

Response of Bureau of General Services and NEWSME Landfill Operations, LLC to DEP Staff and Attorney General Office's Comments on Draft Declaration of Covenants and Restrictions

April 4, 2016

Set forth below are the responses of the Bureau of General Services (BGS) and NEWSME Landfill Operations, LLC (NEWSME) to the March 28, 2016 comments from Department (DEP) Land Staff and the Attorney General's Office on the draft Declaration of Covenants and Restrictions for the proposed 266-acre compensation area for the JRL Expansion. For the convenience of the reader, each comment from the March 28 memorandum is included in its entirety in italics followed by our response. Attached to this document is a redlined draft Declaration of Covenants and Restrictions showing the changes that have been made in the draft Declaration to address DEP Staff and the Attorney General Office's comments.

Comment: *As a preliminary matter, in the Wetland Compensation Plan submitted as Attachment 13 to the NRPA permit application for the Juniper Ridge landfill expansion, section 5.0 contains conflicting language with regard to the mechanism the applicants are proposing to use to protect the proposed preservation site. It states:*

BGS and NEWSNE are working with potential qualified third party entities to establish a conservation easement to provide long-term protection to the proposed preservation area (see Appendix B for an example of conservation easement language). . . . BGS and NEWSNE are proposing to use a Declaration of Covenants and Restrictions to provide long-term protection to the proposed preservation site. Within 90 days of the date the permits are issued, BGS and NEWSNE will submit to MDEP and the Corps a completed draft conservation easement for the proposed site. Within 30 days of the date MDEP and the Corps approve the draft conservation easement in writing, BGS and NEWSNE will execute it and record it with the Registry of Deeds for Penobscot County. . . .

This should be clarified. In addition, the reference to Appendix B stating that Appendix B contains an example of conservation easement language is apparently incorrect as Appendix B to this attachment to the NRPA permit application contains photo-simulations and no example of conservation easement language.

Response: We agree that this language is somewhat confusing. At the time the NRPA application was filed in July 2015, BGS and NEWSME had intended to establish a conservation easement for the proposed compensation area, because this was the Army Corps' preferred method for permanent protection of a compensation area. Subsequent to the application filing, however, BGS learned that it did not have authority to grant a conservation easement, but does have authority to establish covenants and restrictions on its property, which is a typical method approved by the DEP. The Army Corps has subsequently approved of the covenants and restrictions approach and has

approved of the form Declaration of Covenants and Restrictions presented to the DEP. Appendix B to the compensation plan in the July 2015 NRPA application does include the DEP's form "Declaration of Covenants and Restrictions," and this was intended to show the types of restrictions that would be included in any deed document permanently protecting the compensation area. The draft Declaration of Covenants and Restrictions BGS and NEWSME now seek to have approved is the one currently under DEP review, and is being revised today, as an attachment to this response, to address the DEP Staff and the AG office's comments. Once the Declaration is finalized with DEP, Army Corps, and City of Old Town, we will provide a revised compensation plan that properly references the Declaration and includes a copy of the document as an appendix.

Comment: *In the second WHEREAS paragraph, the draft refers to the approvals of the Maine DEP and the US Army Corps of Engineers "pursuant to permit _____" as if one joint permit will be issued. The DEP's permit and the US Army Corps of Engineers approval will be two separate permits."*

Response: Revised draft reflects this revision.

Comment: *In the fourth WHEREAS paragraph, in the fourth line, immediately following the word "enforce" the word "of" should be deleted.*

Response: Revised draft reflects this revision.

Comment: *In section 2(b) of the draft, the first sentence prohibits various activities including the removal of rocks, minerals, gravel, sand, topsoil or other similar materials. It is not clear whether this prohibition is related solely to the removal of such materials for some commercial purpose or whether it simply prohibits the removal of such materials. The Declaration of Covenants and Restrictions normally used by applicants generally contains a provision prohibiting the placement of any soil, loam, peat, sand, gravel, concrete, rocks or other mineral substance on the property and also prohibiting the alteration or manipulation in any way of the topography of the property. Please clarify whether section 2(b) is intended to cover those prohibitions or whether those prohibitions are intended to be covered in section 2(d).*

Response: §2(d) has been revised to clarify the inclusion of these prohibitions.

Comment: *Section 2(c) does not prohibit utility poles which are usually prohibited on such protected land. Is the intent to allow utility poles? Also with regard to section 2(c), the allowance for the declarant to locate, use, or maintain fences and boundary markers on the protected property would allow the placement of fences in any location as it does not limit the placement of fences solely to mark boundaries. I suggest you place some limitation on the*

placement of fences.

Response: Revised draft reflects the prohibition of utility poles and the placement of fences solely to mark boundaries.

Comment: *In section 2(i), in the third line the word "nor" should be "or."*

Response: Revised draft reflects this revision.

Comment: *With regard to section 2(j), it appears you are attempting to prohibit the operation of motorized vehicles and, if so, I suggest you add the word "motorized" before the word "vehicles" in the first line. In section 3(b), the prohibition is described as a prohibit of "motorized vehicles." In the second line of this paragraph, the word "go-cars" should be "go-carts."*

Response: Revised draft reflects these revisions.

