Town of Hampden
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FEB 0 1 2016
Office of the
Town Manager

TO: MRC Member Communities
FR: Greg Lounder
DT: January 28, 2016
RE: Independent Legal Review of the MRC Plan for 2018

You may be aware that a small number of MRC communities, communicating to MRC through Mr. Roger Raymond, Town Manager in Hermon, approached the MRC and requested our cooperation in funding an independent legal review of the contract documents that make up the MRC Plan for 2018. The MRC agreed to fund this request with the understanding that there would no MRC involvement in the independent review process other than to make our legal advisor available to answer questions posed by the independent legal reviewer. The MRC also wanted assurance that the final written independent review report would be made available to all MRC Member Communities.

The independent legal review was completed and the MRC incorporated several of the suggestions before finalizing the contract documents. Mr. Raymond recently contacted the MRC to request that the MRC mail a copy of the final independent legal review report to all MRC Member Communities. To accommodate this request, please find enclosed a copy of the final independent legal review report.

Town of Hampden
RECEIVED

FEB 0 1 2016

Office of the
Town Manager

MEMORANDUM

To: Roger Raymond, Town Manager, Town of Hermon

From: Jim Katsiaficas, Esq., Perkins Thompson

Date: January 8, 2016

Re: Legal Review of Documents Prepared by the Municipal Review Committee, Inc. Regarding the Fiberight Municipal Solid Waste Disposal Proposal

I. Executive Summary

We have reviewed the major legal documents for MRC's proposed transactions between each municipality and MRC and between MRC and Fiberight. The result is the detailed memorandum, with tables and a timeline, that follows, summarizing the several related documents that together implement the Fiberight solid waste management Project the: Development Agreement, Joinder Agreement, Master Waste Supply Agreement, Site Lease and Waste Disposal Agreement for Crossroads Landfill. However, an overview that focuses on five major questions officials from the municipalities considering this Project may want to ask may be helpful, and this Executive Summary attempts to answer those five questions. (Two additional concerns raised this week are the need to be sure that the Amended and Restated Articles, and not the Bylaws, contain all Fundamental Matters, including authorization of spending by MRC, and that there be nine members on the Board , not three to nine as the Articles currently provide.)

1. Is the Town/City obligated to send minimum amounts of MSW per year to the Facility/Back-up Facility?

Yes. By signing the Joinder Agreement, the Joining Member municipality agrees to deliver to the Fiberight Facility all Acceptable Waste generated within its borders for which the collection and disposition is under its control, meaning collected and delivered directly by the municipality or by a contract hauler. Although there is no Guaranteed Annual Tonnage, or "GAT," as there now is under the PERC Agreement, each Joining Member still must agree to an Estimated Delivery Amount of municipal solid waste ("MSW") it will provide during each contract year. This is referred to in Section 3.3(b) of the Joinder Agreement as a "commitment" by the Joining Member municipality which is subject to periodic review, and in Section 3.1(ii) of the Master Waste Supply Agreement as an "obligation."

Failure to deliver the Estimated Delivery Amount alone will not result in a penalty unless the Joining Member diverts MSW to another facility for reasons not permitted under the Joinder Agreement, in which case MRC may invoice a Delivery Diversion charge. If Fiberight demands

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a Delivery Sufficiency Payment from MRC, MRC will pay that amount. MRC may then assess a Delivery Diversion Charge on a Joining Member but only in the circumstance where the Joining Member has not delivered all Acceptable Waste under its control to Fiberight. In all other circumstances, MRC would draw funds to pay the Delivery Sufficiency Payment owed Fiberight from the Delivery Sufficiency Reserve Fund, from Non-Charter Municipalities and, in the event those sources are insufficient, from a special assessment of all Joining Members based on tonnage delivered.

2. Under the MRC/Fiberight documents, can our municipality maintain our recycling and MSW diversion programs? Can we expand them?

Yes to the first question, and yes to the second, but with some qualification.

Section 3.2 of the Joinder Agreement recognizes a Joining Member's right, at its sole option, "to establish, continue, expand or discontinue existing or further MSW reduction, reuse or recycling programs" intended to encourage reduction, reuse and recycling of MSW generated within its borders. So long as it complies with the provisions discussed in the next paragraph, the activity will not result in assessment of a Delivery Diversion Charge by MRC.
If a Joining Member wishes to expand its existing MSW recycling, reduction or diversion programs generally, it may do so with 60 days' prior notice to and consultation with MRC, which will advise the Joining Member of any contract compliance impacts of the change(s) on the Joining Member and on all Joining Members. If the proposal is one to initiate new programs or significantly and materially expand existing programs that divert organic waste from MSW for management through other programs or facilities, the Joining Member also must obtain Fiberight's prior consent. Section 3.4(b), however, exempts the continuation of existing organic waste programs substantially as operated on the Effective Date from requiring approval.

3.4(b) also provides that the Joining Member may institute "Pay as you Throw" or other waste reduction programs without MRC's prior approval so long as all (other) MSW generated within its borders and under its control continues to be delivered to the Facility.

3. What happens if one of various situations occurs that affect the Project or the Facility?

What happens if:

a) Fiberight does not construct the Facility?

For a number of reasons, Fiberight could abandon the project. It could: fail to obtain needed permits, approvals and licenses; receive a permit, approval or license with an impossible condition; fail to secure financing; or have insufficient amounts of Joining Members and Acceptable Waste.

