



Attorneys at Law

TEN FREE STREET
P.O. BOX 4510
PORTLAND, MAINE 04112-4510
www.jbgh.com

Mark A. Bower
e-mail: mbower@jbgh.com

(207) 775-7271 (Phone)
(207) 775-7935 (Fax)

July 12, 2018

FILED ELECTRONICALLY

James W. Parker, Chair
Board of Environmental Protection
c/o Ruth Ann Burke
17 State House Station
Augusta, ME 04333-0017

RE: Juniper Ridge Landfill, #S-20700-WD-BL-A

Dear Mr. Parker:

On behalf of my client, **ecomaine**, I am filing herewith a response to the appeal filed by NEWSME Landfill Operations, LLC and the Bureau of General Services, with regard to the above-referenced proceeding.

Thank you for your attention to this matter.

Sincerely,

Mark A. Bower

MAB/gw
Enclosure

cc: Ruth Ann Burke (by e-mail)
Cynthia Bertocci (by e-mail)
Kevin Roche (by e-mail)

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF:)	
)	
JUNIPER RIDGE LANDFILL)	
)	
STATE OF MAINE, DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES, BUREAU OF GENERAL SERVICES, and)	MAINE HAZARDOUS WASTE, SEPTAGE AND SOLID WASTE MANAGEMENT ACT
)	
)	AMENDMENT
NEWSME LANDFILL OPERATIONS, LLC)	
)	
DEP AMENDMENT APPLICATION SOLID WASTE #S-20700-WD-BL-A)	
)	

**RESPONSE OF ECOMAINE TO THE
APPEAL OF NEWSME LANDFILL OPERATIONS, LLC
AND BUREAU OF GENERAL SERVICES**

In accordance with the Department’s Rules, Chapter 2, Section 24(C),¹ **ecomaine** submits this response to the appeal filed by NEWSME Landfill Operations, LLC and the Bureau of General Services (collectively, the “Appellants”).² For the reasons set forth herein, **ecomaine** respectfully requests that the Board affirm the solid waste license amendment, with conditions, issued by the Commissioner on March 31, 2018, as it relates to the operation of the Juniper Ridge Landfill (hereinafter, “JRL”).

¹ Because **ecomaine** submitted written comment on the application before the Department, it is entitled to file a response to this appeal. See 06-096 C.M.R. ch. 2, § 24(c) (“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).”).

² NEWSME Landfill Operations, LLC is a wholly-owned subsidiary of Casella Waste Systems, Inc. (“Casella”) and is the operator of the landfill. The Bureau of General Services (“BGS”) is part of the Maine Department of Administrative and Financial Services and is the owner of the Juniper Ridge Landfill.

INTRODUCTION

On March 31, 2018, the Commissioner issued an order (hereinafter, “2018 License”) approving a one-year extension of JRL’s solid waste license to allow for the disposal of up to 81,800 tons of municipal solid waste (“MSW”) at the Juniper Ridge Landfill, subject to specific conditions of approval including an option to extend the license for an additional six months. The Appellants have appealed the 2018 License, raising two main arguments: (1) they have made significant efforts to promote the solid waste management hierarchy; and (2) the 2018 License does not comply with the hierarchy because there is insufficient non-landfill capacity for solid waste disposal in the State of Maine. This response will address each argument in turn.

To provide some background, **ecomaine** is a public waste corporation formed pursuant to interlocal agreement among its member municipalities in accordance with the provisions of 30-A M.R.S. §§ 2201 *et seq.*,³ for the purpose of providing an essential public function—the processing of solid waste generated in its member municipalities. In furtherance of that purpose, **ecomaine** owns and operates regional a solid waste management system for the mutual environmental and civic benefit of its owner communities—Bridgton, Cape Elizabeth, Casco, Cumberland, Falmouth, Freeport, Gorham, Gray, Harrison, Hollis, Limington, Lyman, North Yarmouth, Portland, Pownal, Scarborough, South Portland, Waterboro, Windham and Yarmouth—and also serves numerous other associate and contract members.

