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Admitted in: ME

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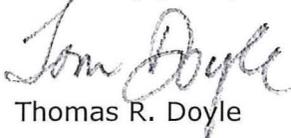
Melanie Loyzim, Acting Commissioner
Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Edward Spencer Petition for Suspension of License Amendment #S-020700-WD-BM-Z

Dear Acting Commissioner Loyzim:

I enclose the Response of Bureau of General Services (BGS) and NEWSME Landfill Operations, LLC (NEWSME) to Edward Spencer's Petition for License Suspension, dated December 31, 2018. As the enclosed response of BGS and NEWSME demonstrates, Mr. Spencer's petition lacks merit and should be summarily dismissed.

Very truly yours,



Thomas R. Doyle

Enclosure

cc: Cynthia S. Bertocci
David E. Burns
Victoria Eleftheriou
Kathy Tarbuck
Edward Spencer
William H. Laubenstein, Esq.
Michael T. Barden
Brian Oliver
Don Meagher
Toni King

**STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF

STATE OF MAINE, ACTING THROUGH THE)
BUREAU OF GENERAL SERVICES)
OLD TOWN, PENOBSCOT COUNTY, MAINE)
JUNIPER RIDGE LANDFILL)
LICENSE AMENDMENT #S-020700-WD-BM-Z)

**RESPONSE OF BUREAU OF GENERAL SERVICES (BGS) AND NEWSME
LANDFILL OPERATIONS, LLC (NEWSME) TO EDWARD SPENCER’S PETITION
FOR LICENSE SUSPENSION, DATED DECEMBER 31, 2018**

Pursuant to Section 25(B) of Chapter 2 of the Department’s Rules, BGS and NEWSME provide this response to the Petition for License Suspension filed by Edward Spencer on December 31, 2018. Mr. Spencer alleges that License Amendment #S-020700-WD-BM-Z was obtained by “at least one false statement [by Mr. Doyle] to the Board which may have influenced their decision that day [October 4, 2018].” Because Mr. Doyle made no false statements to the Board of Environmental Protection (Board), Mr. Spencer’s petition lacks merit and should be dismissed.

BACKGROUND

By Order dated March 31, 2018, the Department issued License Amendment #S-020700-WD-BL-A, extending the deadline for disposal of 81,800 tons of in-state Municipal Solid Waste (MSW) at Juniper Ridge Landfill (JRL) up to and including March 31, 2019. Both Mr. Spencer and BGS-NEWSME appealed the March 31 Order to the Board. After briefing the appeals, oral argument occurred at the Board’s October 4, 2018, meeting. During his oral presentation, Mr. Spencer stated, among other things, the following:

This prohibition of MSW is also included in the Operating Services Agreement. If, for example, the current proposal stands which would allow continued curbside MSW deliveries directly into JRL until 2021 were to be approved, then that would

mean *that the original license and OSA would be violated* for over seven years, from 2014 until 2021.

Spencer petition, p. 2 (emphasis added). Later in his presentation, Mr. Spencer stated, “Remember the restrictions in the OSA—*that there be no MSW.*” Spencer petition, p. 3 (emphasis added).

After hearing from both parties and Department Staff and deliberating among themselves, the Board voted 3 to 1 to deny both Mr. Spencer’s and BGS-NEWSME’s appeals, and affirm the Department’s partial approval of License Amendment #S-020700-WD-BL-A, extending the deadline for disposal of 81,800 tons of in-state MSW at JRL, with modified conditions. Among other things, these modifications extend the deadline for acceptance of non-bypass, in-state MSW at JRL up to and including March 31, 2020.¹

The Board Chair signed Order #S-020700-WD-BM-Z on October 10, 2018.

