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June 10, 2014

Karen Knuuti, Environmental Specialist
Bureau of Remediation and Waste Management
Department of Environmental Protection
Eastern Maine Regional Office
106 Hogan Road
Bangor, Maine 04401

Re: Municipal Review Committee's Application for Public Benefit – Prohibition on Approval of New Commercial Solid Waste Disposal Facilities

Dear Karen:

This firm represents the Town of Greenbush in connection with the Municipal Review Committee, Inc.'s ("MRC") pending Application for Public Benefit Determination ("Application"). We are in the process of preparing a more complete response to the Application and we will file that response in a timely fashion. In the meantime, there is a threshold issue that needs to be addressed; namely, whether MRC's proposal is exempt from the current prohibition on the approval of new commercial solid waste disposal facilities. The Town's position is that the Department must dismiss the Application because MRC's project is *not* exempt from the prohibition.

MRC proposes to construct a "solid waste disposal facility." *See* Application, pg. ES-1. New commercial solid waste disposal facilities, such as the one proposed, are prohibited in Maine. Specifically, Maine law provides, in part, that

[n]otwithstanding Title 1, section 302, the [Maine Department of Environmental Protection] may not approve an application for a new commercial solid waste disposal facility . . . after September 30, 1989 [].

Title 38 M.R.S.A. § 1310-X(1) (Supp. 2014).

MRC's proposal constitutes a new "commercial" solid waste disposal facility and, as such, is currently prohibited under the law. The term "commercial" is not defined in the law. Rather than define which solid waste disposal facilities constitute *commercial* facilities, the Maine Legislature opted to declare *all* solid waste disposal facilities to be

commercial, except those *expressly* excepted under the law. Specifically, Maine law provides:

- 6. Commercial solid waste disposal facility.** “Commercial solid waste disposal facility” means a solid waste disposal facility *except as follows*:
- A-2.** A solid waste facility that is owned by a public waste disposal corporation under section 1304-B, subsection 5.
 - B-2.** A solid waste facility that is owned by a municipality under section 1305.
 - C-2.** A solid waste facility that is owned by a refuse disposal district under chapter 17.
 - D.** Beginning January 1, 2007, a solid waste facility owned and controlled by the Department of Administrative and Financial Services, Bureau of General Services under chapter 24.
 - E.** A solid waste facility that is owned and controlled by a single entity that (1) generates at least 85% of the waste disposed of at the facility or (2) is the owner of a manufacturing facility that has, since January 1, 2006, generated at least 85% of the solid waste disposed of at the solid waste facility.
 - F.** A private corporation that accepts material-separated, refuse-derived fuel as a supplemental fuel and does not burn waste other than its own.

38 M.R.S.A. § 1303-C(6)(emphasis added). As written, only those entities which meet one of the narrow enumerated exemptions may seek approval to construct a new solid waste disposal facility. All other entities, whether governmental, profit or not-for-profit are deemed commercial and may not be approved.

MRC claims to be a Regional Association. The term “Regional Association” is defined at 38 M.R.S.A. § 1303-C(24). The law requires that Regional Associations be formed by one or more of a number of specific methods. MRC claims it was formed by the creation of a nonprofit corporation that consists exclusively of municipalities, counties or quasi-municipal corporations for the purpose, among other permissible purposes, of owning, constructing or operating a solid waste disposal facility. 38 M.R.S.A. § 1303-C(24)(B). Importantly, as developed more fully below, while MRC may be a Regional Association it was *not* formed for the purposes of *owning, constructing or operating* a solid waste disposal facility.

According to its Bylaws, MRC also claims to qualify as an “other regional association” pursuant to Title 38 M.R.S.A. § 1304(5-A). MRC’s Amended and Restated Bylaws, Section 2.3. As the Municipal Review Committee’s name implies, MRC was formed for the purpose of

reviewing and overseeing its members' interactions with the Penobscot Energy Recovery Company, or PERC. MRC's mission and purposes, both as set forth in its Bylaws, are more reflective of a Regional Association established under 38 M.R.S.A. § 1304(5-A) than under 38 M.R.S.A. § 1303-C(24)(B).

Regardless of the source of their authority, Regional Associations are not on the list of entities exempt from the prohibition on commercial solid waste disposal facilities. It is a well-settled rule of statutory interpretation that the express mention of one thing implies the exclusion of others not listed. *Wescott v. Allstate Ins.*, 397 A.2d 156, 169 (Me. 1979) ("The maxim-*expressio unius est exclusio alterius* is well recognized in Maine as in other states"). That is, when certain things (e.g. exemptions) are specified in a law, an intention to exclude all others from its operation is inferred. In this case, the Maine Legislature provided a very specific list of entities exempt from the commercial solid waste disposal facility ban. Regional Associations are not on that list. Period. Granted, MRC is comprised of governmental entities and, for that reason, would not normally be considered "commercial." However, in the context of the definition of "commercial solid waste disposal facility" where the Maine Legislature chose to declare all but a few specific entities to be commercial and specifically did not include Regional Associations among them, MRC qualifies as "commercial."