The Development Agreement allows MRC or Fiberight to terminate if Fiberight does not have adequate financing in place by January 1, 2017. It also permits termination at any time by the

parties' written mutual agreement. MSW would continue to be delivered to PERC until PERC Agreements expire March 31, 2018.

b) Fiberight constructs the Facility but it does not achieve Commercial Operation:

Development Agreement allows either party to terminate if Commercial Operation is not achieved and if Commercial Operation is not achieved by January 1, 2020; MSW on and after April 1, 2018 is disposed of as "Bridge Waste" at Crossroads Landfill Commercial Operation.

c) MRC unilaterally withdraws development rights or materially breaches the Development Agreement?

Fiberight may terminate and MRC reimburses Fiberight's reasonable development expenses.

d) Fiberight's materially misrepresents under or breaches the Development Agreement?

MRC may terminate and Fiberight reimburses MRC's reasonable development expenses.

e) Fiberight achieves Commercial Operation, but there is insufficient Acceptable Waste, or the process fails or does not function as designed?

If insufficient Acceptable Waste, MRC can help find more Maine MSW, and may be assessed Delivery Sufficiency Payments. MRC could terminate at end of Initial Term, but must offer to purchase building (without Fiberight equipment and personal property) or sell land to Fiberight, at Fiberight's option.

If problems are due to Fiberight's breach of agreements, either MRC or a Joining Member can enforce its contract rights. Joining Member municipalities can seek damages from Fiberight for the increased cost of solid waste disposal resulting from the failure of the Fiberight Facility to work in whole or in part, assuming a court agrees these are direct, and not "consequential" or indirect, damages. A Joining Member's Acceptable Waste is delivered to Crossroads Landfill if a Bypass situation.

f) Fiberight files bankruptcy or goes into receivership?

First, Fiberight recently has taken on a major investor, Covanta Energy Corp., which operates approximately 40 waste-to-energy facilities worldwide (and in full disclosure, was represented by this Firm several years ago in an unrelated matter), and so this question does not reflect specific concerns about Fiberight, but simply raises the issue as a hypothetical.

In bankruptcy, if the petition is for Chapter 7 liquidation, the agreements likely would be disregarded and the assets sold, regardless of language the parties might have drafted in the agreements. The Joining Members likely would have to make other long-term arrangements for MSW management and in the short-term, use Crossroads Landfill for Bypass. If the petition is for Chapter 11 reorganization, the agreements likely would remain in place to allow the Facility

to remain operating, perhaps with a successor operator. The Bankruptcy Court process could take a year or more to occur. It is unlikely the agreements would be terminated.

Finally, Fiberight, LLC is a Delaware corporation with at least three major ongoing projects in different states. The projects in other states could be a drain on its assets and could affect the proposed Maine project. Therefore, MRC might consider asking Fiberight to form a separate entity for the Maine project, so that all parties and the regulators would know the identity, assets and financial and technical capacity of the Maine Fiberight entity (MRC understands that Fiberight is preparing to take this step).

4. Can a municipality withdraw at any time from these agreements? Is there a penalty for withdrawing from these agreements?

No as to the first question. Under the Joinder Agreement, a Joining Member may only terminate its participation in the MRC/Fiberight venture as permitted by that Agreement. Under Article 2, Joining Members may terminate at the end of the 15-year long Initial Term or at the end of any of the five five-year long Extension Terms. Under Article 10, the Joining Member (or MRC) could terminate the Joinder Agreement because of an event of default by the other party, including: failure to fulfill its obligations under this or any of the other related Agreements following a 60-day cure period; filing of a petition in bankruptcy or appointment of a receiver not dismissed within 60 days; or the corporation dissolving, liquidating or ceasing operation for more than 60 days. Also, the Joinder Agreement, which establishes the Joining Member's obligation to deliver Acceptable Waste to Fiberight through MRC, expires when the Master Waste Supply Agreement, which obligates MRC to secure commitments from the Joining Members to deliver Acceptable Waste to Fiberight, terminates.

There is no specific penalty under the Joinder Agreement for a terminating Joining Member, but it is obligated to pay outstanding pre-termination obligations – Tipping Fees, Delivery Diversion Charges, and other assessments. However, if enough Joining Members decide not to exercise their option to Extension Terms, there could be insufficient Acceptable Waste for Fiberight to operate. MRC might have to terminate and would be required to give Fiberight (under the Site Lease) its option to sell the building (less equipment and personal property) to MRC or to purchase the leased premises from MRC. Presumably, if the Facility were operating and additional MSW could be found, Fiberight would want to buy the land its building is on, but if the Facility were not working or were economically not viable, Fiberight would want to sell the building. The purchase cost would be paid from the Building Reserve, which is $7 million, and is equal to the highest price on the table of depreciated values in Exhibit C to the Site Lease.

5. What happens to amounts paid by Equity Charter Municipalities into MRC reserve accounts managed by PERC, tip fee stabilization account, operating accounts, and debt service accounts?

Exhibit B to the Joinder Agreement lists the assets and funds currently managed by MRC, and explains the new MRC-managed funds to which those assets would be assigned, and how those funds would be distributed upon: the termination of the PERC Agreements, the departure of any current municipal members of MRC and the completion of the MRC/Fiberight operation.

