW on its tipping floor, does not. Thus, Maine Energy does not have the same flexibility to store waste during maintenance periods, during CMP-ordered downtimes, when it experiences technical problems, or, when operating at full capacity, the volume of waste Maine Energy is obligated to manage simply exceeds capacity. In order for Maine Energy to continue to ensure it has sufficient supplies of waste to enable it to maximize power output, while also zeroing its tipping floor to control odor, it also will have a more frequent need (than PERC, for example) to bypass MSW.

The Department is well-aware of the manner in which Maine Energy operates and the efforts it makes to control odor by, among other things, zeroing the tipping floor. There are no secrets. The monthly reports NEWSME submits to the Department identify the amount and frequency of Maine Energy MSW bypass delivered to JRL. As noted in the Order, since issuance of the JRL License in 2004, MSW bypass totals have remained steady and the 310,000 ton-per-year cap – which only applies to Maine Energy and JRL – has been met. (Order at 5.)

In sum, all of the MSW bypass received at JRL is received in compliance with Section 16(A) of the JRL License.

2. NEWSME Operates JRL in Compliance with Condition 16(B)

Condition 16(B), quoted above on page 6, provides that NEWSME shall not accept MSW bypass at JRL without “verifiable authorization” that a bypass event has been initiated. The condition language specifies that the authorization may be provided by the owner/operator of the

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waste-to-energy facility initiating the bypass. As described above, Maine Energy provides the required authorization to NEWSME in the form of a bypass letter, explaining that a bypass has been initiated, the reasons for the bypass, and the expected duration. (*See, e.g.*, Attachment A (containing an example letter).) As the Department recognizes and as the Board has determined appropriate, when Maine Energy initiates a bypass, MSW may be sent to JRL from Maine Energy's tipping floor as well as from the three transfer stations in Maine. (Order at 6; Board Order at 17.) Similar to Maine Energy, when PERC declares a bypass and sends MSW to JRL, PERC provides NEWSME with a bypass authorization letter. (*See* Attachment C (containing an example of one of PERC's letters).) These letters satisfy Condition 16(B).

Petitioners' contorted argument deserves little mention. They label MSW bypass sent directly from one of the transfer stations to JRL as "unallocated" bypass, weaving out of whole cloth a new category of material whose sole reason for existence is to support Petitioners' argument. (Petition at 4.) They then conclude that because Maine Energy does not include the weight of "unallocated" bypass in its annual report that this MSW sent directly from the transfer stations to JRL is "without 'verifiable authorization.'" (*Id.* at 5.) This argument suffers at least two fatal flaws. First, the "verifiable authorization" requirement, contained in the JRL License, is not a reporting requirement for anyone, let alone for Maine Energy. The letters declaring the bypass provide the authorization and their existence is easily verifiable. Second, what Petitioners call "unallocated" bypass¹⁰ is simply Maine Energy MSW bypass hauled directly from one of the transfer stations to JRL. This bypass is tracked, accounted for, and reported to the Department in NEWSME's monthly reports. This method of record keeping, and the

¹⁰ In addition to the flawed premise of Petitioners' argument – *i.e.*, what they call "unallocated" bypass is Maine Energy MSW bypass authorized for receipt at JRL directly from transfer stations – the example and calculations they provide on pages 4 and 5 of the Petition contain several errors. A discussion of these errors and an actual, accurate example of how Maine Energy and NEWSME account for MSW bypass totals is provided in Attachment D.

(W2497253.3)

management of MSW bypass it thoroughly documents – management that allows NEWSME to operate JRL in compliance with Condition 16(B) without imposing the impractical and burdensome requirement of hauling MSW south to Maine Energy only for the same MSW to then be hauled north to JRL – is transparent, well understood by the Department, and capable of being understood by any member of the public with an interest in solid waste management.

3. NEWSME Operates JRL in Compliance with Condition 16(D)

Condition 16(D) provides, in relevant part, that NEWSME “shall notify the Department if waste deliveries in excess of processing capacity at MSW incinerators continue from a particular incinerator for a period exceeding 1 week.” (JRL License at 60.) Petitioners claim that NEWSME has violated this provision on four occasions since 2008. (Petition at 5.) Their argument is based on a faulty reading of the condition language in not one, but two, respects.

First, Petitioners interpret the Condition 16(D) “notice” requirement as obligating NEWSME to send a formal letter to the Department when MSW bypass from a single facility exceeds a week. (*Id.*) Notice, however, can take many forms. It has been common practice for NEWSME to provide such notice with a phone call to JRL’s Department Project Manager when a bypass event carried into the seventh consecutive day, a day earlier than the condition requires, or in the course of regular discussions with the Project Manager. (NEWSME routinely coordinates with the Department Project Manager on a variety of issues nearly every week, maintaining a constant dialog between the agency and the operator of the Landfill.) This practice, accepted by the Department and followed by NEWSME, satisfies the license condition.