³ Under 30-A M.R.S. § 2201, municipalities and other public agencies are authorized to enter into “interlocal agreements” in order to provide public services in an efficient manner. Furthermore, in accordance with the provisions of Title 13-B of Maine Revised Statutes and 38 M.R.S. § 1304-B(5), **ecomaine** is organized as a nonprofit corporation for the purpose of “owning or operating one or more waste facilities” pursuant to its interlocal agreement.

ARGUMENT

I. THE COMMISSIONER DID NOT ERR BY FINDING THAT THE APPLICATION DOES NOT COMPLY WITH THE SOLID WASTE HIERARCHY.

A. The regulatory standard requires an applicant to demonstrate compliance with the solid waste hierarchy through its own actions, not the actions of a third party.

As the Appellants point out, the Department's regulations implementing the solid waste hierarchy (06-096 C.M.R. ch. 400, § N) are new; therefore, this proceeding will be important to provide guidance as to how those new rules will be construed. Because the application did not meet that regulatory standard, the Commissioner did not err by denying the application.

To begin with, the Appellants tout their efforts to promote the hierarchy, but argue that they have met the regulatory standard due to the activities of Casella, which is NEWSME's parent company. The Department's regulations require an applicant to submit evidence containing "a description of the reduction, reuse, recycling, composting and/or processing programs/efforts that the waste is or will be subject to, **and that are sufficiently within the control of the applicant to manage or facilitate**, including relevant metrics to evaluate effectiveness; and a description of ongoing efforts to increase the effectiveness of these programs/efforts." 06-096 C.M.R. ch. 400, § N(2)(a) (emphasis added). NEWSME and BGS have not described programs or efforts consistent with the waste hierarchy that will be implemented within their own control; rather, they rely principally on Casella's "zero-sort" recycling program as evidence that an amendment of the JRL license meets the regulation's standard. As the Commissioner acknowledged, this argument is not persuasive:

The Department notes that Casella has a diversity of waste management programs, including reduction and recycling that have managed more MSW from 2014 to 2016, but has also increased MSW disposal at JRL from 2014 to 2016. Further, the Department

notes that some of the MSW that Casella specifies as being diverted from JRL is already destined and/or contracted to other Maine facilities. Therefore, the Department notes that it is not appropriate to define these practices as diversion from JRL but rather as obligations to transport waste to the most suitable facility based on logistical, economic, contractual and other factors.

2018 License at 18.

Importantly, the license applicants (NEWSME and BGS), not Casella, have the burden to demonstrate compliance with the hierarchy. It does not appear that NEWSME or BGS are involved in any of the efforts discussed in the brief, nor do they have any control over those activities. Because the Appellants have offered no persuasive argument for reversing the Commissioner's findings, the Board should defer to the fact-finder and affirm the 2018 License.

B. The Appellants' landfill diversion claims are overstated.

Next, the Appellants attempt to find support for their application by making claims about their diversion of solid waste from JRL. However, to argue that solid waste is being "diverted" from JRL is curious, particularly in light of the fact that the tonnage of MSW disposed at JRL has increased significantly year-over-year (and more than doubled) since 2014. In reality, there has been no diversion of waste from JRL at all. Moreover, with the existing 81,800-ton cap on disposal at JRL, MSW cannot be "diverted" when it was never allowed to go there in the first place.

Appellants claim that "NEWSME has complied with the amended license by diverting *over five times more* MSW to other solid waste facilities than it disposed at JRL." Appeal at 6 (emphasis in original); *see also* Appeal at 15 ("Casella has diverted from JRL more than 5 times the MSW it has disposed at JRL over this period."). For example, the Appellants claim that they diverted 317,384 tons of MSW from JRL in 2016. This claim is misleading, however, because JRL is only permitted to accept 81,800 tons of MSW in the first place. To say that the

Appellants are “diverting” the other tonnage from JRL is disingenuous because that excess waste would not be permitted to go there in any event.