Importantly, had it so desired, the Maine Legislature could easily have included the term "Regional Association" in the list of exempt entities. Regional Associations, as a permissible relationship structure, came into existence at the same time that the prohibition on commercial landfills came into existence, both appearing in the same originating legislation. (PL 1989, c. 585, § E, 4 and 34). Thus, it is fair to infer that the Maine Legislature considered including Regional Associations on the list of entities exempt from the prohibition on commercial landfills but, for whatever reason, chose not to do so. Until the Maine Legislature acts to either lift the prohibition or add Regional Associations to the list of exempt entities, MRC's project may not be approved.

MRC seems to acknowledge, as it must, that Regional Associations are not specifically on the short and specific list of exempt entities. Instead, MRC argues that the proposed facility fits under the exception for "a solid waste facility that is owned by a municipality under section 1305." 38 M.R.S.A. § 1303-C(6)(B-2). We disagree. Title 38 M.R.S.A. § 1305 simply requires that municipalities provide disposal services for domestic and commercial solid waste generated within the municipality. 38 M.R.S.A. § 1305. Read together with Title 38 M.R.S.A. § 1303-C(6)(B-2), a single municipality may establish a municipal solid waste disposal waste facility within its geographical boundaries without running afoul of the prohibition on "commercial" solid waste disposal facilities. That makes sense, especially given that the municipality establishing a facility within its boundaries would have complete and unfettered control over the facility's operation.

What does not make sense is MRC's suggestion that "a solid waste facility that is owned by a municipality under section 1305" is anywhere near the same thing as a solid waste disposal facility owned and operated by a Regional Association serving, in this case, the disposal needs of

187+ municipalities and other governmental units. First, the sheer volume differential between a solid waste disposal facility designed to accept waste from one municipality versus the volume generated by, for example, 186 other municipalities is monumental. The latter is identical in all material respects to a commercial landfill operated by for-profit commercial waste disposal company. It makes sense that the Maine Legislature would draw a distinction between a single municipality providing disposal services for waste generated within its own boundaries and a Regional Association that could conceivably be responsible for disposing of an unlimited amount of solid waste. The single municipality should be exempt from the ban on commercial landfills, the Regional Association should not. And, it isn't.

The balance of the provision MRC claims exempts it from the ban on commercial solid waste disposal facilities (i.e., 38 M.R.S.A. § 1303-C(6)(B-2)) is also consistent with our interpretation that § 1305 applies only to a single municipality, not Regional Associations. First, the exception only applies "as long as the municipality controls the decisions regarding the type and source of waste that is accepted, handled, treated and disposed of at the facility. Such would not be the case with MRC's project. Given MRC's governance structure, neither Greenbush nor Argyle would have any control whatsoever over the type and/or source of waste accepted, handled, treated and disposed of at the facility, much less the type of control contemplated by 38 M.R.S.A. § 1303-C(6)(B-2)(1). Second, the statute requires a majority of the voters of the municipality to approve, by referendum election, the acceptance of waste that is not generated within the State. We understand that MRC is not proposing to accept out-of-State waste, but the simple fact that the statute requires voters to approve such acceptance, by referendum election no less, suggests that the exemption is only applicable to single municipalities, not Regional Associations.

MRC acknowledges that 38 M.R.S.A. § 1303-C(6)(B-2)) uses the singular term "municipality," but argues that "words of the singular number may include the plural . . . unless such construction is inconsistent with the plain meaning of the enactment." (Mem. of Law, dated May 30, 2014, pg. 3 (citing 1 M.R.S.A. § 71). We agree with MRC's recitation of the law, but not to its application to this case. Pluralizing the term "municipality" to include 187 municipalities (or more) would expand a statutory provision intended to allow a single municipality to establish a solid waste disposal facility for the disposal of waste generated within its boundaries into a law requiring a single municipality to host a disposal facility of virtually unlimited size and for an entire region (and, conceivably, the entire State). Expanding § 1303-C(6)(B-2)) in this way would be grossly inconsistent with the meaning of the enactment. Thus, while words of the singular number may, under certain circumstances, include the plural, this is clearly not one of those circumstances.