Second, Petitioners read into the condition a requirement that notice be provided, in whatever form, on the seventh day of a bypass event. Mains, in his own affidavit, acknowledges this requirement does not exist.

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Though Petitioners failed to provide the dates of the four alleged violations in the Petition, SPO and NEWSME believe they have identified the four occasions between 2008 and 2010 on which MSW bypass from a single facility, Maine Energy, is alleged to have continued for seven days or more: May 12-21, 2008; May 17-23, 2009; September 21-27, 2009; and August 15-21, 2010.¹¹ Petitioners' claim that notice for all four of these periods was required under Condition 16(D). (*Id.* at 5.) This is simply wrong. The condition language expressly states that notice is required for a bypass period *exceeding* one week. That a week is, in fact, seven days is recognized by Mains. (*Id.*, Ex. 3 at ¶ 17 (“bypass events exceeding one week in length (7 days) must be reported to DEP”).) A bypass period exceeding one week, of course, would be eight consecutive days or more. The May 2009, September 2009, and August 2010 bypass events each were seven days and therefore did not “exceed” one week. A need for notice, therefore, was not triggered. Notice of the single event since 2008 exceeding a week, the May 2008 bypass event, would have been provided in a phone call to, or in the course of regular discussions with, the Department’s Program Manager for JRL, consistent with NEWSME’s policy. Additionally, the occurrence of this event was clearly documented in the monthly report submitted to the Department.

NEWSME has not violated Condition 16(D).

B. The Department Issued the Order with a Full Understanding of the Facts

In their second principal argument in support of their request to modify the Order, Petitioners suggest the Department inappropriately excluded MSW bypass used as the soft layer

¹¹ The August 2010 monthly report identified a single load of solid waste delivered to JRL on August 15 as MSW bypass. Initially, this truck load was improperly logged as MSW Bypass. After submission of the August monthly report this error was corrected. Also, prior to submission of NEWSME’s 2010 annual report this mistake was corrected. This correction is reflected in the end-of-year totals in NEWSME’s 2010 annual report. As a result, in 2010 there were no seven or more day periods during which JRL received MSW bypass from Maine Energy or any of the other Maine incinerators.

(W2497253.3)

from the 310,000 ton cap. (*Id.* at 5-6.) This was the central claim in their Appeal (*see, e.g.*, Appeal at 6-7), which the Board rejected (Board Order at 14-15). The only difference in the Petition is that instead of directly asserting the bypass used in soft layer should not be excluded from the cap, Petitioners allege the Department was not fully informed when it approved that exclusion. This is just a different spin on the same, previously rejected argument. Without consideration of the merits, this argument should be dismissed based on the doctrine of *res judicata*.

Even if Petitioners' argument is considered, it has no basis. Petitioners suggest that SPO (and by inference NEWSME) duped the Department into issuing the Order and excluding MSW bypass used for the soft layer from the 310,000 ton cap because "SPO did not disclose to the Department the fact that MSW was sent to JRL on a regular and continuous basis, even in the summer months when there is no planned shutdown." (Petition at 6.) As repeatedly noted in this filing and as Petitioners are well aware, the date, weight, and source of every truck load of MSW bypass delivered to JRL is reported to the Department on a monthly basis. Petitioners cannot, in good faith, claim that SPO and NEWSME misled the Department about the timing or frequency of MSW bypass deliveries to JRL.

C. The Use of MSW Bypass as the Soft Layer at JRL Does Not Pose a Threat to Human Health or the Environment

Petitioners argue that the use of MSW as the soft layer at JRL is unsafe and threatens human health and the environment. (Petition at 6-7.) They raised the identical argument in the Appeal. (Appeal at 6.) The Board rejected the argument, noting the Department's experience monitoring other landfills that use MSW in the soft layer, that "problems with the use of MSW in the soft layer have not been documented," and that the Department, based on its experience, in fact, *recommends* using MSW as the soft layer in new landfill cells. (Board Order at 15.) The

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Board further found “that MSW bypass is a waste already licensed for disposal at JRL, and there is no reason to expect MSW bypass used in the soft layer to impact the environment, public health or welfare, or create a nuisance since JRL already successfully handles MSW bypass.” (*Id.* at 16.) Petitioners’ spurious argument should not be entertained for a second time and should be dismissed without consideration of its merit based on the doctrine of *res judicata*.