Disposition and Management of Assets

1)	Current Assets - five funds:	New Funds:
Reserve Accounts ($26.6 million) →		Site Capital Costs: up to $5 million, and pay Equity Charter Municipalities that are Departing Municipalities their portion of accounts
i)	Custody Account, working capital)	
ii)	Tip Fee Stabilization Fund)	Reserve Funds:
Operating Accounts (< $1 million))		Building Reserve - $7 million
iii)	Operating Account	Delivery Sufficiency Reserve Fund – $3 million PERC Closure Reserve Fund - 1.167 million Bridge Waste Transportation Reserve Fund -
$1 million		Target Value Reserve Fund
iv)	Operating Budget Stabilization) → Fund)	Equity Charter Municipalities that are Departing Municipalities and remainder to MRC administrative costs (fund likely will be depleted by 4-2018)

Monies released from the new MRC-managed Building Reserve, Delivery Sufficiency Reserve Fund, and PERC Closure Reserve Fund will be distributed pro rata to the Equity Charter Municipalities. Any remaining Bridge Waste Transportation Reserve Fund amounts will be transferred to the Target Value Reserve Fund, which is distributed by the MRC Board at a properly noticed meeting.

v) Debt Service Reserve Fund ($1.33 million) to MRC if not used for debt service, then first used to pay costs of release of funds, for dissolution of PERC Partnership and then to Equity Charter Municipalities based on relative tonnage.

PERC Partnership Ltd. Ptnr. shares – continue to 12-31-2018, then PERC manages until Partnership dissolves or municipalities leave.

2) New Charge. Non-Charter Municipalities pay $2.21/ton over Initial Term, and proceeds are placed in Target Value Reserve Fund. (The $2.21 is the amount estimated to be required as a "make-up" payment amortized over the 15-year Initial Term recognizing that existing Charter Municipalities are leaving money they now have in the Project in to fund various reserves as noted above.)

3) Capital and Maintenance Reserve Account (CMRA). Account maintained by PERC, funded by portion of Tipping Fees, and held by bank in custodial account solely for capital or maintenance expenditures. PERC may withdraw funds to pay or reimbursed capital and

maintenance costs. If the PERC Agreement is terminated before March 31, 2018, Charter Municipalities are entitled to pro rata share of CMRA balance, if any, based on municipal and PERC contributions.

II. Discussion

On behalf of the Town of Hermon, Maine ("Town"), Perkins Thompson has reviewed the following documents provided to us by the Municipal Review Committee, Inc. ("MRC") regarding municipal solid waste ("MSW") management and disposal.

- Draft documents prepared by MRC (the "Proposed Documents"):

  1. Development Agreement between MRC and Fiberight, LLC (dated February 4, 2015) ("Development Agreement");

  2. Form Municipal Joinder Agreement between MRC and each member town ("Joinder Agreement") and exhibits (draft dated December 4, 2015);

  3. Master Waste Supply Agreement between MRC and Fiberight, LLC and exhibits (draft dated December 4, 2015);

  4. Site Lease between MRC and Fiberight, LLC (draft dated December 4, 2015) and exhibits;

  5. Amended and Restated Bylaws of Municipal Review Committee, Inc. (To be effective as of April 1, 2018) ("Amended Bylaws") (undated draft: Eaton Peabody version 1);

  6. Restated Articles of Incorporation of MRC (draft dated December 1, 2015); and

  7. Solid Waste Disposal Agreement between MRC and Waste Management Disposal Services of Maine, Inc. (dated August 24, 2015) ("Crossroads Landfill Agreement").

We also have reviewed revisions dated December 30, 2015 to documents numbered 2, 3, 4, 5 and 6 listed above.

- Current solid waste-related documents (the "Existing Documents"):

  1. Second Amended, Restated and Extended Waste Disposal Agreement between Town of Hermon and Penobscot Energy Recovery Company dated May 18, 1998 ("Second Amended and Restated Agreement") (We have not been provided copies of the prior agreements to review.);

  2. Fifth Amended and Restated Agreement of Limited Partnership of Penobscot Energy Recovery Company (dated July 18, 2011);

3. Amended and Restated Bylaws of Municipal Review Committee, Inc. (Revised as of July 23, 2014) ("Bylaws"); and

4. Articles of Amendment of Municipal Review Committee, Inc. (June 22, 1998).

Because the Proposed Documents are drafts, for purposes of our comments as to the legal effect of these documents we are assuming these drafts will become the final executed documents.

Before we address the Proposed Documents, the Existing Documents and your questions, we observe that these documents and this solid waste management proposal do not exist in a vacuum, but instead exist in a dynamic context that includes the following policy and legal considerations:

- Maine law requires each municipality to "provide solid waste disposal services for domestic and commercial solid waste generated within the municipality," and further provides that it "may provide these services for industrial wastes and sewage treatment plant sludge." 38 M.R.S. §1305(1). (Until a 1989 amendment, P.L. 1989, c. 585 E §17, the statute required each municipality to provide a "disposal facility.") However, there is no State funding to assist in this obligation, which most municipalities meet by paying the tipping fee for disposal of domestic solid waste (and by paying for its collection at transfer stations or by curbside pickup, and transportation) from property tax revenues, offset somewhat by proceeds from "Pay as You Throw" programs, such as pay-per-bag, in municipalities that have adopted such programs.

- Many Maine municipalities have elected to fix and control their long-term solid waste disposal costs by owning an equity interest in the solid waste disposal facility, and to use solid waste disposal methods more environmentally responsible than simple landfilling. This is the case with many of the ecomaine, MMWAC and PERC/MRC municipalities that are owners of interests in these waste-to-energy (WTE) facilities constructed some 30 years ago. Therefore, the cost of providing solid waste disposal services for the municipal solid waste (MSW) generated within these municipalities is not just the tipping fee and collection and transportation costs, but also is the capital and operation and maintenance costs of the solid waste disposal facility.