In addition, much of the “diverted waste” is simply waste that was already destined for disposal or processing elsewhere. Table 4 on page 17 of the 2018 License is a reproduction of Appendix 4 of the application, which the Appellants tried to use to show how much waste was diverted from JRL. However, much of the tonnage is comprised of recyclables under Casella’s “zero-sort” program and waste that is delivered to other facilities pursuant to contracts with those facilities, as the Department pointed out: “The Department notes that some of the MSW outlets identified in the table above as taking ‘diverted’ waste may be the result of contracts for waste disposal that would not have been destined for JRL at any point due to logistical, economic, contractual and other factors.” 2018 License at 17.

More importantly, there is no indication that any of the “diverted waste” is MSW from the former MERC communities, which was the Department’s primary purpose for granting the 2013 solid waste license, with conditions. *See* Department Order #S-020700-WD-BC-A at 41 (Dec. 20, 2013) (hereinafter, “2013 License”) (“The acceptance of additional unprocessed MSW at JRL in addition to bypass and soft layer material for cell construction is consistent with the hierarchy provided that limitations are placed upon such activity to ensure that other waste management options will be implemented for former Maine Energy MSW.”); *see also* 2013 License at 43 (Condition No. 5: “Casella shall continue to plan for, and will make its best effort to divert MSW from landfilling at JRL to the greatest extent practicable.”). It is clear that the Appellants have not accomplished the goals set forth in the 2013 License.

Finally, although the Appellants say that the disposal of tonnage has increased “modestly” since 2014, in reality, the tonnage has more than doubled over that time period. The numbers speak for themselves:

Year	Tons	Percentage Increase
2014	36,878	
2015	57,521	55.9%
2016	69,934	21.6%
2017 ⁴	78,641	12.5%

In conclusion, although the intended purpose of the conditions set forth in the 2013 License was to see a decline in MSW disposal at JRL, the actual result has been exactly the opposite: a steady increase in tonnage over the past five years. The Appellants’ claims of diverted waste lack credibility.

C. The 2013 License did not set a precedent for consistency with the solid waste hierarchy.

The Appellants also take the position that the Department previously found the disposal of MSW at JRL to be consistent with the hierarchy, *see* Appeal at 5, and therefore the precedent has been set for good. However, the historical purpose for the 2013 License must be kept in mind, as the Appellants are trying to re-write history.

The 2013 License allowed the State-owned JRL to be used—for the very first time—as a disposal site for non-bypass, unprocessed MSW. The decision was premised almost entirely upon the fact that the MERC waste-to-energy plant in Biddeford had closed, and the communities that had disposed of MSW there needed a place to bring their tonnage. *See* 2013

⁴ The data for 2017 was provided by the Appellants in their filing with the Department dated March 15, 2018.

License at 3, § 2.C (Summary of Proposal). The express goal was to have in place another plan for that tonnage within the five-year term of the 2013 License; clearly, that has not happened. See 2013 License at 41 (“The acceptance of additional unprocessed MSW at JRL in addition to bypass and soft layer material for cell construction is consistent with the hierarchy provided that limitations are placed upon such activity **to ensure that other waste management options will be implemented for former Maine Energy MSW.** Such limitations include a volume limit, a time limit, and requirements for delivery of some MSW to a facility at a higher level on the hierarchy.”).⁵ The Department found that the 2013 License was consistent with the hierarchy only if certain conditions were imposed on the disposal of unprocessed MSW. The key limitations imposed by the 2013 License were: (1) a disposal cap of 81,800 tons per year; and (2) an expiration date of March 31, 2016 (which was extended by this Board to March 31, 2018). With regard to the latter, the Department found that this “limitation is appropriate to ensure that activities at JRL support, and do not subvert, the waste management hierarchy.” 2013 License at 25. Put differently, the Department feared that making JRL a long-term disposal option would undermine the waste hierarchy.