If the Board considers Petitioners’ argument on its merits again, the argument should be rejected again, for the very same reasons as before. Additionally, since issuing the Order, the Department prepared a summary analysis of the many technical reasons why it recommended use of MSW for the soft layer at JRL. This summary analysis, included as Attachment E, confirms the Department’s prior determination in the Order and the Board’s prior determination in denying the Appeal – that the use of MSW bypass for the soft layer is not only protective of human health and environment, but the preferred material for use as the protective layer in new landfill cells. (Order at 5-6 (noting that staff determined MSW bypass “best meets the purpose of the soft layer” and “recommended” the use of MSW bypass as the soft layer at JRL because “at other secure landfills in Maine MSW has been found by staff to be the best material for the soft layer”); Board Order at 14-16 (affirming the staff’s recommendation and the reasoning in the Order).)

D. There Has Been No Change in Condition or Circumstance Requiring Modification of the Order

The fourth and final argument advanced by Petitioners is that there has been a change in condition or circumstance justifying modification of the Order. (Petition at 7-8.) There are two components to this argument, both of which are unavailing.

First, Petitioners selectively quote and mischaracterize a statement made by Department staff at the March 3, 2011 Board meeting. Based on this mischaracterization, Petitioners claim

the statement reflects a “change in position” by the Department with regard to why the Order was issued. (*Id.* at 8.) Specifically, Petitioners assert that the Department backtracked from what was written in the Order, which stated: “Staff recommend that MSW bypass be the primary waste used in the soft layer at Juniper Ridge because at other secure landfills in Maine MSW has been found by staff to be the best material for the soft layer.” (Order at 6.) Petitioners offer the following statement as showing the change in position:

First of all, I think it’s very important to keep in mind that the Minor Revision license that is the subject of our conversation this morning is really focused on an increase in the 310,000 tons at Maine Energy. That license [*i.e.*, the Order] does not explore nor evaluate the merits of using MSW as a soft layer [at the] landfill. That’s something that we don’t approve in this particular way.

(Petition at 7 (quoting the Department’s Paula Clark) (without emphasis added by Petitioners).)

The alleged change in position, Petitioners claim, necessitates modification of the Department’s finding in the Order. (*Id.*)

As an initial matter, the basis for the Department’s approval of the Order is stated in, and evident from, the Order itself. Petitioners abandoned any further right to challenge the basis for the Order when they chose not to appeal the Board Order to Superior Court. If they felt statements made by Department staff during the course of the Board’s consideration of the appeal on March 3 called into question the basis for the Order, these concerns should have been expressed on March 3¹² and pursued further in an appeal of the Board Order to court. Having opted not to do so, Petitioners should not be permitted to revive those claims now. *See Kurtz & Perry, P.A. v. Emerson*, 2010 ME 107, ¶ 19 n.1, 8 A.3d 677 (noting the Law Court has established that one’s failure to exercise his rights to an available appeal results in a *res judicata*

¹² SPO and NEWSME have not reviewed the audio of the March 3 meeting and do not believe there is any reason to do so. SPO and NEWSME acknowledge it is likely that Petitioners expressed these same concerns on March 3. If they did, that would only further support dismissal of their argument without further consideration by the Board.

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effect on the subsequent litigation of identical issues and claims dealt with in the administrative decision).

Additionally, the statement quoted by Petitioners does not reflect a change in the Department's position. What Ms. Clark was conveying in the quoted remarks is that the Department does not approve the type of material used in the soft layer at a landfill through a license modification documented in the form of a minor revision order. Rather the type of material used in the soft layer is simply approved by the Department through consultation with the landfill owner/operator. Thus, the Order only was needed because the Department determined a minor revision to the JRL License was required to establish that the MSW bypass used as the soft layer would not count towards the 310,000 ton cap. This explanation was offered by Department staff to help the Board understand why there was not more elaborate discussion of the properties of MSW as a soft layer material in the Order, as Petitioners contended there should have been.

This is not to say, however, that the Department did not consider the appropriateness of MSW as the soft layer material in the course of issuing the Order. As the Board found, the Department did properly consider whether MSW should be the material used at JRL (Board Order at 15-16), and as evident from the Department's explanation of its analysis, the Department made a reasoned and appropriate determination (see Attachment E).

