

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

Mark C. Draper, Chair

William F. Hinkel
Executive Analyst

Ruth Ann Burke
Board Clerk

June 28, 2021

SENT VIA ELECTRONIC MAIL ONLY

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**Re: Appeal of Department Order S-010735-WD-YB-N
Notice of receipt of appeal and deadline for comment on proposed supplemental evidence**

Dear Participants and Interested Persons:

This letter acknowledges receipt of the appeal of Conservation Law Foundation (CLF) of the May 11, 2021, Order of the Commissioner of the Department of Environmental Protection (Department) conditionally approving the application of Waste Management Disposal Services of Maine, Inc. (WMDSM or Licensee) to construct a 7.75-million cubic yard expansion at the site of the existing WMDSM landfill, located in Norridgewock (Department Order S-010735-WD-YB-N). CLF's appeal was timely filed with the Board of Environmental Protection (Board) on June 10, 2021. A copy of the appeal is available to view or download from the Department's webpage <https://www.maine.gov/dep/waste/crossroadslandfill/index.html>.

Identification of proposed supplemental evidence

The record on which the Board decides an appeal is generally limited to the record considered by the Department staff in its review of the application, any supplemental evidence admitted by the Board, and additional evidence obtained from a hearing of the appeal, if such a hearing is held. CLF's appeal

includes information that is not in the Department's licensing record and which is identified by the Appellant as proposed supplemental evidence. CLF requests to introduce as proposed supplemental evidence Exhibit 2: A portion of the 2019-2020 Surface Water Ambient Toxic Monitoring Program Final Report.

CLF does not identify any other supplementary evidence in its appeal. However, footnotes 55, 70, 71, 72, 73, 89, and 90 reference materials that are outside of the administrative record prepared by Department staff in its review of the application. An appellant seeking to supplement the record must provide copies of all proposed supplemental evidence with the written appeal. *Rule Concerning the Processing of Applications and Other Administrative Matters*, Chapter 2 § 24(D)(1).

Additionally, CLF's appeal includes in footnotes 19, 37, 52, 55, 63, 68, and 84 electronic links to materials that are not in the administrative record prepared by Department staff in its review of the application. Chapter 2 § 24(B)(2) disallows the acceptance of electronic links to documents. Therefore, all electronic links provided in the appeal are struck and the materials referenced in those footnote links will not be considered by the Board.

Licensees' response to proposed supplemental evidence

Chapter 2, § 24 governs the process for Board appeals of Department licensing decisions. This section of Chapter 2 is attached to this letter for your convenience. In accordance with Chapter 2, § 24(C)(2)(a), because there is proposed supplemental evidence included with this appeal (CLF Appeal Exhibit 2), the Licensee may submit written comment on the admissibility that evidence and may offer proposed supplemental evidence in response to the Appellant's proposed supplemental evidence. The Licensee may also comment on the admissibility of the materials referenced in footnotes 55, 70, 71, 72, 73, 89, and 90, but not attached to the appeal.

Section 24 (D) of the rule allows supplemental evidence to be admitted in an appeal when the Board Chair finds it is relevant and material to the appeal, and that:

- a) the person seeking to supplement the record has shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time; or
- 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.

The Licensee's response to the proposed supplemental evidence **must be filed by 5:00 p.m. on July 13, 2021**. If the Licensee submits responsive proposed supplemental evidence, the Appellant will have an opportunity to comment on whether it meets the test for admittance into the record.

Filing of documents

All filings must be copied to the service list. A copy of the service list is attached to this letter. Any revisions to the service list will be circulated to all participants.

The filing of any submission or the service of any document or communication upon a party to the appeal proceeding is deemed complete when the document or communication is sent to the party or the

party's designated representative by electronic mail, postal mail, in-hand delivery, or telefax. Electronic mail is preferred, provided the signed original document is received by the Board within three working days of the filing date. Any participant or interested person may request of the Board a paper copy of any filing in this matter. In the absence of such request, the Board and Board staff will provide service by electronic mail only. The Board staff or Board Chair may require the service of any document or communication upon a party to the appeal proceeding to be completed by paper copy using postal mail.

Filings with the Board must be directed to:

Mark C. Draper, Chair
Board of Environmental Protection
c/o Ruth Ann Burke
17 State House Station
Augusta, ME 04333-0017
ruth.a.burke@maine.gov

Also attached is a copy of the Interested Persons List to whom notice of Board meetings and final actions of the Board will be provided.

