

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
DOCKET NO. TBD

PENOBSCOT ENERGY)
RECOVERY COMPANY, LP,)
USA ENERGY GROUP,)
LLC, AND EXETER AGRI-ENERGY, LLC)

Petitioners)

v.)

MAINE DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)

Respondent)

PETITION FOR REVIEW OF
FINAL AGENCY ACTION
PURSUANT TO
M.R.Civ.P. 80C

INTRODUCTION

On July 14, 2016, the Maine Department of Environmental Protection (“MDEP”) issued Solid Waste, Air Emissions, and Stormwater Management Licenses to the Municipal Review Committee, Inc. (“MRC”) and Fiberight, LLC (“Fiberight”), essentially greenlighting the construction of a new, experimental solid waste processing facility in Hampden, Maine (“Fiberight facility” or “Fiberight project”). The issuance of these permits and the development of this facility has the potential to change the solid waste disposal landscape in a significant portion of the State of Maine and will have impacts lasting for decades. Specifically, this new facility seeks to replace the existing waste-to-energy system being used by a large number of municipalities with untested technology. Even if Fiberight’s experimental technology succeeds, and no real evidence was provided that it will, the Fiberight process is less desirable from

the standpoint of Maine's solid waste hierarchy than the existing waste-to-energy process, see 38 M.R.S.A. § 2101. Even more importantly, if the project fails to come online by the projected date, which scenario appears likely, or at all, the impacted municipalities will be forced to landfill their solid waste for the foreseeable future. *Id.* (land disposal must be last resort for solid waste).

MDEP issued the MRC/Fiberight permits despite serious deficiencies in the record and in contravention of existing statutory and regulatory requirements. Furthermore, despite the serious questions raised by a host of parties, including members of the Environmental & Natural Resources Committee of the Maine Legislature, and despite its obligation to safeguard the state's solid waste system as a whole, MDEP proceeded to approve this project with tunnel vision, in the absence of critical information,¹ without the benefit of a public hearing, and in disregard of the widespread public impact of their decision.

In light of these issues, Petitioners Penobscot Energy Recovery Company, LP ("PERC"), USA Energy Group, LLC ("USAE"), and Exeter Agri-Energy, LLC ("Exeter") petition this Court to review the MDEP's issuance of the licenses for the Fiberight facility, to reverse the MDEP's decisions, and to direct MDEP to deny the licenses based on the information currently before the department.

¹ For example, the MDEP was informed by the United States Environmental Protection Agency, on or around June 29, 2016, that Fiberight had not provided the EPA with information critical to the determination of whether its "product" would be considered a "non-hazardous secondary material" or not. This determination has a significant impact on the Maine licensing criteria. Regardless, the MDEP proceeded to approve the project. An August 8, 2016, email submitted to MDEP after the approvals demonstrates that the information still has not been provided.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 38 M.R.S.A. § 346 and 5 M.R.S.A. § 11001.
2. Venue is proper pursuant to 5 M.R.S.A. § 11002(1)(B).

PARTIES

3. Petitioner PERC is a Maine limited partnership with a principal place of business in the Town of Orrington, County of Penobscot, State of Maine. PERC was formed in 1983 to develop and operate the waste-to-energy facility currently located and operating in Orrington, Maine. The PERC facility is capable of processing 300,000 tons of municipal solid waste (“MSW”) per year, reduces the volume of MSW to be landfilled by 90%, and can continue to operate until at least 2035.
4. Petitioner USAE is a Minnesota limited liability company with a place of business in Minneapolis, County of Hennepin, State of Minnesota. USAE is the managing general partner of the PERC facility.
5. The Fiberight facility is intended to serve the same municipalities currently being served by PERC and will directly impact PERC’s business and viability.
6. Exeter Agri-Energy, LLC is a Maine limited liability company with a principal place of business in the Town of Exeter, County of Penobscot, State of Maine. Exeter is in the business of creating energy and other products from

organic materials and the proposed Fiberight project will impact the industry and market in which it operates.

FIRST GROUND FOR RELIEF

MRC/Fiberight Failed to Demonstrate that Licensing the Project is Consistent with Maine's Solid Waste Hierarchy.

7. 38 M.R.S.A. § 1310-N requires any new solid waste facility to obtain a MDEP license prior to construction or operation and MDEP can only issue the license if it is able to make the statutory findings required by both 38 M.R.S.A. § 1310-N and applicable MDEP regulations. *See Solid Waste Management Rules*, 06-096 CMR chs. 400-425.

8. Furthermore, the Maine Legislature has declared it to be the policy of the State to plan for and implement an integrated approach to solid waste management and has created a hierarchy of management techniques. 38 M.R.S.A. § 2101.

9. A solid waste facility applicant must demonstrate that development of the proposed facility would be consistent with the State's solid waste management hierarchy.

10. MRC/Fiberight failed to make the above-described demonstration, and MDEP's approval of the Project, given its potential operation and impact, was unsupported by substantial evidence and was in violation of the hierarchy and other similar legislative directives to avoid landfilling solid waste, to reduce the

amount of waste delivered to solid waste processing facilities, and to segregate and reuse or recycle organics.

SECOND GROUND FOR RELIEF

MRC/Fiberight Failed to Demonstrate Title, Right, and Interest (TRI) in the Project Property

11. The relevant MDEP regulations require all solid waste applicants to demonstrate that they have sufficient title, right, and interest (TRI) in the property at issue, including a requirement that options held by an applicant must give rights of sufficient duration and terms to permit the proposed construction and use of the property, including closure and post closure care.

12. Both MRC and Fiberight are applicants for the Fiberight project.

12. There is no evidence in the record from which the MDEP could have concluded that Fiberight, the entity actually intending to develop the facility, has any real estate rights with respect to the project property.

