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**VIA EMAIL: Julie.M.Churchill@maine.gov
And U.S. Mail**

Julie M. Churchill
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

Dear Julie:

Comments in Opposition to MRC/Fiberight Draft Permits

I. Introduction

These comments are filed on behalf of USA Energy Group, LLC, which is the managing general partner, as well as the operator, of the PERC facility in Orrington.

These comments are intended to accomplish the following:

1. Oppose the draft permits issued by the Maine Department of Environmental Protection (the Department) to Fiberight and MRC for the construction and operation of a solid waste facility in Hampden, Maine (the "Fiberight Facility");
2. Request review of the draft permits by the Attorney General's office, and
3. Request that the Department hold a public hearing to fully explore and understand the confusing and inconsistent information in the application materials and subsequent submittals by the MRC and Fiberight.

Prior to issuing environmental permits, the Department must find that the applicants have satisfied all of the statutory and regulatory permitting requirements. Here, neither Fiberight nor MRC have submitted the information necessary to support such a finding.

II. The MRC has no authority to obtain title, right, or interest or otherwise expend funds towards the development of the Fiberight facility.

A. MRC's Authority is Limited by Statute and its By-Laws

The Municipal Review Committee ("MRC") has only the limited authority granted by the statute, 38 M.R.S.A § 1304-B(5-A), under which it was created to act on behalf of the municipalities which are involved. The limited statutory functions set forth in 38 M.R.S. § 1304-B(5-A) for regional public waste disposal associations are largely echoed in the MRC's Amended and Restated Bylaws. Section 2.2 of the MRC Bylaws sets forth a list of functions that mostly amount to acting as a liaison, reviewing and administering aspects of members' dealings with PERC and Bangor-Hydro and administering cash distributions.

The broadest listed function in the Bylaws is to "[p]erform such additional acts and functions as the Board of Directors deems necessary and/or desirable to effectuate the mission and general purpose of the corporation and the administration of the Agreements and any other instruments or agreements ancillary or collateral thereto." This is insufficient to support the MRC's active and financially substantial participation in the development of the Fiberight Facility. Given that the MRC was formed to represent its constituent communities, and also bears the burden of proof as a co-applicant for this project, the viability of its Title, Right or Interest and Financial Ability rest on the extent of its authority. Prior to issuance of any permits or licenses, the Department must require that the MRC confirm that its participation in this project is legally authorized.

The MRC's participation for which authority should be shown, includes (according to the application):

- an option agreement with HO Bouchard for the potential purchase of real estate for the Fiberight Facility;
- a Development Agreement with Fiberight;
- a Master Waste Supply Agreement with Fiberight; and
- a commitment of \$5,000,000 from its Tip Fee Stabilization fund to the purchase and improvement of the real estate on which the Fiberight facility is to be located.

These actions, and the commitment of funds they represent, would require authorization by both the Board, and all the member municipalities. MRC has not, however, provided any resolutions or other authorizations to reflect this. MRC has failed to provide reasonable evidence that it is authorized to act on behalf of, and take on significant liabilities that may impact, its charter and non-charter members in the manner described in the application materials.

The MRC has publicly represented that some of its municipal members executed a resolution authorizing the MRC to promote the advancement of a post 2018 planning process. However, advancement of a post 2018 planning process is a massively different undertaking than expending \$5 million of their collective funds and taking on construction and operational liability for a new solid waste facility. Nowhere within the boundaries of the application, or in the public documents US Energy has reviewed is there any documentation of MRC's authority to file applications, or to take on the obligations described in the application materials. Without such evidence, the MRC's TRI and financial ability demonstration fails.

B. Even if requisite authority were assumed, both the MRC and Fiberight's financial ability documentation fails to satisfy the Department's legal requirements.

Chapter 400 of the Department's solid waste rules require that applicants demonstrate that they have access to the funds necessary to design, build, and operate a proposed facility. In response to this requirement, MRC has committed (without confirmed authority, as discussed above) \$5 million towards purchasing and improving land with a road and utilities for use by Fiberight. Not only must that showing fail for lack of authority, but must fail because MRC has not presented any documentation suggesting that it has reasonable access, as a co-applicant must, to the \$67 million necessary to design and build the proposed facility (not to mention the additional fund necessary for operations).

