

## Office of Policy and Legal Analysis

Date: May 21, 2021

To: Joint Standing Committee on Environment and Natural Resources

From: Dan Tartakoff, Legislative Analyst

Re: LD 1639, An Act To Protect the Health and Welfare of Maine Communities and Reduce Harmful Solid Waste (Carney)

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### **Summary of bill**

This bill amends the definition of "waste generated within the State" to limit the amount of the residue that may be disposed of by an incineration, recycling and processing facility at a solid waste landfill in the State to the weight of the solid waste initially generated in the State by that facility during its annual reporting period. The bill eliminates the provisions of the law regarding recycling and source reduction requirements for solid waste processing facilities that were in operation during calendar year 2018 and that accept exclusively construction and demolition debris. It adds environmental justice to the public benefit determination standards for solid waste disposal facilities.

### **List of legislators/entities that submitted written testimony and/or spoke at the hearing**

**Proponents** – Senator Carney, Penobscot Nation, 350 Maine, Appalachian Mountain Club, Community Action Works, Conservation Law Foundation, Defend Our Health, Don't Waste ME, Environmental Priorities Coalition, Maine Unitarian Universalist State Advocacy Network, Natural Resources Council of Maine, Physicians for Social Responsibility Maine Chapter, Sierra Club Maine, Sunlight Media Collective, additional members of the public.

**Opponents** – Associated Builders and Contractors Maine, City of Auburn, Brunswick Sewer District, Casella, Chase Trucking, Complete Labor and Staffing Solutions, Easy Rent-All Corporation, Exchange Trucking LLC, City of Lewiston, Lewiston-Auburn Water Pollution Control Authority, Maine Logistic Solutions LLC, Maine State Chamber of Commerce, Maine Water Environment Association, ReSource Waste Services, Staples Trucking Inc., TRC Trucking, Troiano Waste Services, Willett Trucking, York Sewer District, additional members of the public.

**Neither for nor against** – Department of Environmental Protection, Maine Municipal Association, Portland Water District.

### **Additional background – LD 401 process (2019 and 2020)**

During the hearing, questions were raised regarding the committee process on LD 401 during the 129th Legislature. LD 401 was introduced in 2019 as a concept draft that described a variety of proposals related to landfilling/waste management. It had a public hearing on April 3, 2019. In 2019, the ENR Committee considered a number of other solid waste/waste management-related bills. Work sessions on all those bills, including LD 401, were held on April 5 and 26 and on May 10 and 15. During that period, DEP and other stakeholders developed a proposal to address a number of issues raised in these bills as well as issues raised as part of the DEP's five-year update to the State's waste management and recycling plan pursuant to Title 38, section 2122.

Those stakeholders reached consensus on a variety of issues, which were incorporated into an amendment to LD 112 that was unanimously supported in ENR and enacted as Public Law 2019, chapter 291. The remaining issues on which there was not consensus were deferred to the next session, as described in the carry over request on LD 401, to allow for additional stakeholder discussions. In 2020, work sessions were held on LD 401 on January 17 and February 5 at which time it was unanimously voted OTP-AM to incorporate a proposed amendment resulting from those stakeholder discussions over the 2019 interim. That amendment, which was enacted as Public Law 2019, chapter 619, included the changes relating to ReSource’s Lewiston facility that were discussed by numerous speakers during the LD 1639 hearing.

### **Notes, issues and proposed amendments**

1. *Definition of “environmental justice”* – it was noted that the bill uses the term “environmental justice” (see page 2, line 42) but does not define that term. A number of options were suggested during the hearing for consideration as an appropriate definition:
  - From US EPA (as noted by Senator Bennett): means the fair treatment of people of all races, cultures, incomes, and educational levels with respect to the development and enforcement of environmental laws, regulations, and policies. Fair treatment implies that no population should be forced to shoulder a disproportionate share of exposure to the negative effects of pollution due to lack of political or economic strength.
  - From DEP’s ch. 400 solid waste management rules (as noted by Senator Carney): means the right to be protected from environmental pollution and to live in and enjoy a clean and healthful environment regardless of ancestry, class, disability, ethnicity, income, national origin, or religion. Environmental justice includes the equal protection and meaningful involvement of all people with respect to the development, implementation, and enforcement of waste management laws, regulations, and licensing decisions.

As noted by Representative Doudera, her LD 1682 in EUT also uses a definition for “environmental justice,” which appears modeled after the DEP rules definition.

2. *Impact on ReSource Lewiston, City of Lewiston and other entities* – in submitted testimony, ReSource stated that if 1639 is enacted, its Lewiston facility will terminate operations. According to ReSource, that facility supports approximately 40 direct jobs and dozens more indirect jobs, spends about \$14 million per year and has more than 50 customers and 100 vendors. It also pays a direct benefit to the City of Lewiston of approximately \$275,000 per year and allows the City to dispose of certain wastes at the facility without charge.