If you have any questions, you may contact Board Executive Analyst William F. Hinkel at bill.hinkel@maine.gov (207) 314-1458 or Assistant Attorney General Katherine Tierney at katherine.tierney@maine.gov (207) 626-8897.

Respectfully,



Mark C. Draper, Chair
Board of Environmental Protection

cc (via e-mail only): Service List (June 25, 2021)
Interested Persons List (June 25, 2021)

Attachments:

Service List (June 25, 2021)
Interested Persons List (June 25, 2021)
Excerpt from Chapter 2 (section 24)

Board of Environmental Protection

Unless otherwise specified, all filings are due by 5:00 p.m. to Mark C. Draper c/o Ruth Ann Burke

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**Board of Environmental Protection Appeal of
Crossroads Landfill Phase 14 Expansion, #S-010735-WD-YB-N
By Conservation Law Foundation
Service List, June 25, 2021**

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**Board of Environmental Protection Appeal of
Crossroads Landfill Phase 14 Expansion, #S-010735-WD-YB-N
By Conservation Law Foundation
Interested Persons, June 25, 2021**

Interested Persons

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- (1) Except as described below, written consent must be applied for no later than two weeks after any transfer of ownership of property subject to a license. Pending determination on the application for approval of a transfer, the transferee shall abide by all of the conditions of such license, and is jointly or severally liable with the original licensee for any violation of the terms and conditions thereof. The transferee shall demonstrate to the Department's satisfaction the technical and financial capacity and intent to: (a) comply with all terms and conditions of the applicable license, and (b) satisfy all applicable statutory and regulatory criteria.
- (2) The transfer of a license for a hazardous waste facility, solid waste disposal facility, waste oil facility and biomedical waste facility must be approved prior to the transfer of ownership of the property which is the subject of the license.
- (3) A license pertaining to the occupational activities of persons (e.g. transporter licenses, underground oil storage tank installers, asbestos or lead abatement professionals) is not transferable, unless specifically allowed by statute or rule.
- (4) If the proposed transferee demonstrates that the original licensee no longer has sufficient title, right or interest in the property subject to the license, the Department may allow the transfer application to be processed without the signature of the original licensee.

22. Petition for Corrected License. Within 30 days following the effective date of a license, any person, including the Department, may request in writing that the Commissioner or Board issue a corrected license to correct any clerical error or omission, or to clarify the meaning of a license term or condition when that clarification explains, but does not modify the substance of that license term or condition. The Commissioner or Board shall consider the petition within 30 days of receipt of such request. The filing of a petition under this section does not serve to stay the deadlines for any appeal of a Commissioner or Board Order, and the effective date of any corrected order shall be the same as the original order.

23. Petition for Surrender of License. Any licensee may petition the Commissioner to surrender its license if the licensee demonstrates to the Department's satisfaction that it has never used the license for its intended purpose nor begun any of the activities approved under the license and does not intend to do so in the future. The petition must also provide that the licensee waives notice and opportunity for hearing. In addition, an agronomic utilization license may be surrendered at any time in accordance with 38 M.R.S. §1310-N(6-D) and a Site Location license for a partially constructed development or a completed borrow, clay or topsoil mining operation may be rescinded in accordance with 38 M.R.S. §489-C.

The Commissioner may require written and photographic documentation, certified statements and sampling analyses, in addition to any other relevant information, as demonstration that the activities described in the license have not been undertaken. The Commissioner shall require that a petition for surrender of a license and written approval of that surrender be recorded in the registry of deeds for any license previously recorded in the registry of deeds.

When the Commissioner approves the surrender, the license is deemed null and void as of the date of approval.

24. Appeal to the Board of Commissioner License Decisions. Final license decisions of the Commissioner may be appealed to the Board by persons who have standing as aggrieved persons.

Notwithstanding Section 2(B), license decisions that may be appealed to the Board include acceptances of permit by rule notifications, decisions on minor revisions, and public benefit determinations.