MRC tries to advance its cause by claiming that ambiguity exists in the statutes and the ambiguity ought to be resolved in favor of including Regional Associations under the list of those entities excepted from the ban on commercial solid waste disposal facilities. As detailed above, there is no ambiguity. The list of excepted entities is specific and exclusive. Regional Associations, a term which came into existence at the same time the ban was enacted, is not on that list. Therefore, MRC's proposed facility is considered a commercial solid waste disposal

facility and, as such, is prohibited under the law. Where a statute is unambiguous, it is to be interpreted according to its plain language. Rich v. Dept. of Marine Resources, 2010 ME 41, ¶ 7, 994 A.2d 815, 818 (Me. 2010); Cobb v. Bd. of Counseling Prof. Licensure, 2006 ME 48, ¶ 13, 896 A.2d 271, 275. The statutes in the case are unambiguous and must be interpreted according to their plain language.

To the extent there *is* any ambiguity in the interplay between Regional Associations and the prohibition on the approval of new commercial solid waste disposal facilities, that ambiguity exists within the definition of "Regional Association" itself. Title 38 M.R.S.A. § 1303-C(24) provides that the Regional Association relationship must be formed by one or more of the following methods:

- A. Creation of a refuse disposal district under chapter 17;
- B. Creation of a nonprofit corporation that consists exclusively of municipalities and is organized under Title 13, chapter 81 or Title 13-B, for the purpose, among other permissible purposes, of owning, constructing or operating a solid waste disposal facility, including a public waste disposal corporation under section 1304-B, or whose members contract for the disposal of solid waste with a solid waste disposal facility, including, but not limited to, a qualifying facility as defined in Title 35-A, section 3303;
- C. Creation of a joint exercise of powers agreement under Title 30-A, chapter 115; or
- D. Contractual commitment.

MRC, by its own admission, falls under Section B. We concede that Section B acknowledges that Regional Associations *may be formed for the purpose of owning, constructing or operating a solid waste disposal facility*. Regional Associations so formed, however, are not *per se* exempt from the commercial solid waste disposal facilities ban. Indeed, Regional Associations are no more exempt from the prohibition than a for-profit corporation legally formed for the exact same purposes.

Furthermore, and very importantly, MRC is *not* organized for the purposes of *owning, constructing or operating* a solid waste disposal facility. The Municipal Review Committee was formed to oversee its members' relationship with PERC and MRC's mission and purpose, as stated in its Bylaws, clearly reflect that organizational objective. MRC's Bylaws make absolutely no mention of, or even hint at, *owning, constructing or operating* a solid waste disposal facility. We have included a copy of the relevant portion of MRC's Amended and Restated Bylaws for your convenience. So, even if Regional Associations were excepted from the prohibition against new commercial solid waste disposal facilities, MRC would not fall

within that exception because it was not formed for the purpose of *owning, constructing or operating* a solid waste disposal facility.¹

In addition, MRC's Bylaws state that it shall have all the powers, rights and duties normally incident to corporations under Title 13-B of the Maine Revised Statutes, "as well as the powers, rights and duties granted by Title 38, Section 1304-B, subsection 5-A of the Maine Revised Statutes." MRC's Amended and Restated Bylaws, Sec. 2.3. Title 38 M.R.S.A. § 1304-B(5-A) relates to "other regional associations." The statutory provision dealing with "other regional associations," unlike § 1303-C(24) dealing with "regional associations," makes no mention whatsoever regarding the right to "own, construct or operate" solid waste disposal facilities. So, to the extent MRC has the powers, rights and duties conferred upon "other regional associations" by §1304-B(5-A), those powers, rights and duties do not include the ability to own, construct or operate a solid waste disposal facility.

In summary, there is currently a prohibition on the approval of new commercial solid waste disposal facilities. For the foregoing reasons, MRC, whether or not a Regional Association, is not excepted from that prohibition. Accordingly, the Department must dismiss MRC's Application for Public Benefit Determination.

Very truly yours,

FARRELL, ROSENBLATT & RUSSELL



Roger L. Huber

Enclosures

cc: Town of Greenbush
P. Andrew Hamilton, Esq.
Jon Doyle, Esq.

¹ / In its May 18, 2014 filing with the Department, the law firm of Doyle & Nelson raised a number of arguments concerning MRC's corporate scope and authority. We join in those arguments as if they were more fully restated herein.

AMENDED AND RESTATED
BYLAWS
OF
MUNICIPAL REVIEW COMMITTEE, INC.

(Revised as of October 25, 2006)

ARTICLE I
Name, Location and Corporate Seal

Section 1.1 The name of this corporation shall be Municipal Review Committee, Inc., and it shall be located in Bangor, County of Penobscot, State of Maine.

Section 1.2 The corporate seal shall be the common wafer seal unless otherwise determined by the Board of Directors.

