

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



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July 29, 2021

SENT VIA ELECTRONIC MAIL ONLY

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**Re: Appeal of Department Order S-010735-WD-YB-N
Chair ruling on proposed supplemental evidence and request for reconsideration;
Response to motion to dismiss**

Dear Participants:

Conservation Law Foundation (CLF) filed with the Board of Environmental Protection (Board) a timely appeal 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). Along with its appeal, CLF submitted excerpts of the 2019-2020 Surface Water Ambient Toxic Monitoring Program Final Report (SWAT Report) as proposed supplemental evidence. On July 13, 2021, WMDSM submitted written comments in opposition of CLF's proposed supplemental evidence.

Discussion on Supplemental Evidence

The admittance of supplemental evidence is a two-prong test. First, the proposed supplemental evidence must be relevant and material to the appeal, and second,

- 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.

Rule Concerning the Processing of Applications and Other Administrative Matters, Chapter 2, § 24(D).

The portion of the SWAT report offered by CLF as proposed supplemental evidence relates to findings of perfluoroalkyl substances (PFAS) in fish from above and below licensed wastewater treatment plants that discharge treated effluent to the Kennebec River. Because WMDSM trucks landfill leachate to two wastewater treatment facilities for treatment prior to discharge to the Kennebec River, CLF argues that the SWAT Report is relevant and material to the appeal. CLF also argues that because the SWAT Report was published on June 2, 2021, after the issuance of the Department Order, it is newly discovered evidence and could not have been discovered through the exercise of reasonable diligence earlier in the licensing process.

WMDSM argues that neither the report nor data characterizing PFAS in fish in the Kennebec River are relevant to the applicable solid waste licensing criteria or the Department Order on appeal. Specifically, WMDSM argues that the SWAT Report pertains “to generalized concerns with licensed discharges from wastewater treatment plants and the regulations governing those discharges.” WMDSM also argues that although the SWAT Report was not published until after issuance of the Department Order, all environmental sampling data collected as part of the Kennebec River PFAS monitoring and incorporated into the SWAT Report was publicly available well in advance of the issuance of the Department Order and could have been submitted as comments on the application.

Ruling on SWAT Report as proposed supplemental evidence

CLF has not made a compelling argument that the SWAT Report excerpt regarding PFAS levels in fish is relevant and material to the appeal, which concerns the licensing criteria of the Maine Hazardous Waste, Septage and Solid Waste Management Act and applicable solid waste rules. Therefore, because the first prong of the supplemental evidence admittance test is not met, the proposed supplemental evidence is excluded.

Additionally, even if the SWAT Report was relevant while the report itself was not available during the processing of the application, CLF has failed to demonstrate that it could not have raised the issue of PFAS levels in the Kennebec River summarized in the SWAT Report during the processing of the application. The data underlying the SWAT Report was publicly available prior to the issuance of the Department Order, and CLF could have raised its concerns regarding those data at that time. Therefore, the second prong of the supplemental evidence admittance test is also not met. Accordingly,

references to the SWAT Report in CLF's appeal (pp. 10, 11, 26, 27, 28) will be redacted prior to circulating to the full Board.

Ruling on request to strike non-record evidence

WMDSM's July 13, 2021, response includes a request to strike from CLF's appeal certain evidence that WMDSM purports is neither in the administrative record nor identified by CLF as proposed supplemental evidence. Specifically, WMDSM argues that information in the appeal regarding (i) data concerning drought conditions in Maine, and (ii) the specifics of a permit issued for the Turnkey Landfill in New Hampshire should be stricken on the basis that it is outside the record and that CLF did not properly propose this information as supplemental evidence in accordance with Chapter 2 § 24(B). WMDSM further argues that even had the non-record evidence been properly offered as supplemental evidence, it would not satisfy the Chapter 2 § 24(D) criteria for admittance.

References to the drought conditions in Maine appear on pages 17 and 18 of the appeal; references to the Turnkey Landfill in New Hampshire appear on pages 7, 20, 22, 26, and 28 of the appeal.