- Municipalities have limited legal authority to direct the MSW for which they are required to provide disposal services to the solid waste disposal facilities they help finance. Some 30 years ago, Maine municipalities enacted solid waste flow control ordinances to require solid waste generated within their boundaries to be disposed of at the facilities which they had pledged their full faith and credit to finance for 25 to 30 year terms in order to meet their State mandates. However, some haulers challenged these ordinances and disposed of the waste at facilities that charged lower tipping fees, keeping the increased profit. The U.S. Supreme Court held in 1994 in *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, that because solid waste is an item in interstate commerce, ordinances directing solid waste to a particular facility over another were discriminatory and violated the dormant commerce clause of the U.S. Constitution. More recently, in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste,* 550 U.S. 330 (2007), the U.S. Supreme Court held that flow control ordinances can be used, and do not discriminate against interstate commerce, when requiring solid waste to be delivered to **publicly** owned

facilities.

The Proposed Documents require the Joining Member to deliver or cause to be delivered "on an exclusive basis all Acceptable Waste generated within its borders the collection and disposition of which is under its control." At least one provision states that it does not require a Joining Member will not be required to institute flow control ordinances. However, because a private entity – Fiberight – will own the solid waste disposal facility, the MRC Joining Member municipalities most likely would be prevented by the *Clarkstown* decision from enacting and enforcing flow control ordinances. The only solid waste each MRC Joining Member municipality can guarantee to the proposed Fiberight Facility is that which it collects (by curbside collection or transfer station) and delivers, or has collected and delivered, to the solid waste disposal facility itself or by contract hauler. Municipalities generally collect or contract for the collection of residential MSW, leaving private haulers to collect solid waste from industrial and commercial users under private contracts. Waste collected by private haulers is not controlled by the municipality and could be disposed of at any facility where the private hauler pays a lower tipping fee (and could pocket the difference in cost). Landfills often are a less expensive disposal option than waste-to-energy facilities and are likely to be less expensive than the Fiberight option, but landfilling is lowest on the State and U.S. EPA hierarchies of preferred solid waste disposal methods. In sum, the only Acceptable Waste a Joining Member controls and can commit is that which it collects and delivers or has collected and delivered for it.

- The area of solid waste management is subject to change by federal and State government at any time. The Maine and U.S. EPA solid waste hierarchies favor solid waste reduction, reuse and recycling over waste-to-energy, and favor all of these over landfilling. The Maine Legislature has been studying solid waste management for the last several years, and appears poised to promote reduction, reuse and the 50% MSW recycling goal.

For example, while MRC and its members are pursuing a solid waste disposal method that relies in large part on processing the organic waste stream to create useable byproducts, the Maine Legislature is considering a draft bill that may divert needed organic waste. In January 1995, Maine DEP issued its annual "Maine Solid Waste Generation and Disposal Capacity Report" that at page 1 identifies the diversion of organics as "the largest opportunity to reduce the disposal of Maine's solid waste stream in landfills and incinerators." Acting on this, the Environment and Natural Resources Committee of Maine's Legislature has proposed a draft bill for the Second Regular Session that would add a provision to the Maine Waste Management Act to require large quantity commercial food waste generators (generating one ton of food waste or more per week), including food wholesalers and distributors, restaurants, hospitals, schools, supermarkets, resorts, conference centers and others, to either treat it on site or deliver it to a composting facility with available capacity within 20 miles from the generator (although the generator could elect to deliver it to a composting facility more than 20 miles away). This would not be enacted, if at all, until after the Joining Members approve the MRC documents and as proposed, would not become effective until January 1, 2020. It will take the place of L.D. 313, held over from last session, and the Committee will hold a work session on it on January 6, 2016, at 1:00 pm. Thus, State legislation intended to promote diversion of the organic portion of MSW could reduce the amount of organic MSW available to the proposed Fiberight facility—a facility

that would be specifically designed to process this waste in order to help municipalities meet their State mandate to provide MSW disposal services.

With those larger policy and legal considerations in mind, we turn to address the following questions posed by the Town:

1. The Town's obligations and responsibilities under the Proposed Documents.

A. Development Agreement.

This is the framework and timetable for the parties' responsibilities and activities under this business transaction. The Town, as a Joining Member, has no contractual obligations under the Development Agreement, as it is between MRC and Fiberight. However, MRC's obligations under this agreement are on behalf of the Joining Members. The agreement requires MRC to exercise "best efforts" to cause Joining Members to enter into Joinder Agreements. MRC must reimburse Fiberight's "reasonable development expenses" if MRC unilaterally withdraws the exclusive award of development rights to Fiberight or materially breaches its obligations under the Development Agreement. There is no explanation of how this liability would be funded, and there is no dollar cap on MRC's exposure. The agreement further requires MRC to indemnify Fiberight for any "activity related to the Project Site or the Facility undertaken by [MRC]," and for any breach of the agreement by MRC. There is no dollar cap on MRC's financial exposure under the indemnity, although indirect and consequential damages are excluded.

B. Joinder Agreement. (See Table A for Summary and Comments)

This is the critical document between each municipality (Joining Member) and MRC that describes the municipal obligations, and Fiberight, as a third-party beneficiary under it, has enforcement rights.