Mr. Spencer did not appeal the Board’s decision to Superior Court. Instead, over 50 days *after* the expiration of the court appeal period, Mr. Spencer emailed a letter petition dated December 31, 2018, to Acting Commissioner Loyzim requesting that “the Department undertake procedures to ascertain whether this License Amendment was obtained by false representation to the Board.” In his petition, Mr. Spencer claims that Thomas Doyle, the attorney arguing on behalf of NEWSME and BGS before the Board on October 4, “made at least one false statement to the Board which may have influenced their decision that day.” Specifically, Mr. Spencer objects to the fact that, after Mr. Spencer read his “testimony,” Mr. Doyle said, “I respect Ed’s ability or opportunity to have his opinion about matters, but he is not entitled to his own facts.” Mr. Spencer

¹ In addition, the modifications included a possible one-time six-month extension beyond March 31, 2020, for no greater than 40,900 tons of in-state MSW based on demonstrated need, and during the extension period through March 31, 2020, BGS and NEWSME must develop and prepare to implement measures that eliminate the need for non-bypass, in-state MSW disposal at JRL.

asserts: “Everything in my testimony is factual, and to have stated otherwise without being specific is a misrepresentation.” Spencer petition, p. 1.

Actually, Mr. Doyle did get specific during oral argument immediately after stating that Mr. Spencer “is not entitled to his own facts.” Mr. Doyle stated:

Here, the original license in 2004 for Juniper Ridge didn’t allow disposal of MSW because the applicants did not request it in their application. And the OSA did not allow for MSW to be provided in the landfill, but what it says, essentially, is that Acceptable Waste at JRL is any waste that is licensed to go there. So all these subsequent licenses that we obtained, including the one in 2013, are licenses that allow MSW to go to Juniper Ridge, and are completely consistent with the OSA.

Spencer petition, p. 3.

As discussed below, Mr. Doyle made no misrepresentation.

ANALYSIS

I. The Operating Services Agreement (OSA) does not prohibit MSW at JRL.

Contrary to statements made by Mr. Spencer, the OSA does not prohibit MSW at JRL.

Under section 2.1.2 of the OSA, the State granted Casella “the exclusive right to operate and dispose of Acceptable Waste at the Landfill.” Under section 1.2 of the OSA, “Acceptable Waste” is defined, in relevant part, to mean “such material as may from time to time be legally accepted at the Landfill in accordance with applicable permits and other applicable laws and regulations.” Obviously, non-bypass MSW, or any other solid waste, needs to be approved in a Department permit to be an Acceptable Waste, but there is no prohibition in the OSA *per se* on acceptance of MSW at JRL. Indeed, the only express reference to MSW in the OSA is in section 2.11, entitled “Tipping Fees on Non-FJ Waste,” which states as follows:

- (a) Casella shall charge Tipping Fees for disposal of waste that is not FJ Waste or Lincoln’s Biomass Ash according to the following schedule:

...

- *Municipal solid waste*, including municipal solid waste designated as “by pass” on an infrequent basis. \$58.00/Ton”²

(Emphasis added.) If the State had intended to prohibit MSW at JRL, why would it have entered into an OSA that lists the maximum tipping fee Casella may charge for MSW disposed at the landfill?

What’s clear is that when the State entered into the February 5, 2004 OSA, it was aware that circumstances may someday occur that would make disposal of non-bypass MSW at JRL appropriate. Such a scenario was expressly discussed in Casella’s July 9, 2003, proposal to the State to operate the State landfill:

Incorporated in NEWSM’s 30-year term proposal is a forward planning assumption to accept up to 200,000 tons of municipal solid waste that may require disposal because the current disposal facility is no longer available or financially viable, and is not disposed of at a facility higher in the State Hierarchy. . . This provision is not intended to, and will not be used to disrupt or destabilize the contractual arrangements, service areas, or waste stream supplies of any current solid waste disposal facility. However, *the West Old Town landfill will be operated to help address future disposal needs of the state as the current providers of disposal are phased out.*

Casella Proposal: State Planning Office WM&R #1 Contract for Landfill Operation, July 9, 2003, pp. 27-28, Table 5, fn. 3, appended as Attachment 1 (emphasis added).³ By letter dated August 18, 2003, the State Planning Office (SPO) selected Casella as the operator of the then soon-to-be-

² Under this section of the OSA, Tipping Fees are “‘not to exceed’ fees,” and are “subject to annual adjustment in accordance with changes in the CPI and changes in law which materially affect the cost of landfill design, construction, operations or closure.” *Id.* These fees also are exclusive of any fees that may be imposed by the State under statutes or rules.