Likewise, Fiberight has submitted no documentation indicating that it has access to sufficient funds to design, build or operate the facility. A Covanta entity submitted a vague letter of interest, but with no commitment, no dollar amount, and no details. To backfill the weakness of this letter, Fiberight submitted the financial documentation from a different Covanta entity, one which has not, at least in the public record, indicated even an interest in the project, much less any intent to fund.

Given the dearth of documentation, there is absolutely no link between Covanta's money and Fiberight, which adds up to a complete failure to satisfy the financial ability requirements. This is a critical issue.

The acceptance of a vague letter of interest as sufficient evidence of financial ability is completely out of step with both the legal requirement, and the Department's application of those requirements to all other proposed developments in the state.

US Energy requests that the Department hold MRC and Fiberight to the same standard as other applicants for Maine environmental permits, and deny the permits for failure to provide adequate financial assurances. In the alternative, US Energy requests that the Department not issue final approvals unless and until these financial assurances are provided by both MRC and Fiberight.

C. Because MRC has not shown requisite authority, the site control documentation fails to satisfy the title, right or interest requirement. (TRI)

As presented in the application materials, the MRC is responsible for site control for Fiberight's project, and the MRC will proceed to act as a landlord to the Fiberight Facility. MRC has not provided any evidence that it is authorized to pursue or support the development of the Fiberight Facility, much less expend funds from the Tipping Fee Stabilization Fund.¹ The option agreement between the MRC and HO Bouchard that is intended to satisfy the TRI requirement provided is both void for lack of authority, and for MRC's lack of documented authority to use funds to exercise that option.

As a co-applicant, Fiberight must also demonstrate that it has TRI in the property necessary for the project. The application materials make clear that any rights Fiberight may have in the property are contingent on the validity of MRC's rights. To the extent MRC's TRI fails for the reasons identified above, so must Fiberight's TRI fail.

US Energy requests that the Department deny the permits for failure to sufficiently demonstrate TRI, as it is inextricably linked to financial capacity in this particular proposal.

III. The proposed project violates the solid waste hierarchy

The proposed facility violates Maine's solid waste hierarchy set forth in 38 MRSA § 2101. The MRC's burden of proof is to show that facility will result in "less" MSW being landfilled than is the case now with the PERC facility fully operational. The PERC facility reduces waste volume by approximately 90%. The application materials fail to satisfy this burden in two ways.

First, the operational requirements of the Fiberight facility require that municipalities add their organic waste in which their MSW, which violates the letter and intent of both the hierarchy and recently passed legislation directing the segregated handling of organic waste. Incidentally, this practice will increase the total tonnage of waste delivered to the Fiberight facility, so while the tipping fee per ton may appear attractive at the moment, the total tonnage will increase, resulting in increased costs for the towns.

Second, between the 2018 expiration of PERC agreements and the Fiberight facility being ready to receive waste, no earlier than 2020, the Department is authorizing the towns to directly landfill 100% of their waste, the "bridge capacity waste." Further, this landfilling could go on indefinitely - emails between the Fiberight Virginia demonstration plant and the Virginia Department of Environmental Quality indicate that the demonstration plant is not actually reducing waste volume or creating digestate, but instead recycles some material and landfills the rest. This demonstration plant is demonstrating that Fiberight is not capable of performing the processing necessary to match the waste volume reduction currently achieved at PERC.

The MRC's plans are clearly intended to provide a cheaper tipping fee (with the assumption of significant additional expenses and liabilities) in a manner that is contrary to the State Waste Management Hierarchy.

The Department must deny the MRC and Fiberight license applications, as the proposed operations are in direct contravention of the Solid Waste Management Hierarchy. The proposed project violates the statutory requirements of the State that the Department is charged to uphold.