Initial Term. Notice of Extension. Section 2.1 establishes an Initial Term of at least 15 years, beginning on the Effective Date and continuing until the later of April 1, 2033 or the 15th anniversary of the Commercial Operation Date, and may be extended for up to five consecutive five-year periods at the Joining Member's discretion; Joining Member must give MRC at least 12 months' written notice to exercise the right of extension. However, as to the right to terminate, Joining Members should recognize that elimination of their MSW may have impacts on all parties under the four separate agreements. Section 10.3 provides that the Joinder Agreement automatically terminates upon expiration of the Master Waste Supply Agreement.

Delivery of All Acceptable Waste Generated Within Borders and Under its Control to Facility. Under 3.1, Joining Member agrees to deliver or cause to be delivered to the Fiberight facility ("Facility") "all Acceptable Waste generated within its borders the collection and disposition of which is under its control." Obligation begins on the Commercial Operation Date (defined under the Master Waste Agreement as being the later of (i) the date on which the Performance Test was completed and accepted; and (ii) April 1, 2018). This obligation is exclusive – the Joining Member must deliver or have delivered the Acceptable Waste under its control exclusively to Fiberight, and to no other solid waste disposal facility.

No Diversion of Acceptable Waste to Another Facility. Section 3.2 warns the Joining Member that violation of the Art. 3.1 delivery requirements could have a material adverse effect on the Fiberight Facility's financial performance and on the Joining Members. Each Joining Member agrees not to divert the Acceptable Waste to another facility unless permitted under the Joinder Agreement. Failure to comply results in assessment of a Delivery Diversion Charge equal to: 1) the product of the number of tons of waste diverted and the applicable tipping fee, and 2) the Joining Member's share of any penalty billed by Fiberight to MRC as a result of the diversion under Section 3.3 (c). It also recognizes Joining Member's right, at its sole option, "to establish, continue, expand or discontinue existing or further MSW reduction, reuse or recycling programs," subject to Section 3.4 (below) and that these programs will not result in a Delivery Diversion Charge.

Notice and Consultation before New or Expanded Recycling. Under Section 3.4(a), a Joining Member proposing to change "the scope of its responsibility" to deliver MSW originating within its borders to the Facility must provide MRC with at least 60 days' notice and "shall consult with MRC" regarding that change "prior to any implementation." MRC will advise the Joining Member of any contract compliance impacts of the change(s) on the Joining Member and on all Joining Members.

Also, Fiberight Consent before New or Expanded Organic Waste Diversion. A Joining Member proposing to initiate new programs or significantly and materially expand existing programs that divert organic waste from MSW for management through other programs or facilities also must obtain Fiberight's prior consent. Section 3.4(b), however, exempts the continuation of existing organic waste programs substantially as operated on the Effective Date from requiring approval.

Pay as You Throw Exception. Section 3.4(b) also provides that the Joining Member may institute "Pay as you Throw" or other waste reduction programs without MRC's prior approval so long as all (other) MSW generated within its borders and under its control continues to be delivered to the Facility.

Estimated Delivery Amount. MRC is obligated under the Master Waste Supply Agreement to deliver, through Joining Members under the Joinder Agreements, at least 150,000 TPY of Acceptable Waste to the Facility, or be liable for Delivery Sufficiency Payments. While this is MRC's obligation under the Master Waste Supply Agreement (Sections 3.3(a) and 6.2), each Joining Member in Section 3.3(b) agrees to an estimated amount of its annual delivery of Acceptable Waste. "Estimated Delivery Amount" does not include recyclable materials delivered to Fiberight as part of its Recycling Program (under Section 5.2 of the Master Waste Supply Agreement), or recyclables collected by Joining Members in separate programs.

Estimated Delivery Amount is a Commitment; Review. Although not stated as a guarantee, Section 3.3(b) of the Joinder Agreement sets out the Joining Member's acknowledgement of MRC's commitment to deliver MSW and agreement that the stated Estimated Delivery Amount is a reasonable amount. Therefore, a Joining Member should be careful to include in its Estimated Delivery Amount only that MSW it collects and delivers by

itself or by a hauler, adjusted for any recycling, reduction or reuse projected during the first five years and perhaps for the full 40 years. Section 3.3(b) states that the Joining Member and MRC "shall review the commitment" at specified times (at either party's request, but no more frequently than every five years, and for good cause shown) for appropriate adjustment, indicating that the "Estimated Delivery Amount" is a commitment of the Joining Member. (The Master Waste Supply Agreement, in Section 3.1, requires MRC to "secure commitments" from the Joining Members to deliver MSW to the Facility and calls this an "obligation.")

Delivery Diversion Charge. Although a Joining Member is not automatically penalized simply for failure to deliver Acceptable Waste in the amount of the Estimated Delivery Amount (Section 3.3(d) provides that "the fact that Joining Member has not achieved the Estimated Delivery Amount in and of itself will not justify imposition of a Delivery Diversion Charge"), as noted previously, under Section 3.2(b), a Joining Member's unpermitted diversion results in a Delivery Diversion Charge, which is paid into the Delivery Assessment Reserve Fund to be used when MRC's aggregate Delivery Commitment of at least 150,000 TPY of Acceptable Waste to the Facility is not met. Section 3.3(c).

