



**To:** Julie Churchill, Project Manager, Maine Department of Environmental Protection

**From:** Sarah Lakeman, Sustainable Maine Project Director, NRCM

**Subject:** Comments on the licensing application for the proposed MRC/Fiberight Project

**Date:** December 3, 2015

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NRCM is committed to protecting the integrity of Maine's Solid Waste Management Hierarchy because we believe it supports sustainable materials management in Maine. This hierarchy prioritizes the reduction of waste at the source, reuse, recycling, and composting over processing waste for energy or burying it in a landfill (*See attachment 1*).

Maine's 126<sup>th</sup> Legislature passed a bill in 2013 titled "*An Act to Implement the Solid Waste Management Hierarchy*" which created a new waste facility licensing criterion that requires DEP to find, before issuing a license, that "*the practices of the facility are consistent with the State's solid waste management hierarchy*" (*See attachment 2*). NRCM is not persuaded that the Fiberight facility meets this requirement. .

NRCM believes that the proposed Fiberight waste processing facility, and the policies outlined in the MRC's municipal contracts, are inconsistent with the State's solid waste management hierarchy, and thus would fail to meet the new licensing criterion, for the following reasons:

- 1) Fiberight technology prevents paper products, food scraps, and other organic material found in the waste stream from being recycled or composted and instead uses these materials as an energy source—which is a clear violation of the hierarchy. Part of the reason Maine prioritizes recycling over other waste processing methods is to reduce pressure on virgin resources and save embodied energy in our materials by using those materials as inputs into new products.
- 2) Fiberight's mixed-waste processing could undermine recycling efforts and degrade the quality of materials collected for recycling. NRCM is very concerned that the "one bin for all waste" system could cause some communities to discontinue successful source-separated recycling and composting programs and prevent new programs from being started. The quality of the recycled material is extremely important for a strong recycling economy, and buyers of recycled commodities pay a higher price for materials that have not been contaminated with household trash.
- 3) Fiberight's mixed-waste collection option could undermine pay-as-you-throw (PAYT) programs, which are one of the most effective ways to reduce waste and equitably distribute disposal costs in a community. Some towns may find that they will save on transportation costs by mixing recycling back in with regular trash. In that event, it's likely that PAYT programs

could be repealed or not considered because it would negate the reason to pay per bag if recycling separately was no longer an option.

- 4) MRC's contractual arrangements with municipalities contain "*Delivery Diversion Charges*" that would penalize municipalities for reducing tonnage brought to the facility. These provisions would discourage waste reduction—the most important rung on the hierarchy. Municipalities would also not be allowed to initiate any new recycling or organics programs without prior consent of the MRC. This provision could prevent advancements in recycling and composting in the State, which is a clear violation of the hierarchy, and also could prevent municipalities from potential cost saving programs. (See *attachment 3: memo from John Noer to PERC Municipal Customers*.)

In summary, we feel strongly that the Fiberright proposal runs contrary to the State's long-term materials management goals and fails to meet the licensing criteria for that reason. Thank you for your consideration of these comments.

## ATTACHMENT 1

### §2101. Solid waste management hierarchy

**1. Priorities.** It is the policy of the State to plan for and implement an integrated approach to solid waste management for solid waste generated in this State and solid waste imported into this State, which must be based on the following order of priority:

A. Reduction of waste generated at the source, including both amount and toxicity of the waste; [1989, c. 585, Pt. A, §7 (NEW).]

B. Reuse of waste; [1989, c. 585, Pt. A, §7 (NEW).]

C. Recycling of waste; [1989, c. 585, Pt. A, §7 (NEW).]

D. Composting of biodegradable waste; [1989, c. 585, Pt. A, §7 (NEW).]

E. Waste processing that reduces the volume of waste needing land disposal, including incineration; and [2007, c. 583, §7 (AMD).]

F. Land disposal of waste. [1989, c. 585, Pt. A, §7 (NEW).]

It is the policy of the State to use the order of priority in this subsection as a guiding principle in making decisions related to solid waste management.

## ATTACHMENT 2

### An Act To Implement the Solid Waste Management Hierarchy

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 38 MRSA §1310-N, sub-§1, as amended by PL 2013, c. 243, §1, is further amended to read:

1. **Licenses.** The department shall issue a license for a waste facility whenever it finds that:

A. The facility will not pollute any water of the State, contaminate the ambient air, constitute a hazard to health or welfare or create a nuisance;

B. In the case of a disposal facility, the facility provides a substantial public benefit, determined in accordance with subsection 3-A; ~~and~~

C. In the case of a disposal facility or a solid waste processing facility that generates residue requiring disposal, the volume of the waste and the risks related to its handling and disposal have been reduced to the maximum practical extent by recycling and source reduction prior to disposal. This paragraph does not apply to the expansion of a commercial solid waste disposal facility that accepts only special waste for landfilling or to any other facility exempt from the requirements of subsection 5-A. The department shall find that the provisions of this paragraph are satisfied when the applicant demonstrates that the applicable requirements of subsection 5-A have been satisfied-; and