Similarly, the Commissioner’s approval of the 2018 License is subject to a key qualification: “The Department finds that the applicant has demonstrated a need in the short-term to provide disposal options due to unknowns associated with the change in operating capacity of PERC and the construction and commercial operation date of the CRM [Fiberight] facility.” 2018 License at 34. Therefore, just as in 2013, the Department has found consistency with the waste hierarchy only if certain conditions are imposed, including Conditions 5 and 7,

⁵ Therefore, the Appellants’ statement that “where the MSW is generated or pursuant to which contacts it is handled as of the moment an application is filed is not the key issue,” Appeal at 14, is at odds with the purpose of the 2013 License. As the Board will recall, the source of the MSW (the former MERC communities) was is the key issue in that proceeding.

which are included to acknowledge the short-term uncertainty in disposal capacity until Fiberight is at full capacity and PERC adjusts to new market conditions. The Department clearly remains concerned that long-term disposal of MSW at JRL could undermine the waste hierarchy.

D. The third-party agreements with PERC and Fiberight do not establish consistency with the hierarchy.

The Appellants' final argument for consistency with the waste hierarchy is that there are third-party agreements to bring waste to other facilities—PERC and Fiberight (a/k/a “Coastal Resources of Maine” or “CRM”). The main problem with this argument is that those agreements are wholly contingent upon full approval of the application—disposal 81,800 tons of waste per year at JRL, without limitation.

Although the Appellants argue that “Casella has taken significant steps to ensure that it will continue to divert MSW from JRL to other facilities higher in the hierarchy,” Appeal at 10, those steps appear to be limited to two disposal contracts with PERC and Fiberight.⁶ Furthermore, the Appellants acknowledge that the agreements rely upon the unconditional success of their license application. *See* Appeal at 15 (“To be sure, both of these agreements [with PERC and Fiberight] are contingent upon the Commissioner’s approval of the request to dispose of 81,800 tons of MSW per year at JRL.”). The agreement with PERC contains the following provision: “The parties understand and agree that the effectiveness of this Agreement . . . is contingent on receipt by NEWSME of the MSW permit amendment described above for **not less than 81,800 tons per year** of Municipal Solid Waste from Maine at the Landfill no later than March 31, 2018.” The Fiberight agreement contains a similar limitation: “The parties understand and agree that the effectiveness of this Agreement is contingent on receipt by the JRL of the MSW permit for **a minimum of 81,800 tons per year** no later than March 31, 2018.” In

⁶ Notably, neither Appellant was a signatory to the two contracts, as both were signed by Pine Tree Waste, another subsidiary of Casella.

other words, the waste will only be diverted from JRL to the extent that the Appellants obtain exactly what they want in this proceeding, and no less.

The clear intent of including these “poison pill” provisions in the agreements is to hamstring the Department’s decision-making process; indeed, the Department noted its objection to this tactic in its March 12, 2018 follow-up comments on the application: “While the Department respects that BGS and NEWSME have finalized agreements with both Fiberight and PERC as a ‘result of arms-length, good-faith negotiations,’ the Department does not condone the fact that these agreements are contingent on the Department’s approval of the application request.” This view is shared by **ecomaine**; although the agreements by Pine Tree Waste to dispose of waste at PERC and Fiberight are a positive development, they should not be viewed as evidence of compliance with the waste hierarchy regulations when they are conditioned upon the disposal of a significant quantity of MSW at landfills—the very lowest rung on the hierarchy. That tonnage is being held “hostage” by the Appellants in order to improve their chances of obtaining a desired outcome.

II. THE DEPARTMENT’S 2018 LICENSE IS SUPPORTED BY THE AVAILABLE DISPOSAL CAPACITY IN MAINE.

The Appellants’ second principal argument is that there is insufficient non-landfill capacity in the State, making the Department’s 2018 License inconsistent with the waste hierarchy. But the Department did not find that there was a shortfall in capacity, only that there is some near-term uncertainty that justifies a limited term license. Moreover, the initial premise of the Appellants’ argument—that there is insufficient disposal capacity—is faulty.