Delivery Sufficiency Payment Contributions. Under Section 3.3(d), if Fiberight assesses a Delivery Sufficiency Payment against MRC, Joining Members may be required to contribute to that payment as follows:

1) To the extent MRC owes the payment because one or more Joining Members have not delivered all MSW under their control required to be delivered, each such Joining Member is assessed a Delivery Diversion Charge, which is its "ratable share" of the Delivery Sufficiency Payment "as determined by the MRC on the basis of tons of Acceptable Waste delivered," and is applied against Delivery Sufficiency Payment.

2) The remaining Delivery Sufficiency Payment portion allocable to Charter Municipalities is paid from Delivery Assessment Reserve Fund.

3) Non-Charter Municipalities are required to pay an assessment in an amount equal to their allocable share of the amount paid from the Delivery Assessment Reserve Fund to Charter Municipalities multiplied by the percentage deliveries by Non-Charter Municipalities bears to all deliveries by all Joining Members during the appropriate time period.

4) In addition, each Joining Member may be assessed a special assessment on the basis of its ratable share of the remaining Delivery Sufficiency Payment amount after all other payment sources are applied – however, the actual formula for calculating this assessment is not stated. This would be assessed by MRC after notice to Joining Members and opportunity to be heard, and may be collected or offset against any rebates payable to Joining Members.

When Joinder Agreement terminates, any remaining balance in Delivery Sufficiency Reserve Fund, after expenses, returns to Equity Charter Municipalities pro rata as in Exhibit B.

Shall Not Deliver Acceptable Waste, and Must Indemnify MRC and Fiberight for Same. Under Section 3.5, a Joining Member shall not deliver Unacceptable Waste to the

Facility, and shall pay the "full cost for, and shall indemnify and hold harmless" MRC and Fiberight for any liability, claim or damage arising from delivery of Unacceptable Waste to the Facility. This could constitute a waiver of the Joining Member's Maine Tort Claims Act (MRC has made some changes to help) immunities, limits and defenses, in addition to disincentivizing Fiberight from actively screening haulers for Unacceptable Waste, and MRC has incorporated our recommended changes to Section 8.8. Joining Member also agrees to use reasonable efforts to offer local options for household hazardous waste disposal. This indemnity is greater than the municipal obligations under the PERC Agreements – may want to go back to that language.

Hauler Compliance. Under Section 3.5, a Joining Member is responsible for its contract haulers' compliance with the Joinder Agreement's delivery requirements. This means that a Joining Member should ensure that its haulers are adequately insured and that full indemnification provisions are included in its hauler contracts. The Proposed Documents could be revised to require that haulers would be required to sign access agreements with Fiberight, so that Fiberight, and not Joining Members, have responsibility for the acts of haulers. An alternative is for Joining Members to enact licensing ordinances for haulers collecting MSW within their boundaries.

Payment of Tipping Fees. Under Sections 4.1 and 4.2, the Joining Member is obligated to pay tipping fees for Acceptable Waste "and other wastes" (undefined and of unknown type) delivered and credited to its account. The Joining Member will receive an invoice directly from Fiberight on a weekly basis within five calendar days of the end of each calendar week and payments will be due to Fiberight within 30 days of receipt unless MRC challenges the calculation of the tipping fee. If the Joining Member fails to make timely payment of tipping fees, it may be precluded from delivering Acceptable Waste to the Facility or Back-up Facility. The Tipping Fee is $70 per ton, as stated in Section 5.1 of the Master Waste Supply Agreement.

Authorization to Act for Joining Member. Under Sections 5.1 and 5.2, the Joining Member acknowledges it is a member of a group of entities for which MRC administers the relationship with Fiberight; agrees to be a Joining Member and a Member of MRC; authorizes MRC to work on behalf of it and all Joining Members to manage MSW disposal; and agrees to ratify its execution of the Joinder Agreement as required.

Transportation, Bypass and Disposition of Unacceptable Waste. Under Section 6.1, Joining Member and MRC each is obligated to hear each other's proposals for collective transportation of MSW to the Facility and/or for use of MSW-produced transportation fuel. Under Section 6.2, Joining Member acknowledges MRC has entered into an agreement for MSW disposal at the Back-up Facility for Bridge Capacity Waste (Acceptable Waste collected between April 1, 2018, and the Commercial Operation Date) and Bypass Waste (Acceptable Waste collected after the Commercial Operation Date, but the Facility has not yet achieved Commercial operation as of the end of the Excused Delay Period or it is out of service for maintenance, Repair or Force Majeure), and agrees to pay the Tipping Fees for Bypass Waste as if it were Acceptable Waste and for Bridge Capacity Waste. Under Section 6.2(d), Joining Member agrees to comply with Back-up Facility's Acceptable Waste delivery and transporter rules.

Indemnification. The Joinder Agreement provides for reciprocal indemnifications by Joining Member and MRC. Under Section 8.1, Joining Member agrees to defend, indemnify and hold harmless MRC, each other Joining Member and their members, directors, elected officials, officers, agents and employees against claims "resulting directly" from any failure by Joining Member to perform fully its obligations under the Joinder Agreement. MRC has made changes to liability and to recognize the Joining Member's Maine Tort Claims Act immunities, limitations and cap on liability. MRC's reciprocal indemnification in Section 8.2 has been extended to "appointed" as well as to elected officials as we suggested.

Notice of Assertion of Right of Indemnification. Under Section 8.3, a Joining Member asserting a right of indemnification against MRC must provide MRC with written notice of commencement of a legal action or other circumstances giving rise to claim for indemnification within 10 days and 30 days, respectively. Also, the indemnified party is obligated to provide the indemnifying party access to all records and information relating to the claim, facts and circumstances, except privileged; MRC has amended this to ensure attorney work-product or materials confidential by statute or under the Freedom of Access Act are protected.