Numerous other entities, many of those involved in the transportation of materials to and from ReSource Lewiston facility, testified to the significant impact that the closure of the facility would have on their businesses as well.

3. *LD 401 changes at ReSource* – as discussed by many speakers, the compromise reached in LD 401 in 2020 regarding ReSource’s Lewiston facility allowed it to meet reduced recycling thresholds for 2022 and 2023 for the materials it processes instead of the 50% recycling

requirement that would otherwise apply. As a result of that change, ReSource stated that it has spent more than \$1.5 million in new equipment and a new processing line at the facility to meet those targets. Those speakers recommended allowing ReSource time to implement these changes and make progress towards meeting the modified recycling requirements provided for in LD 401.

It is worth noting that as part of LD 401, as enacted, DEP was directed to include in its 2024 update to the state waste management and recycling an evaluation of and any recommendations concerning the special provisions enacted through LD 401 that applied to the ReSource facility, specifically whether amendments to those provisions are necessary.

4. *Impact on wastewater treatment facilities* – multiple entities (Brunswick Sewer District, Lewiston-Auburn Water Pollution Control Authority, Maine Water Environment Association and York Sewer District) expressed concern over the impact the bill may have on the ability of municipal wastewater treatment facilities to manage biosolids, the options for which are already significantly limited at present due to PFAS-related limitations on land application. If enacted, those entities are concerned they may be forced to transport biosolids to other states for disposal, increasing municipal costs.
5. *Leachate concerns* – multiple individuals testified regarding contamination associated with landfill leachate from the State-owned Juniper Ridge landfill (JRL) either escaping into the surrounding environment or being discharged into the Penobscot River following treatment at the ND Paper mill. Although, as stated by multiple proponents, the bill is intended to reduce the amount of out of state waste ultimately ending up at JRL, it does not appear that the bill specifically addresses concerns raised about contamination associated with landfill leachate from JRL other than the addition of “environmental justice” considerations as part of a public benefit determination process for new or expanded solid waste disposal facilities.
6. *Troiano Waste Services, proposal* – instead of enacting this bill, recommends convening a stakeholder group to build a long-term plan for State and regional waste disposal needs.
7. *Constitutional concerns* – there was some discussion at the hearing over whether the proposal implicates the Commerce Clause of the US Constitution. Although a court’s evaluation of any state law under the Commerce Clause would be fact-specific, with respect to the regulation of solid waste, the Supreme Court has generally found that:
  - A state may not prohibit the importation of solid waste unless that prohibition is the only means to advance a legitimate local purpose (see *Maine v. Taylor*, 477 U.S. 131 (1986)); and
  - Prohibiting the importation of out-of-state waste in order to conserve in-state landfill capacity falls squarely within the area that the Commerce Clause puts off limits to state regulation (see *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978)); but
  - A state may restrict the acceptance of certain wastes in a manner that discriminates against interstate commerce when acting as a market participant, i.e., in the case of a

publicly-owned waste facility (see, e.g., *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007)).

To the extent that the proposal would discriminate against out-of-state waste disposed of at JRL, which is owned by the State, or a landfill owned by a municipality, regional association or refuse disposal district, the so-called market participant exception would appear to apply.

As noted by DEP, the significance of classifying waste as “generated within the State” is that by law, a solid waste disposal facility owned by the State (i.e., JRL) may not be licensed to accept waste that is not generated in Maine and that any other publicly owned solid waste landfill that proposes to accept waste that is not generated within the State first obtain a public benefit determination.

8. *Effect of proposed changes to definition of “waste generated within the State”* – in a number of places, the bill provides that residue generated by certain facilities will only be considered “waste generated within the State” if the weight of residue disposed of at a landfill does not exceed the weight of solid waste initially generated within the State that was processed by that facility.

This language raises of a number of questions the committee may want to consider or seek additional stakeholder input on:

- If the weight of residue from the facility that is landfilled exceeds the weight of solid waste initially generated within the State, is all of the residue now excluded from the definition of “waste generated within the State,” in other words, is all the residue then considered to have been generated outside the State?
- If residue used at a landfill for daily cover, frost protection, or other operational or engineering-related purpose under 1303-C(40-A)(C)(1) is considered “recycled” under 1310-N(5-A)(B)(2) rather than “disposed,” does such residue still factor into the calculation of “the residue disposed” under the new changes to the definition of “waste generated within the State” proposed in the bill?
- Is it feasible from an operational/technical perspective for facilities subject to this new language to actually determine the weight of solid waste initially generated within the State that was processed by the facility in a calendar year?

From the DEP’s testimony, the definition of “waste generated within the State” prior to the 2020 changes was intended to address the issue, particularly for waste-to-energy facilities (WTEs), of attempting to identify and potentially segregate residues that had been generated through the incineration or processing in Maine of waste that originated in another state and also took into account such issues as the seasonal fluctuations in the volumes of out-of-state generated waste accepted by WTEs.

**Fiscal information**

Not yet available from OFPR.