Comment: *In paragraph 3(b), in line 5, there should be the word "be" after the word "must." Also with regard to that paragraph, it is not clear whether the written consent required in section 3(a) in the first sentence is also required for the recreational use of snowmobiles and all-terrain vehicles, since this document seems to grant that permission explicitly. I note that section 3(a) allows the declarant to grant permission, with the third party and operator's written consent, to use of the property for "recreational purposes" which may include hiking, walking, cross-country skiing and snowshoeing but bike riding is not listed, although it is not excluded and it is clearly not prohibited.*

Response: Bicycling has been prohibited in the revised draft. Written consent for the use of recreational motorized vehicles is required pursuant to §3(b)(iv), all other uses are necessary uses related to emergencies and maintenance and therefore written consent is not required.

Comment: *In the introductory paragraph of section 4, the draft reserves for the declarant the right to "use the Protected Property for all purposes not inconsistent with the Declaration." Please clarify what types of purposes are intended to be covered in this sentence. If it is intended to be primarily the uses listed below in (a), (b), and (c) but not limited to those, the sentence could say "including, but not limited to the uses specified below." In the second sentence of the introductory paragraph, the draft says that the declarant must provide advance written notice of use "that may have a material adverse affect on the purposes of the Declaration" to the Third Party. The draft should also require such notice to be given to the DEP (and presumably the Corps).*

Response: Revised draft reflects these revisions except with respect to the inclusion of the Corps. The Corps previously commented on the Declaration and the Corps' position is that it enforces its permit, not the Declaration, and therefore it did not want to be granted any rights in the Declaration nor did it want to be a signatory to the Declaration.

Comment: *Section 4(c) references "any existing deed restrictions and associated recording*

information." Are there existing deed restrictions?

Response: Title and survey work have not yet been completed on the Protected Property.

Comment: *Following section 4(c) there are provisions with regard to notices to various parties that do not seem related to section 4(c) or even section 4. Perhaps these should be placed elsewhere. There is a provision for how notices should be given to the DEP, however, I am not sure there are any notices required to be given to the DEP in this document.*

Response: The third sentence of the introductory paragraph of Section 4 contemplates advance notice to the Third Party and the DEP before undertaking any permitted use of the Protected Property that may have a material adverse effect on the purposes of the Declaration.

Comment: *In the paragraph with regard to notices to Third Party and DEP, in line 4, the draft requires the third party and the DEP to respond to such notices within 30 days and to state any specific objections within 30 days. Please add, after the word "notice" in line 4, "either requesting any necessary additional information or." Also with regard to the paragraph outlining provisions with regard to notices to Third Party and DEP, there should be a period at the end of that last sentence.*

Response: Revised draft reflects these revisions.

Comment: *The language in section 5(f) is very broad. It would allow grading and landscaping to be carried out by the declarant with no limitation on the reason or extent of it except that it would be "at the direction and approval of the Town Engineer and/or any other local or state board/agencies." The Town is responsible for building and maintaining any trails and no other changes to the topography of the property are envisioned. At the very least, such actions should be limited to those done at the direction of and with the approval of the City of Old Town, the DEP and the Corps. The language in section 5(h) is also too broad. If this is intended to be just to allow the declarant to do what is necessary to build roads under section 3(b), that should be stated.*

Response: Revised draft reflects these revisions, however, the Corps has requested that it not be granted any rights under the Declaration.

Comment: *Section 6 is entitled "Monitoring and Enforcement of Rights of the Third Party." The DEP (and possibly the Corps) should also have monitoring and enforcement authority. I suggest you strike the words "of the Third Party" from the title of this section. The first paragraph of the section seems to envision that the DEP and the Army Corps also have enforcement and monitoring authority as it starts out with the term "each party."*

Response: Revised draft reflects these revisions, however, the Corps has requested that it not be

granted any rights under the Declaration.

Comment: *In the fourth line of the first paragraph in section 6, the phrase "After providing Declarant with notice" appears to be inconsistent with the language in Exhibit A.*

Response: The language of Exhibit A has been removed per the final comment contained herein.

Comment: *The second paragraph of section 6 refers to "either party" when it should refer to "any party." Similarly, in the third paragraph under section 6, line 6 refers to "Declarant and Third Party" when it should also include the DEP, and presumably the Corps.*

Response: Revised draft reflects these revisions, however, the Corps has requested that it not be granted any rights under the Declaration.

Comment: *In section 8, in the second, third and fourth lines, the word "their" should be "its."*

Response: Revised draft reflects this revision.

Comment: *In the sixth line of section 8, the draft states that the declarant must notify the third party. It should also require the declarant to notify the DEP (and possibly the Corps).*

Response: Revised draft reflects this revision, however, the Corps has requested that it not be granted any rights under the Declaration.

Comment: *In section 10(c) of the draft, the declarant would reserve its right to assign "all or any portion of its rights and obligations in the Protected Property to the Operator" but section 2(a) states that the property cannot be divided. Is the intent of section 10(c) to allow the declarant to assign its ownership in a portion of the protected property to the operator?*

Response: No, the intent is not to allow transfer of ownership to Operator, but Declarant may contract with Operator with respect to the management of the Protected Property in a similar manner as has been done with the Juniper Ridge Landfill.

Comment: *Exhibit A appears intended to provide a description of the property. The list of "Affirmative Rights" appears to be a restatement of the rights and obligations of the third party. This is problematic in that it may not correctly capture all the rights and obligations of the third party and it does not mention the DEP or the Corps. I suggest not attempting to list any party's affirmative rights in the description of the property in this Exhibit.*

Response: Revised draft reflects this revision.