Dispute Resolution. Under Section 8.5, the parties are obligated to resolve disputes under Section 14.5 (should be Section 11.8, Section 14.5 is the Master Waste Supply Agreement reference), which provides for good faith informal resolution during the 14 days following written notice of dispute, followed by submittal of the dispute to arbitration under the American Arbitration Association's commercial arbitration rules before a single arbitrator, unless they cannot agree to a single arbitrator, in which case there will be a panel of three arbitrators.

Changes to Waiver of Immunity Language. MRC has added language to Section 8.8tas requested by us to make it clear that the Joining Members are not waiving their Maine Tort Claims Act immunities, limitations and cap on liability.

Must Sign Needed Documents. Under Section 11.16, the parties are obligated to sign any reasonable papers and documents necessary to effectuate the Joinder Agreement.

Change in Law. Must notify MRC when become aware of change in law and cooperate to address it.

Additional Payment. Under Exhibit B, Non-Charter Municipalities and rejoining Departing Municipalities will pay an additional $2.21 per ton over the 15-year Initial Term, with proceeds to Target Value Reserve Fund. Rejoining Departing Municipalities pay this amount and must repay amounts received from reserve and operating accounts.

Joining Member Must Follow Ratification Steps in Exhibit C. Exhibit C to the Municipal Joinder Agreements sets out the Components of Ratification, which the Joinder Agreement, Joining Member must follow.

C. Master Waste Supply Agreement

This is an Agreement between MRC and Fiberight under which the Town is a third-party beneficiary and has third-party beneficiary enforcement rights against Fiberight. The Town has no direct obligations under it, but indirectly is obligated by virtue of having to fulfill obligations to MRC, which does have duties under this Agreement.

However, the Master Waste Supply Agreement in Section 4.3 obligates all entities delivering MSW to Facility, including Joining Members and their Haulers, to agree not to deliver Unacceptable Waste to Facility and to indemnify MRC, Fiberight and its subcontractors for costs related to any such deliveries. For Joining Members, this is a Maine Tort Claims Act issue by potentially modifying or waiving its protections, and may require amendment of existing MSW hauler transportation contracts to comply with this and other hauler requirements. **Section 6.8 should be revised consistent with the proposed revision to Section 8.8 of the Joinder Agreement.**

Also, to the extent Section 6.8 purports to impose obligations on third party haulers, these obligations are not effective because the haulers are not parties to the agreement. A better approach would be to require third party haulers to enter into Facility access agreements with Fiberight where they specifically agree to access terms.

Section 5.1 establishes the initial $70 per ton tipping fee, subject to upward (but not downward) CPI adjustment each January 1.

2. MRC's obligations and responsibilities to the Town under the Proposed Documents, whether these differ between "joining" and "member" municipalities, how these differ from MRC's responsibilities under the Existing Documents, and what the ramifications might be for Joining Members.

Classification of Joining Members. To understand MRC's responsibilities to Joining Members, it is necessary to understand the various classes of Joining Members.

A. First, the following are the classes of members as recognized by PERC in the Existing Documents.

Under the MRC Articles of Amendment dated June 22, 1998, there are three categories of MRC members:

1) **Equity Charter Municipalities**, which have entered into the Second Amended and Restated Agreement before September 30, 1998;

2) **Amending Charter Municipalities**, which entered into the Second Amended and Restated Agreement on or after September 30, 1998; and

3) **Original Charter Municipalities** that had entered into the First Amended and Restated Waste Disposal Agreement but not the Second Amended and Restated Agreement.

The Second Amended and Restated Agreement differs slightly and recognizes:

1) **Charter Municipalities** listed in Schedule B;

2) **Amending Charter Municipalities** that are of three categories:

- **Amending Charter Municipalities** that executed the Second Amended and Restated Agreement on or before September 30, 1998 and so had the right to purchase a limited partnership interest in PERC and timely exercised that option ("**Equity Charter Municipalities**");

- **Amending Charter Municipalities** that executed the Second Amended and Restated Agreement after September 30 and before March 31, 2004; and

- **Amending Charter Municipalities** that executed the Second Amended and Restated Agreement after the closing date.

Amending Charter Municipalities in the last two categories did not have the right to receive warrants for Bangor Hydro stock or to purchase limited partnership interests in PERC.

B. The following are the classes of members in the Proposed Documents.

The Amended and Restated Articles provide for two classes of members – **Charter Members** (members as of expiration of the PERC Agreements) and **Non-Charter Members**. The Joinder Agreement is between "**Joining Members**" and MRC. The term "Joining Member" includes municipalities, solid waste disposal districts and other "eligible entities" (not defined). The Joinder Agreement divides municipalities into three categories:

1) **Charter Municipalities** – MRC members currently delivering MSW to PERC under the Second Amended and Restated Agreement – these include:

- **Equity Charter Municipalities** – those Charter Municipalities with Equity Charter Municipality status under the Second Amended and Restated Agreement;

- **New Charter Municipalities** – Charter Municipalities that are not Equity Charter Municipalities (joined after September 30, 1998, and were not entitled to purchase equity interests in PERC);

- **Charter Municipalities** – **not** stated in the MRC Documents, but those Charter Municipalities that had signed the First Amended and Restated Waste Disposal Agreement but **not** the Second Amended and Restated Agreement.