At page 18 of their appeal, the Appellants refer to certain facts and figures that are misleading, at best. For example, the reference to 1.2 million tons of total in-state waste, which is based on the Department’s “Maine Solid Waste Generation and Disposal Capacity Report:

Calendar Year 2015” (“2015 Capacity Report”) is unhelpful because it does not factor in the 440,000 tons of waste that were recycled in Maine that year. *See* 2015 Capacity Report, Table 2.⁷ There is obviously no need to find a disposal option for those tons of recycled waste. Furthermore, the most recent available data, which is found in the 2016 Capacity Report, results in an even lower total amount of waste that needs to be either incinerated or landfilled. In 2016, the total amount of non-CDD MSW that was neither recycled nor disposed as incinerator ash (in other words, unprocessed waste that needed to be either incinerated or landfilled) totaled 656,761 tons.⁸ Using that total waste figure of 656,761 tons, and the Department’s calculated capacity of 595,000 tons, leaves only about 62,000 tons per year for disposal at all other landfills in the state—Crossroads (Norridgewock), Hatch Hill (Augusta), Bath, Brunswick, Presque Isle and Tri-Community (Fort Fairfield).⁹ Apparently, rather than allowing those other facilities to continue handling waste as they have been, Casella is proposing that the State-owned JRL accept all of that remaining waste (and then some).

Another area where the Appellants have used questionable data is with regard to Fiberight’s capacity—they have repeatedly understated Fiberight’s capacity at 105,000 tons per year. *See* 2018 License at 19. As indicated in the Fiberight solid waste license, that plant is designed to handle an average of 650 tons of MSW per day, which is well in excess of 105,000

⁷ This data is also included in Table 5 of the 2018 License at page 20.

⁸ This total is calculated from the figures in Table 1 on page 3 of the 2016 Capacity Report: 1,556,711 (total tonnage) – 442,218 (MSW recycled) – 314,649 (CDD landfilled) – 40,205 (CDD recycled) – 102,878 (incinerator ash) = 656,761. Note that incinerator ash should not be counted as “MSW Landfilled” when trying to calculate available capacity because it is already allowed to be disposed at JRL without limitation (i.e., from PERC).

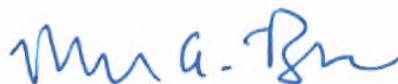
⁹ Using the figures in Table 4 at page 8 of the 2016 Capacity Report, and applying the conversion factor of 0.85 tons for each cubic yard, the five municipal landfills alone accepted 104,180 tons of MSW in 2016—more than enough to cover the 62,000 remaining tons. That total does not even count the capacity at Crossroads, which accepts both in-state and out-of-state waste.

tons per year. Additionally, recent news reports indicate that Fiberight's planned capacity is 180,000 tons per year and the plant will be operational in September 2018.¹⁰ If Fiberight fully utilizes its planned capacity of 180,000 tons, rather than the 105,000-ton capacity cited by the Appellants, the delta of 75,000 tons essentially makes up the tonnage disposed at JRL in 2017.

CONCLUSION

In conclusion, there is actually more non-landfill capacity available now than there was in 2013, even factoring in PERC's somewhat lower anticipated capacity. This is due in large part to the fact that the Fiberight facility was not in the picture then, which is a significant change in circumstances. The Department reasonably concluded that, provided PERC and Fiberight are given the opportunity to come up to speed, there will be adequate capacity for MSW disposal in the State without disposal at JRL. The one-year license with reasonable conditions will provide time to see whether there is sufficient capacity to manage MSW in Maine in compliance with the solid waste hierarchy.

Dated: July 12, 2018



Mark A. Bower, Esq.
Attorney for **ecomaine**

JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112-4510
(207) 775-7271

¹⁰ See <http://www.mainebiz.biz/article/20180612/NEWS01/180619984/fiberight-plant-makes-progress-at-site-and-with-recycling-mission>.