The second component to Petitioners' claim that a change in condition or circumstance warrants modification of the Order is yet another attempt to take a second bite at the apple and rejuvenate their failed Appeal. In the Order, in support of its determination that MSW was appropriate for use in the soft layer at JRL, the Department highlighted problems it had observed at other landfills using different materials in the soft layer, specifically noting problems that had

arisen from the use of front-end process residue (“FEPR”). (Order at 6.) The Department explained that FEPR from incinerators, ash, contaminated soils and bark have the potential to:

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 sift 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.*)

Petitioners objected to this negative treatment of FEPR in the Appeal as unsupported (Appeal at 5) and requested modification of the Order “to remove all references relating to the suitability (or lack thereof) of other waste streams placed as soft layer material, including but not limited to FEPR” (*Id.* at 10.). They similarly objected to the Department’s discussion of FEPR in their Request to Stay and Supplement the Record, submitting with that request an affidavit by Denis St. Peter that they claimed showed FEPR does not pose the risks when used for the soft layer that the Department identified in the Order. (Request to Stay and Supplement the Record at 1-2 & St. Peter Affidavit.)

The arguments Petitioners advance now about the treatment of FEPR in the Order are identical to the arguments they advanced previously. The St. Peter Affidavit is identical, as well, having already been submitted with the Request to Stay and Supplement the Record. Petitioners attempt to retry this portion of the Appeal and submit a previously disallowed affidavit should not be allowed based on the doctrine of *res judicata*. Additionally, that they are making the identical argument and presenting the identical affidavit as before, underscores that there has been no change in condition or circumstance.

Finally, in support of their argument that FEPR is a good soft layer material, Petitioners rely on a report prepared by Sevee & Maher Engineers, Inc. for ecomaine in which Sevee &

Maher investigated sump clogging at ecomaine's South Portland landfill.¹³ (Petition, Ex.4 (the report is attached to the St. Peter Affidavit).) Petitioners characterize this report as showing that clogging of the landfill's leachate drainage system was "due to the use of geotextiles," as opposed to material used as the soft layer. (*Id.* at 8.) Thus, they reason, contrary to the Department's statements in the Order, FEPR and similar materials such as those used in the South Portland landfill, are good materials to use in the soft layer. The report, however, supports the Department statement in the Order, quoted above, that soft layer materials that are too coarse and either allow passage of finer materials or contain a high component of finer materials create the potential for clogging. In the executive summary of the report, Sevee & Maher explain:

The principle [sic] cause of clogging was determined to be the soil component of the tire chip layer. Apparently, the tire chips used for the sump construction contained a considerable amount of fine grained material (silt and clay). The somewhat open void space within the tire chip layer allowed the fine materials to shift downward during periods of infiltration and rising/falling leachate levels within the sump area. The fine grained materials were retained on the geotextile layers (especially the outer most layer) thereby limiting the drainage capacity of the overall leachate collection system in the sump area. Minimal physical clogging of the sand and stone components of the leachate was detected as part of [the] investigation, further supporting that the soil fraction of the tire chips was the principle [sic] cause of clogging.

(*Id.* Ex. 4 (see page 1 of ecomaine report).) In sum, the report referenced by Petitioners does not support their claim.

IV. There is No Need for the Board to Hold a Hearing

Petitioners offer no new evidence. The evidence they again seek to offer previously was rejected by the Board because, among other things, it was untimely. They opted not to appeal this ruling or the Board Order. They cannot now submit the exact same evidence only under a

¹³ Petitioners state the ecomaine report investigated "clogging issues at Pine Tree Landfill." (Petition at 8.) This is not correct. The report investigates clogging at ecomaine's South Portland/Scarborough landfill.

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different procedural label (now presented as a petition to modify) and expect the Board to take up the matter a second time and restart the Superior Court appeal clock.

Holding a public hearing rests with the sound discretion of the Board. As noted extensively above, there is nothing new in the Petition that has not already been considered and rejected by the Board in the Board Order. There is no credible conflicting technical information regarding a license criterion and it is not likely that a public hearing will assist the Board in understanding this matter. There is no need for the Board to exercise its discretion to hold a hearing; Petitioners' request should be denied.

CONCLUSION

Petitioners seek to rejuvenate the failed arguments of their recent Appeal in the present Petition. Based on the doctrine of *res judicata*, fundamental fairness, and administrative efficiency, they should not be permitted to do so and the Petition should be dismissed. Should the Board consider the merits of the Petition, however, the outcome should be the same. PERC and MRC have offered no new evidence or justification for the Board to reopen or modify the Order it affirmed on appeal only months ago.

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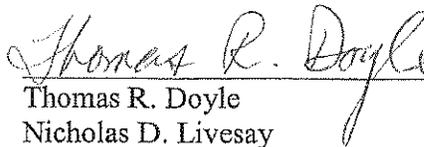
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