³ *See also* Table 5, fn. 2, which provides: “Since it is impossible to predict the future of PERC and Maine Energy, these volumes could change over time. It is anticipated, however, that should they close, and other facilities higher on the State Hierarchy do not dispose of the waste now being sent to those facilities, the West Old Town Landfill will attract a significant portion of the waste now being disposed at these facilities.”

acquired State-owned West Old Town Landfill, on the basis of Casella's proposal in response to the SPO's Request For Proposals.

As we now know, this scenario--the need for disposal of non-bypass MSW at JRL--actually occurred at the end of 2012, when the Maine Energy facility closed and was later demolished, and the in-state MSW that was previously disposed there needed a new disposal home.

Thus, it is clear that the OSA does not prohibit disposal of MSW at JRL, and Mr. Spencer's statement to the contrary is false.

II. The 2004 DEP License Amendment for JRL did not prohibit the disposal of non-bypass MSW, if later approved.

The 2004 DEP License Amendment for JRL's vertical increase and additional waste streams and the Department's contemporaneous Response to Comments Summary make clear that the State and NEWSME were not seeking to dispose of non-bypass MSW in the 2004 license, but that the possibility of accepting MSW in the future was not foreclosed.

In relevant part, the 2004 DEP license provides as follows:

SPO [predecessor of BGS] proposes to dispose of the waste streams generated in Maine that are currently accepted for disposal at the Pine Tree Landfill in Hampden, Maine. These waste streams are the following: construction and demolition debris; the residues (ash, front-end process residue and oversized bulky wastes) generated by municipal solid waste ("MSW") incinerators located in Maine; a limited amount of MSW bypass from the incinerators; water/wastewater treatment plant sludge; and smaller amounts of miscellaneous non-hazardous wastes.

2004 License Amendment, p. 4 (emphasis added).

On page 39 of the same order, the Department states:

Additional sources of MSW would require Department review and approval prior to acceptance for disposal.

And in Condition 16 of that same License Amendment, the Department states:

With regards to acceptance of MSW for disposal, *consistent with its proposal, the applicant*:

- A. shall not dispose of unprocessed MSW from any source other than bypass from the following sources: PERC incinerator in Orrington and the Maine Energy incinerator in Biddeford; waste delivered under an interruptible contract with PERC; or waste delivered in excess of processing capacity at other MSW incinerators in Maine;

2004 DEP License Amendment, p. 59 (emphasis added). *See also* Condition 18 (“Prior to accepting for disposal any waste not listed in the application, the applicant shall submit an application for the new waste to the Department for review and approval”).

Collectively, these passages make clear that the applicants (SPO and NEWSME) did not request approval for the acceptance of non-bypass MSW in 2004, but as with any other additional waste stream, acceptance of such a waste stream was not automatically foreclosed. It would require DEP review and approval before the additional waste stream could be accepted. This is standard Department procedure and is, in fact, consistent with the standard condition imposed on every solid waste license, and virtually every other DEP license. *See* Standard Condition 1 for Solid Waste Facility Licenses (“The granting of this approval is dependent upon and limited to the proposals and plans contained in the application and supporting documents submitted and affirmed by the license. Any consequential variation from these plans, proposals and supporting documents is subject to review and approval prior to implementation”).

Of course, this is exactly what occurred in the Department’s proceedings conducted in 2013 that resulted in the December 20, 2013 MSW License Amendment Order and in its March 31, 2018 Order extending the term of the MSW License Amendment. Both of those permits specifically authorized disposal of non-bypass MSW at JRL.

Finally, that the 2004 License Amendment did not foreclose the possibility of non-bypass MSW being later approved for disposal at JRL is made clear by the Department’s own Response

to Comments Summary published at the time it issued the April 9, 2004, License Amendment. In response to a question about what might happen if another disposal facility were to close, the Department responded as follows:

Comment: Will the WOTL take MSW if an incinerator or an existing MSW landfill closes?