- A. **Appeal Period.** Within 30 days of the filing of a license decision by the Commissioner with the Board, an aggrieved person may appeal to the Board for review of the Commissioner's decision. The written appeal must specify whether the appellant desires the Board to hold a hearing on the appeal and whether the appellant requests that supplemental evidence be included in the record on appeal. An appellant who does not request a hearing or propose supplemental evidence in the written appeal is considered to have waived any opportunity for a hearing or inclusion in the record of supplemental evidence. The decision to hold a hearing is discretionary with the Board. An untimely appeal must be summarily dismissed by the Chair unless notice of the Commissioner's license decision was required to be given to the person filing an appeal and the notice was not given as required. The Chair's dismissal of an appeal for untimeliness is not subject to appeal to the full Board and is final agency action. In response to a motion by the licensee, the Chair may dismiss an appeal if the Chair decides an appellant is not an aggrieved person. The Chair's ruling to dismiss an appeal for lack of standing as an aggrieved person is appealable to the full Board. The filing of an appeal to the Board does not stay the license decision.
- B. **Content of Appeal**
- (1) The written appeal must include evidence demonstrating the appellant's standing as an aggrieved person; the findings, conclusions or conditions objected to or believed to be in error; the basis of the objections or challenge; and the remedy sought.
 - (2) Exhibits attached to an appeal must be clearly labeled indicating date and source, and indicating whether the exhibit is in the existing record or is proposed supplemental evidence. Unlabeled exhibits may be rejected by the Chair. Electronic links to documents will not be accepted. In the case of lengthy documents, the appellant must specify the relevant portions.
 - (3) If the appellant requests that supplemental evidence be included in the record and considered by the Board, such a request, with the proposed supplemental evidence, must be submitted with the appeal. A request to supplement the record must address the criteria for inclusion of supplemental evidence set forth in section 24(D).
 - (4) If a hearing is requested, the appellant must provide an offer of proof regarding the testimony and other evidence that would be presented at the hearing. The offer of proof must consist of a statement of the substance of the evidence, its relevance to the issues on appeal, and whether any expert or technical witnesses would testify.
 - (5) An appeal must be addressed to:

Chair, Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017
 - (6) Appeals must be copied to the Commissioner, the licensee and, if a hearing was held on the application, any intervenor. The Board staff shall provide

notice of the appeal to persons on the Department's interested persons list for the application or license at issue.

- C. **Response to Appeal.** A written response to the merits of an appeal may be filed by a licensee (if the licensee is not the appellant) and any person who submitted written comment on the application (hereafter collectively referred to as the respondents). All proposed supplemental evidence is subject to the labeling and form requirements of section 24(B)(2) and the criteria for inclusion of supplemental evidence set forth in section 24(D).
- (1) If no supplemental evidence is offered by an appellant, the following provisions apply:
 - (a) If no supplemental evidence is offered by an appellant, a respondent's complete response to the merits of the appeal must be filed within 30 days of the date of the Board's written acknowledgement of receipt of the appeal with a copy to the appellant.
 - (b) If no supplemental evidence is offered by an appellant, but a respondent offers supplemental evidence in response to the appeal, the appellant may file argument addressing only the admissibility of the proposed supplemental evidence within 45 days of the date of the Board's written acknowledgement of receipt of the appeal.
 - (2) If supplemental evidence is offered by an appellant, the following provisions apply:
 - (a) If supplemental evidence is offered by an appellant, a respondent may submit written comment on the admissibility of the proposed supplemental evidence and may offer proposed supplemental evidence in response to the appellant's proposed supplemental evidence and the issues raised on appeal. The respondent's submission is due within 15 days of the date of the Board's written determination as to which of the appellant's exhibits constitute proposed supplemental evidence unless the Board establishes an alternative schedule.
 - (b) If a respondent offers any supplemental evidence, the appellant may submit written comment on the admissibility of the proposed supplemental evidence within 15 days of the date of the Board's written determination as to which of the respondent's exhibits constitute proposed supplemental evidence.
 - (3) The Chair shall rule on the admissibility of all proposed supplemental evidence in accordance with section 24(D) within 10 days of receipt of all comments regarding admissibility of all of the proposed supplemental evidence.
 - (4) Within 20 days after the Chair's decision on the admissibility of all of the proposed supplemental evidence, the respondent's complete response to the merits of the appeal must be filed.
 - (5) Further evidence may not be provided directly to Board members or distributed at Board meetings or hearings without specific permission of the Chair.