IV. Inconsistent Messaging and Conflicting Technical Data Necessitates a Hearing.

US Energy requests a public hearing be held to sort out the application submissions. In reviewing the various supplemental filings from both the public and the applicant, the technical details of the project are confusing and inconsistent, particularly as it relates to the impact of that technical information on the appropriate permitting requirements. Several sections of Chapter 13 of Title 38, including 38 MRSA §§ 1302, 1310-S and 1310-AA, express the intention of the Legislature that they wish the public to be involved in the process surrounding solid waste management; a public hearing would be prudent and appropriate here.

For example, the project was originally certified as anticipated to generate 36,000 gallons per day of wastewater. Later, the applicant submitted information indicating that the project is anticipated to generate 150,000 gallons per day. This indicates a significant change in operations, and yet no such operational change was readily discernible from the submission. There also appears to be conflicting technical information about whether this facility would qualify as a major or minor source of air emissions, whether the incineration of post-hydrolysis solids (PHS) would require a beneficial use permit under Department Rule Chapter 418, and whether the incineration of PSH should be regulated under the "non-waste" provisions of the Clean Air Act or the "waste" provisions of the Clean Air Act.

Such confusing and inconsistent technical data submitted by the applicants necessitates a hearing in order for the Department and the public to fully understand the technical information that has been submitted. Even Maine's news media has carried numerous articles challenging the technical aspects of the facility and its assumption. Interested persons and experts ought not be left to only to comments prompted by news articles, but should be given the opportunity to fully vet the information with the Department at a public hearing.

While the Department typically requires that requests for public hearing be received within 20 days of an application being accepted as complete for processing, the Department retains the independent authority to initiate the public hearing process where it might assist the Department in clarifying and understanding credible conflicting technical information. US Energy requests that the Department to consider initiating just such a public hearing,

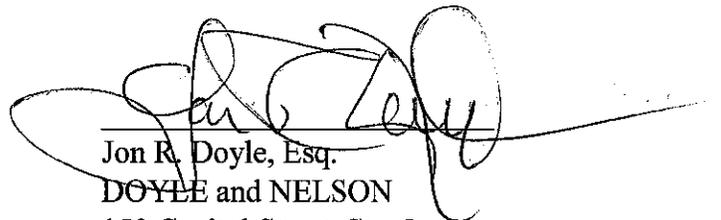
particularly where, as here, the data related to one of the primary technical issues was not fully in the record until a day or two before the draft permit issued, leaving no time for fulsome analysis or comment.

It needs to be pointed out and emphasized that those provisions of the DEP statutes contained in Title 38 having to do with waste management are full of declarations of legislative policy which make very clear that the public is to have a role. The reader should look at 38 M.R.S.A. §1310-S which is full of directions for public participation when the Legislature has striven to make those as all encompassing as possible and the provisions of §1310-AA having to do with public benefit determination. The writer has not found similar counterparts in other Maine statutes and the Maine Legislature has a rich tradition of involving Maine's public in the doings of discovery. One does not need to look further than these examples and they are not alone to learn that there is a preference for the public to participate in all important processes.

V. Conclusion

The licenses, as currently drafted, and if based on the information currently in the record, do not satisfy the legal requirements to which project applicants are held. To issue licenses that have not undergone legal review, that are not supported by the evidence in the record, and that conflict with the legislative directives provided in statute can only ultimately result in financial harm and uncertainty to a large number of Maine municipalities who have put their faith (as well as funds) in the MRC with regard to this project.

We submit that the Municipal Review Committee/Fiberight applications are incomplete, inappropriate and ineligible for permits from the Department. We submit that there is no information in the Department record to support the draft permits. We therefore request that the permits be denied.



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¹ MRC has access to certain funds in the Tip Fee Stabilization Fund. The purpose of the fund is to help municipalities in the event tipping fees are increased. According to the information submitted by MRC, it plans to use the money in the Tip Fee Stabilization Fund to fund the development of the Fiberight Project. There is no information in the record that shows that MRC has any authority to spend the Tip Fee funds for that purpose.