Response: No existing MSW landfills or incinerators are expected to close in the foreseeable future. *If one did, the MDEP expects SPO may wish to take the MSW to WOTL because one of the stated purposes of the WOTL is to provide capacity for Maine wastes.*

Response to Comments West Old Town Landfill License Amendment Application, p. 44 of 77 (emphasis added), appended as Attachment 2.

Thus, again it is clear that Mr. Spencer's statements were wrong. Nothing in the 2004 License Amendment can be read to bind the Department from later authorizing disposal of non-bypass MSW at JRL, as it did in 2013 and 2018, and thus disposal of that waste stream will not result in seven years of violations of the 2004 permit, as Mr. Spencer said.

CONCLUSION

The foregoing discussion demonstrates that Mr. Spencer is incorrect. Mr. Doyle made no misrepresentations during his oral argument. The OSA does not prohibit disposal of MSW at JRL. Although the 2004 DEP License Amendment did not allow disposal of non-bypass MSW in that order, the applicants did not request to dispose of that waste stream in that proceeding. But the terms of the License Amendment and licensing history make clear that this did not foreclose the possibility of the applicants' seeking approval of MSW disposal at JRL in later years, which is exactly what happened.

Mr. Spencer failed to appeal to Superior Court the denial of his appeal to the Board of License Amendment #S-020700-WD-BM-Z. The Commissioner should not allow him yet another bite at the apple, nor to prolong this process through an end-round around the appeal period, by

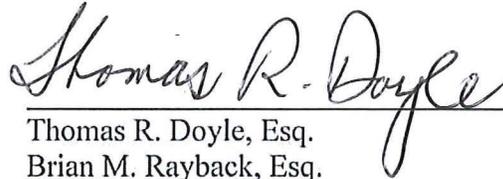
initiating any further proceedings under Section 27 of Chapter 2. Mr. Spencer's petition lacks merit and should be summarily dismissed.

Dated January 16, 2019.



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**PROPOSAL: STATE PLANNING OFFICE WM&R #1
CONTRACT FOR LANDFILL OPERATION**

Submitted to:

Division of Purchases
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111 Sewall Street
9 State House Station
Augusta, ME 04333-0009

Attn: George Mac Donald

Submitted by:

New England Waste Services of ME, Inc.
C/O Casella Waste Systems, Inc.
110 Main Street, Suite 1308
Saco, Maine 04072
Tel: (207) 286-1668; Fax: (207) 286-1696
Contact: Mr. James Hiltner, Regional Vice President

July 9, 2003

- iv. Property Tax Reimbursement Program, similar to what NEWSM has established in Hampden, for the two properties located at the access road entrance to the West Old Town facility.
- v. Under a 15 year operating services Agreement, \$.75 per ton of non-mill waste disposed in the landfill.
- vi. Under a 30 year operating services Agreement, \$1.50 per ton of non-mill waste disposed in the landfill and extension of sewer line from the Old Town sewer system to the West Old Town Landfill.

The cost of the above host community benefits is included in NEWSM's financial bid. Any host community benefits which are negotiated with the City in excess of these benefits shall be a surcharge on the tipping fees presented in Section 5.a.

10. Rights and Duties of the Parties to Any Contract Entered Into Pursuant to the RFP Shall Be Subject to All Applicable Laws and Legal Requirements

NEWSM understands that any obligations of the State under the Contract that require the expenditure of funds are subject to legislative appropriations as provided by law.