- D. **Record on Appeal, Supplemental Evidence.** The record for appeals decided by the Board is the administrative record prepared by Department staff in its review of the application, unless the Board admits supplemental evidence or decides to hold a hearing on the appeal.
- (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 as provided in section 24(B)(2) and section 24(C).
 - (2) The Board may allow the record to be supplemented on appeal when it finds that the evidence offered is relevant and material and that:
 - (a) the person seeking to supplement the record has shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time; or
 - (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 licensing process.
 - (3) The Chair may accept into the record additional evidence and analysis submitted by Department staff in response to issues raised on appeal or supplemental evidence offered by the appellant(s) or licensee(s).
- E. **Alternative Dispute Resolution.** If the appellant(s) and licensee(s) agree to use mediation or another form of alternative dispute resolution to resolve the appeal and so notify the Board, the Board will not hear the matter until the conclusion of that effort, provided the effort at resolution does not extend beyond six months of filing of the appeal. The Board may accept, reject or modify any mediated settlement that does not include withdrawal of the appeal.
- F. **Procedure.** The procedure for hearings on appeals is governed by section 7(C) of this rule. Appeals decided without a hearing will be considered based on the administrative record on appeal and oral argument at a regular meeting of the Board as follows:
- (1) the executive analyst for the Board briefly introduces the appeal, indicating the subject matter, the appellant's basis for appeal and the relevant statutes and rules;
 - (2) the appellant makes a presentation discussing objections or challenges to the Commissioner's decision on the application;
 - (3) when the appellant is a person other than the licensee, the licensee is then provided an opportunity to address the issues raised by the appellant;
 - (4) at the Chair's discretion, other persons may comment on the appeal;
 - (5) Department staff makes a presentation addressing the objections and challenges of the appellant and indicating the Commissioner's recommended disposition of the appeal;
 - (6) at the Chair's discretion, the appellant and licensee may be provided with a final opportunity for rebuttal.

The Board, its staff and legal representative may at any time address questions to any person participating in the appeal.

- G. Decision on Appeal.** The Board shall, as expeditiously as possible, affirm all or part, affirm with conditions, order a hearing to be held as expeditiously as possible, reverse all or part of the decision of the Commissioner, or remand the matter to the Commissioner for further proceedings. The Board's decision is based on the administrative record on appeal, including any supplemental evidence admitted into the record and any evidence admitted during the course of a hearing on the appeal. The Board is not bound by the Commissioner's findings of fact or conclusions of law. An evenly divided vote of the Board has the effect of affirming the Commissioner's decision unless a majority of Board members subsequently vote at that meeting for another action on the appeal or table the matter until another meeting. In the case of an evenly divided vote, the findings and reasoning of the Board members voting in favor of the Commissioner's decision constitute the Board's reasoning in the affirmation.

25. Revocation or Suspension of a License

- A. Authority.** Notwithstanding Title 5, section 10051, after written notice and opportunity for a hearing pursuant to Title 5, chapter 375, subchapter 4, the Commissioner may revoke or suspend a license whenever the Commissioner finds that any of the criteria set forth in section 27 has been met.
- B. Filing of Petition with the Commissioner.** Any person may petition the Commissioner to initiate proceedings to revoke or suspend a license. The petition must state which of the criteria listed in section 27 is being invoked, and must specifically describe the factual basis for the petition. The petitioner shall serve a copy of the petition on the licensee at the time the petition is filed with the Commissioner. The petition once filed may not be supplemented. The licensee's response to the petition must be filed within 30 days of the filing of the petition with the Commissioner unless the Commissioner, upon a request by the licensee and for good cause shown, extends that deadline. No later than 21 days following receipt of the licensee's response to a petition to revoke or suspend a license, the Commissioner shall dismiss the petition or initiate proceedings by providing the licensee with written notice and opportunity for a hearing. The written notice shall state which of the criteria listed in section 27 is being invoked and the factual basis for the Commissioner's decision to initiate proceedings.
- C. Action Initiated by Commissioner.** If the Commissioner decides on his or her own motion to initiate proceedings to revoke or suspend a license, the Commissioner shall provide the licensee with written notice and opportunity for hearing. The written notice shall state which of the criteria listed in section 27 is being invoked and the factual basis for the Commissioner's decision to initiate proceedings.
- D. Hearing.** The licensee must request a hearing within 15 days of the Commissioner's written notice of opportunity for a hearing. If the licensee requests a hearing, it shall be held within 45 days of the request for hearing unless the Commissioner and the licensee agree to another time. The procedure for hearings is governed by section 7(C). If the proceeding was initiated as a result of a petition, the petitioner is deemed to be a party to the hearing and need not petition to intervene.