13. There is no evidence in the record from which the MDEP could conclude that MRC's rights are sufficient to meet the regulatory requirements.

THIRD GROUND FOR RELIEF

MRC/Fiberight Failed to Demonstrate the Technical Ability to Perform the Project.

14. The governing statute and relevant MDEP regulations require the applicants to demonstrate the technical ability to design, construct, operate, maintain, close, and, if applicable, accomplish post-closure care of the facility in compliance with all regulatory requirements.

15. The record before MDEP was insufficient to permit a conclusion that either MRC or Fiberight has or will have the technical ability to perform the Project.

16. To the extent the determination of technical ability was deferred by MDEP, this was in error and an abuse of discretion.

FOURTH GROUND FOR RELIEF

MRC/Fiberight Failed to Demonstrate the Financial Ability to Perform the Project.

17. The governing statute and relevant MDEP regulations require the applicants to demonstrate the financial ability to design, construct, operate, maintain, close, and, if applicable, accomplish post-closure care of the facility in compliance with all regulatory requirements.

18. The record before MDEP was insufficient to permit a conclusion that either MRC or Fiberight has or will have the financial ability to complete the above-listed project components. The problems with MDEP's findings on this

issue include the fact that any conclusions about financial ability were based on facially inaccurate cost estimate data.

19. To the extent the determination of financial ability was deferred by MDEP, this was in error and an abuse of discretion.

FIFTH GROUND FOR RELIEF

The MDEP Approval of the Licenses was Arbitrary, Capricious, and an Abuse of Discretion Given the Contradictory, Conclusory, and Incomplete Nature of the Assertions in the Applications

20. In issuing the licenses, the MDEP made findings on several points based on information that was either inconsistent with or contradicted by other information provided by the applicants, e.g. claims in the solid waste application conflicted with claims in the air emission application.

21. MDEP failed to reconcile these issues, either independently or through the conduct of a public hearing, before issuing the licenses.

22. To the extent the licenses were issued based on contradictory or incomplete information in the applications, and to the extent the licenses relied on conclusory assertions by the applicants rather than an evidentiary showing, there was insufficient evidence to support the issuance and the MDEP's action was arbitrary, capricious, and an abuse of discretion.

SIXTH GROUND FOR RELIEF

There was Insufficient Evidence in the Record to Support Approval of the Minor Source Air Emission License

23. MRC/Fiberight's Air Emission application was premised on the conclusion that the post-hydrolysis solids (PHS) produced by their process would be classified as a "non-waste" pursuant to federal regulations.

24. The United States Environmental Protection Agency ("EPA") has not concluded that PHS is a "non-waste" and there was insufficient evidence in the record to permit the MDEP to conclude that such a classification would be granted.

25. For this reason, the air emission license as issued was unsupported by the record and was an abuse of discretion.²

SEVENTH GROUND FOR RELIEF

Under the Circumstances of this Case, the MDEP should have held a public hearing on the MRC/Fiberight Licenses.

26. The MDEP initially denied timely requests for public hearing on these licenses because, at the time, it claimed there were no credible technical conflicts relating to licensing criteria.

27. MRC/Fiberight submitted much of their technical information well after the initial, twenty-day public hearing request period and subsequent technical submissions did, in fact, result in conflicts.

²The ambiguity as to how PHS is characterized also raises other issues, including the issue of whether the applicants should have been required to obtain a beneficial use license pursuant to Chapter 418 of the Solid Waste regulations.

28. Some of the technical issues involved conflicting and confusing information from the applicants that could not be adequately resolved through the written public comment process. Rather, the more vigorous exploration permitted by a hearing was needed.

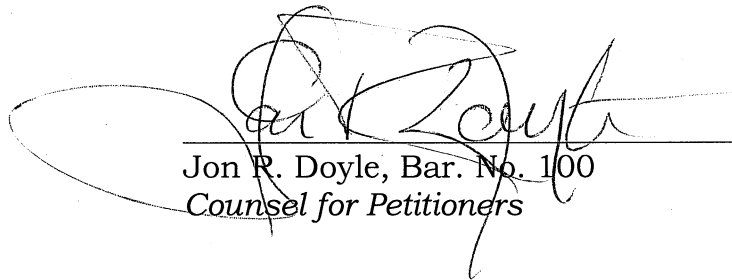
29. In light of the subsequent conflicts on technical issues, the nature of the conflicting information, the fact that the project will impact the solid waste management system for multiple municipalities and counties and State-wide, the fact that the Fiberight project involves activity not previously licensed in the State, the impact of the project on the property and business interests of existing solid waste management companies and related entities, and the public scrutiny being given to the project, MDEP abused its discretion in failing to hold a public hearing on these licenses and deprived Petitioners and others of their due process rights.

OTHER GROUNDS FOR RELIEF

30. Petitioners reserve the right to rely on and brief any other issues raised before the MDEP, by any party, or to raise additional issues after review of the record or any new information that may come to light pertaining to the Fiberight project.

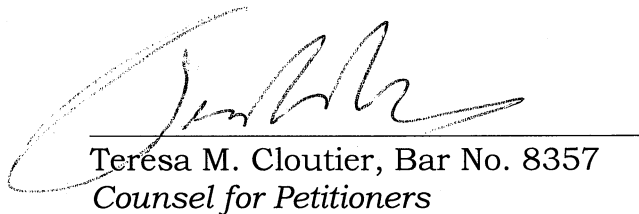
WHEREFORE, Petitioners respectfully request that the Court review this matter and issue an order REVERSING the MDEP's decision on MRC/Fiberight's applications and directing MDEP to DENY those applications. In the alternative, Petitioners request that the Court remand the matter to the MDEP for public hearing and further fact-finding.

Dated this 12th day of August, 2016.



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