ARTICLE II
Mission and Purpose

Section 2.1 The mission of this corporation is to better ensure the continuing availability to its members of long-term, reliable, safe and environmentally sound methods of solid waste disposal at a stable and reasonable cost. Members may include counties, refuse disposal districts, public waste disposal corporations and other quasi-municipal entities in addition to municipalities.

Section 2.2 The purpose of this corporation on a continuous basis shall be to promote the common good and general welfare of the people of its members in the following manner on a regular basis:

1. Act as a liaison for and representative of the members, which members are commonly known interchangeably as "Charter Municipalities" and "Member Municipalities", with the Penobscot Energy Recovery Company, Limited Partnership ("PERC") and Bangor Hydro-Electric Company ("Bangor Hydro");

2. Review PERC's monthly and annual financial performance and operating reports;
3. Review quarterly tipping fee adjustments by PERC;
4. Review projected/documentated utilization of Capital and Maintenance Reserve Account ("CMRA") monies;
5. Oversees the CMRA;
6. Review and verify calculation by PERC of cash and performance credits to be provided to Charter Municipalities under the Waste Disposal Agreements between each such Member Municipality and PERC (each individually an "Agreement" and collectively the "Agreements") as those Agreements may be amended from time to time;
7. Review any changes proposed by PERC to the line item definitions in the operating Profit and Loss Report;
8. Review of Sampling Methodology and PERC's compliance with performance standards;
9. Review of the financial operating information of Bangor Hydro and monitoring the operations of Bangor Hydro, as well as the process of the deregulation or restructuring of the electric power industry in Maine and its impact on Bangor Hydro; and
10. Perform 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.
11. With regard to so-called Equity Charter Municipalities who have further modified their respective waste disposal agreements with PERC by executing a Second Amended, Extended and Restated Waste Disposal Agreement prior to September 30, 1998:
 - A. Receive or direct cash distributions from PERC or its trustee (sometimes called "Performance Credits") and determine the

allocation, use and application thereof on behalf of Equity Charter Municipalities;

- B. Purchase, sell and otherwise deal on behalf of the Equity Charter Municipalities with limited partnership interests in PERC Limited Partnership;
- C. Receive, hold, exchange, sell, exercise or otherwise administer and deal with warrants for one million shares of common stock of Bangor Hydro as contemplated by the provisions of the Custodian Agreements between MRC and Bangor Savings Bank and the Warrant for Purchase of Common Stock issued by Bangor Hydro and as determined by a two-thirds majority vote of the Board of Directors present and voting;

On occasion, the Municipal Review Committee, Inc. will also perform the following functions:

1. Review any additional costs imposed by PERC on the basis of a change in law and approve, disapprove or suggest alternatives to same;
2. Formulate appropriate response to notification by PERC of a change in its financial condition that may result in a cessation of operations under the Agreements;
3. Enforcement of Member Municipalities' priority lien on CMRA monies including, determining each Charter Municipality's pro-rata share of same in the event of a termination of operations under the Agreements;
4. Administration of withholding, escrow, and release of monies resulting from a cumulative CMRA shortfall;
5. Exercise of options and other functions concerning tonnage contemplated by Article V and Article VIII of the Agreements including reallocation, trading, or replacement any tonnage shortfalls;

6. Review and recommend appropriate action pursuant to any request by PERC to assign its rights and responsibilities under the Agreements;
7. Establish an escrow account for accrued but unpaid Performance Credits;
8. If appropriate, consent to refinancing that may materially affect performance credits, book value of the PERC facility, or distributable cash;
9. Represent Charter Municipalities in arbitration of disputes arising under the Agreements including, consenting to be bound by such arbitration;
10. Periodically review and evaluate the fairness and practical aspects of the allocation of various benefits and risks among its members encumbered in their respective waste disposal agreements and other relationships;
11. Interface with FAME and other lenders to PERC concerning the administration of loans and other credit relationships with PERC.

Section 2.3 This corporation shall have all the powers, rights and duties normally incident to such corporations and all other rights granted to corporations organized under Title 13-B of the Maine Revised Statutes, as well as the powers, rights and duties granted by Title 38, Section 1304-B, subsection 5-A of the Maine Revised Statutes.

ARTICLE III Membership

Section 3.1 Designation of Members. The corporation shall have three classes of members: (1) Original Charter Municipalities; (2) Amending Charter Municipalities; and (3) Equity Charter Municipalities, as those terms are defined in the municipalities' respective Waste Disposal Agreements with PERC and otherwise set forth in the Articles of Incorporation as amended from time to time or as set forth in the bylaws, as may be amended from time to time. Only municipalities and counties, inclusive of public