Ruling: My June 28, 2021, ruling struck footnote references to materials regarding the Turnkey Landfill in New Hampshire (e.g., footnotes 70-73, 89, 90). The textual references to the Turnkey Landfill in New Hampshire that appear on pages 7, 20, 22, 26, and 28 of the appeal are also stricken because the information is not in the record and is not relevant or material. This information will be redacted prior to circulating to the full Board.

My June 28, 2021, ruling struck electronic links contained in appeal footnotes that reference materials that are not in the administrative record, including references to drought conditions in Maine. References to the drought conditions in Maine that appear on pages 17 and 18 of the appeal will be redacted prior to circulating to the full Board.

Request for reconsideration of Chair ruling

My June 28, 2021, ruling struck from CLF's appeal footnotes 19, 37, 52, 55, 63, 68, 70, 71, 72, 73, 84, 89, and 90 on the basis that they do not meet the Chapter 2 § 24 requirements for admittance to the record. On July 8, 2021, CLF filed a request to reconsider that ruling, arguing that the footnotes not admitted to the record (1) contain information that is already a part of the underlying Department record; (2) include evidence that, while not explicitly contained in the administrative record, directly relate to concerns that were repeatedly raised by CLF and other commenters throughout the application process; or (3) include publicly available information to which reference was made for additional context. CLF argues that they referenced in comments submitted to the Department prior to the issuance of the Department Order the materials to which they provide electronic links in appeal footnotes 19, 37, 52, 63, 68, and 84. Additionally, CLF argues that the reference in footnote 37 is to the Department's Maine Solid Waste Generation and Disposal Capacity Report for 2018 and 2019.

Ruling: The electronic link in footnote 37 is to a non-Department webpage. The Department's Maine Solid Waste Generation and Disposal Capacity Report for 2018 and 2019 may be referenced during oral argument to the extent it is relevant and material to the appeal; however, the electronic link to the non-Department webpage offered in footnote 37 is disallowed by rule.

Footnote 52 offers an electronic link to a Department document that is in the record (Response to Comments, dated June 22, 2020). It is unclear from CLF's appeal what other materials it intended to reference in footnote 52. The June 22, 2020, Response to Comments document is in the record and may be referenced during oral argument to the extent it is relevant and material to the appeal; however, the electronic link is disallowed by rule.

At no time has CLF submitted to the Department the materials referenced in the remaining footnotes 19, 55, 63, 68, 70, 71, 72, 73, 84, 89, and 90. CLF's prior reference to the materials in footnotes to comments submitted to the Department is not a surrogate for the actual submission of the materials, either to the Department during the processing of the application for inclusion in the administrative record, or as proposed supplemental evidence at the time the appeal is filed. Chapter 2 unambiguously disallows electronic links to documents, which in this case are documents not already in the administrative record.

My prior ruling to disallow electronic links in appeal footnotes 19, 37, 52, 55, 63, 68, 70, 71, 72, 73, 84, 89, and 90 is unchanged after consideration of the arguments provided in CLF's July 8, 2021, request for reconsideration.

Deadline for License's responses to the merits of the appeal

WMDSM did not offer proposed supplemental evidence in response to CLF's proposed supplemental evidence. Therefore, pursuant to Chapter 2, § 24(C)(4), WMDSM's deadline for the filing of a response to the merits of the appeal is **August 18, 2021, at 5:00 p.m.**

Motion to dismiss

On July 13, 2021, WMDSM filed with the Board a motion to dismiss CLF's appeal for lack of standing. On July 21, 2021, CLF filed a request for the opportunity to respond to WMDSM's motion to dismiss. Prior to ruling on WMDSM's motion, CLF may file a response by **August 9, 2021, at 5:00 p.m.**

Filing of documents

Attached is a revised service list that updates the phone contact information for Susanne Miller. All filings must be copied to the service list, dated July 28, 2021. 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
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c/o Ruth Ann Burke
17 State House Station
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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 (July 28, 2021)

Attachment: Service List (July 28, 2021)

ATTACHMENT

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, Revised July 28, 2021**

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