B. Anticipated categories, sources, and amounts of solid wastes

Table 5

<u>Category</u>	<u>Source</u>	<u>Estimated amount (yr.)</u>
Mill waste	Georgia-Pacific	50,000
Biomass ash	Lincoln Pulp and Paper	6,000
MSW incinerator ash	PERC ⁽¹⁾ , Maine Energy ⁽²⁾	100,000
Front End Process Res. ⁽¹⁾	PERC, Maine Energy	90,000
Non-processibles ⁽¹⁾	PERC, Maine Energy	16,000
Construction and demo	State of Maine	100,000
Treatment plant sludge	State of Maine	6,000
Municipal Solid Waste ⁽¹⁾ (including bypass)	PERC, Maine Energy	15,000 - 167,000
Miscellaneous special waste	State of Maine	23,000
Non-contracted Municipal solid waste ⁽³⁾	State of Maine	Up to 200,000
TOTAL		400,000 to 600,000 tons per year

- (1) under contract to NEWSM. NEWSM has entered into an agreement with PEC to extend the current PERC residue disposal agreement to 2018 and to specifically reserve capacity at the West Old Town Landfill for this material.
- (2) available to NEWSM in 2007
Since it is impossible to predict the future of PERC and Maine Energy, these volumes could change over time. It is anticipated, however, that should they close, and other facilities higher in the state Hierarchy do not dispose of the waste now being sent to these facilities, the West Old Town Landfill will attract a significant portion of the waste now being disposed at these facilities.
- (3) Incorporated in NEWSM's 30-year term proposal is a forward planning assumption to accept up to 200,000 tons of municipal solid waste that may require disposal because the current disposal facility is no longer available or financially viable, and is not disposed of at a facility higher in the State Hierarchy. This MSW would be accepted by contract, with the written permission of the solid waste's generator or responsible party, on a first come-first served basis. This provision is not intended to, and will not be used to disrupt or destabilize the contractual arrangements, service areas, or waste stream supplies of any current solid waste disposal facility. However, the West Old Town landfill will be operated to help address future disposal needs of the state as the current providers of disposal are phased out.

Table 6 on the following page illustrates the implementation schedule for NEWSM's proposal.

III.301

Response to Comments Summary
West Old Town Landfill License Amendment Application

Prepared by the Department of Environmental Protection
April 2004

- Comment:** Since the same owner also operates the Hampden Landfill, if a waste stream is approved for disposal at the Hampden Landfill, does that mean it is automatically approved for disposal at the WOTL?
- Response:** *Acceptable waste at WOTL will not be defined by incorporation. No waste streams will be added to the list in the application without a licensing action specific to the WOTL. The operations manual for the facility will contain a waste characterization and acceptance plan that will be updated on an annual basis to reflect any additional waste streams the operator has been approved to accept. If it were the intent of the operator to propose a change to the waste streams for both sites, separate requests would need to be submitted for MDEP approval.*
- Comment:** How is the ash treated at the incinerator? What is the consistency of the ash prior to transport? How will it be transported? Does it get a slurry on top during transport?
- Response:** *Incinerator ash is quenched with water prior to transport. Enough water is added to cool and dampen the ash only, no slurry is formed on the ash. The ash is transported in a covered tractor trailer truck to the site.*
- Comment:** If low-level nuclear waste is reclassified as a special waste (fitting the definition of special waste under the Regulations), can it be accepted for disposal at West Old Town?
- Response:** *If low-level nuclear waste is reclassified as a special waste and fits the definition of a special waste under MDEP regulations it could be disposed of at the West Old Town Landfill only if the applicant were to request a change in waste stream and the request is approved by the MDEP.*
- Comment:** Will hazardous waste be brought in for disposal at this landfill?
- Response:** *No wastes regulated as hazardous waste under 06-096 CMR Chapter 850 will be allowed in the WOTL.*
- Comment:** Will the WOTL take MSW if an incinerator or an existing MSW landfill closes?
- Response:** *No existing MSW landfills or incinerators are expected to close in the foreseeable future. If one did, the MDEP expects SPO may wish to take the MSW to WOTL because one of the stated purposes of the WOTL is to provide capacity for Maine wastes. Any out of state wastes that were being delivered to a facility that closed would not be routed to WOTL.*
- Comment:** All raw MSW should be landfilled at Pine Tree Landfill until it is at capacity, in order to lessen the odor and traffic impacts of the WOTL.