D. The practices of the facility are consistent with the State's solid waste management hierarchy set forth in section 2101. The department shall adopt rules incorporating the State's solid waste management hierarchy as a review criterion for licensing approval under this subsection. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

ATTACHMENT 3

MEMORANDUM

**FROM:** John Noer  
**TO:** Penobscot Energy Recovery Company Municipal Customers  
**RE:** Preliminary Draft (10/9/15) of Municipal Review Committee (MRC)  
Municipal Joinder Agreement  
**DATE:**

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We have reviewed the above-described Preliminary Draft of the MRC’s Municipal Joinder Agreement which we understand would be the basis for each community to become contractually obligated and committed to the Fiberright program which the MRC is offering to each community starting in 2018 and would offer to you for your consideration the following comments concerning that agreement and the impact that we understand it will have on each community:

1. Although section 3.3(d)(i) of the Joinder Agreement does not use the phrase “Guaranteed Annual Tonnage (GAT)”, it does use the phrase “Delivery Diversion Charges” which is clearly still a GAT. The Agreement contains absolutely no defined process for determining the amount of any such GAT charges and gives the MRC Board full, undefined and uncontrolled authority to determine and assess these charges.
2. Although what is “acceptable waste” and “unacceptable waste” it plays a significant role in the operation of the process described in the Joinder Agreement, neither of these important terms is defined by that Agreement or any of its exhibits.
3. The following are provisions in the Joinder Agreement where a signing municipality will be completely delegating and relinquishing to the MRC and its Board all decision-making authority and local control:
  - Section 3.4. A municipality will not be able to initiate any new programs, with a few very narrow exceptions, or expand existing programs with respect to municipal solid waste and organics without the prior consent of the MRC;

- Section 4.3(a) provides that the management of any and all rebate provisions under that section of the Agreement is reserved totally to the MRC;
  - Section 5.1 gives a complete and total delegation of authority to the MRC and its Board to manage the entire system and operate the Joinder Agreement and the underlying Master Waste Supply Agreement in every respect;
  - Section 5.2 contains an absolute ratification and acceptance by each joining community of all MRC Articles of Incorporation and Bylaws as those documents presently exist and may be amended from time to time in the future;
4. Section 4.1 provides for the assessment by the MRC of tipping fees for the disposal of municipal solid waste with no provision for any type of process for determining the amount from time to time of those tipping fees. In addition to the existence of a GAT/Delivery Diversion Charge in Section 3.3(d)(i) of the Agreement, the MRC is also provided complete and unfettered authority and control over the determination and the assessment of tipping fees.
  5. Under Section 6.1 a joining municipality will give up any right to contract for or make arrangements for the transportation of their municipal solid waste which authority is reserved to the MRC.
  6. Section 7 of the Joinder Agreement provides total authority and authorization of the MRC to retain all existing funds (approximately \$24 million) which has accumulated in various accounts, including the Tipping Fee Stabilization Account, under the existing PERC LP Agreement. This section allows the MRC to utilize these funds for various new purposes and uses under the terms of the Joinder Agreement within the total discretionary authority of the MRC and its Board.
  7. Under Section 8 of the Joinder Agreement each joining municipality is required to broadly indemnify the MRC from any damages resulting from any of its actions or failure to act under the terms of the Agreement, keeping in mind that the provisions of this Agreement on an overall basis gives the MRC and the MRC Board the complete authority to determine what those requirements may be, thus resulting in a joining municipality relinquishing all local control and decision-making authority.
  8. Under Section 2.2 of the Joinder Agreement the MRC has certain specified rights to terminate the Agreement with particular attention to the end of the term or extended term of the Agreement; however, there is no provision for any process whereby a joining municipality may withdraw from the Agreement should it determine that it is in the best interest of that municipality and its residents to do so.

9. Exhibit C to the Joinder Agreement contains what is described as “components of ratification” of that Agreement. One of the requirements of Exhibit C is for each joining municipality to produce a legal opinion on the enforceability of the Agreement and a municipality’s delegation of legal authority to the MRC and the MRC Board issued by the municipality’s legal counsel or through the “acceptance of a blanket legal opinion from Eaton Peabody” which firm is the counsel of record for the MRC. This proposed process raises a clear conflict of interest situation whereby the MRC’s legal counsel would be rendering opinions concerning legality and enforceability for joining municipalities under the terms of the Agreement.
  
10. Under Section 11.8, it is unclear as to whether or not the arbitration and mediation process described in that section is binding or whether a joining municipality would still have the legal right to contest/resolve any legal issues through a legal action in the Maine courts.

Since we understand that there is a considerable amount of pressure being placed on prospective joining municipalities to sign the Joinder Agreement, because of the above-described issues that are raised by the provisions of the proposed agreement that would result in a joining municipality essentially granting total unfettered authority to the MRC and the MRC Board and to basically give up any and all local control with respect to municipal solid waste management issues, we urge you to carefully consider the provisions of this agreement and to seek the appropriate professional legal advice and counselling before you make a final decision with respect to your community’s future waste management program.