2) **Departing Municipalities** – those Charter Municipalities that either affirmatively elect not to become Joining Members or do not sign a Joinder Agreement by the later of May 1, 2016, or seven days after the date of any town meeting at which approval of the Joinder Agreement is to be scheduled.

3) **Non-Charter Municipalities** – Joining Members that were not Charter Municipalities.

In summary, any municipality or other eligible entity that enters into the Joinder Agreement will be a Joining Member and a Charter Member. Joining Members will include municipalities that are, under the Second Amended and Restated Agreement, Charter Municipalities (including Equity Charter Municipalities and New Charter Municipalities, or "Non-equity Charter Municipalities"), Non-Charter Municipalities, and readmitted Departing Municipalities.

C. Obligations MRC owes to the Town.

1) Under Existing Documents.

MRC has no obligation to the Town under the Second Amended and Restated Agreement, as it is between the Town and PERC.

However, MRC has obligations to the Town and to each MRC member under the MRC Bylaws and under the Amended Articles of Incorporation. These obligations primarily are to act as a liaison between the municipal members and PERC, to oversee PERC's financial performance and reporting, to oversee the Capital and Maintenance Reserve Account, to review and verify the calculation of performance credits, to monitor PERC's compliance with performance standards, to monitor the status of the power purchase agreement, and to receive and direct cash distributions and to act regarding limited partnership interests with regard to the Equity Charter Municipalities. MRC also has the responsibility to identify alternative waste disposal options MRC or a successor organization might implement after PERC agreements terminate, including "any and all actions incident to the development, ownership, financing and/or operation of a new integrated solid waste disposal facility to serve the Charter Municipalities."

2) Under the Proposed Documents.

Under the Joinder Agreement, MRC owes the same general obligations to all Joining Members – to supply an aggregate of at least 150,000 tons per Contract Year of Acceptable Waste delivered by the Joining Members, or on their behalf, to the Facility, and to administer their funds and reserve funds, except that the Joining Members will pay tipping fees directly to the Facility.

Specific MRC obligations to municipalities under Joinder Agreement:

- Provide any notice of termination at least nine months in advance (Section 2.2);
- Consult with Joining Member to establish Estimated Delivery Amount (Section 3.3(b));
- Review Estimated Delivery Amount at Joining Member's request or for good cause shown (Section 3.3(b));
- Set aside and manage Delivery Assessment Reserve Fund from other reserve funds, Joining Member Contributions and other sources to pay any Delivery Sufficiency

Payment Assessment (Section 3.3(c));

- Return remaining balance in Delivery Assessment Reserve Fund to Joining Members as in Exhibit B on termination of Joinder Agreement (Section 3.3(e));

- Consult with Joining Members regarding proposed changes in MSW delivery amounts, including where new or expanded recycling, reuse or diversion programs are proposed (Section 3.4);

- Provide advice and guidance to Joining Members with regard to any Unacceptable Waste claims (Section 3.5);

- Review and accept or dispute Fiberight tipping fee calculations (Section 4.1);

- Manage Rebates from Fiberight payable to Joining Members under the Section 5.3 of the Master Waste Supply Agreement in manner that is in best interests of all Joining Members, and may offset Rebates against Delivery Diversion Charges and other assessments, penalties and costs, and provide quarterly report of all rebate offsets (Section 4.3);

- Make Fiberight quarterly rebate calculations available to all Joining Members (Section 4.3(b));

- Pay remainder of rebates to Joining Members on basis of Acceptable Waste delivered (Section 4.3(c));

- Administer Joinder Agreement, Master Waste Supply Agreement and Site Lease on behalf of Joining Members; serve as advocate for and advisor to Joining Members to ensure availability of long-term reliable, safe and environmentally sound MSW disposal at stable and reasonable cost; work with all Joining Members to manage MSW under Proposed Documents; ensure Fiberight compliance with its obligations; file and prosecute permit applications; prosecute or participate in administrative and judicial proceedings; review, administer, accept, invest, apply and distribute tipping fees, rebates and other payments to MRC and Joining Members; and negotiate and enter into collective MSW transportation, management and disposition contracts (Article 5);

- Cooperate with Joining Members for collective MSW transportation (Section 6.1);

- Provide Bridge Capacity and Bypass Waste Facility (Section 6.2);

- Consult with Joining Members before implementing delivery to Backup Facility (Section 6.2);

- Administer Joining Members' assets under Existing Agreements in accordance with Exhibit B (Section 7.1);

- Distribute Project Site sale assets, net of expenses, in accordance with Exhibit B (Section 7.2);

- Defend, indemnify and hold harmless Joining Member and its elected (should also say "and appointed") officials, officers, agents, and employees **resulting directly** from (could say "to extent resulting from" instead) any willful or negligent act or omission by MRC and any failure by MRC to perform fully its obligations under Joinder Agreement (Section 8.2);

- Provide notice if asserting right to indemnification (Section 8.3);

- Provide notice and opportunity to be heard before exercising right to assign Joinder Agreement to successor entity (Section 9.2);

- Inform Joining Members and provide them with hearing regarding accepting of a Force Majeure Plan and indicate impact of that Plan on future tipping fees and rebates (Section 11.4);

- Inform Joining Members of Event of Default under Master Waste Supply Agreement or Site Lease and of MRC's proposed actions (Section 11.4(a));

- Provide Joining Members notice and hearing regarding proposed amendments to Master Waste Supply Agreement or Site Lease (Section 11.4(b));

- Notify Joining Members promptly of change in law, and use reasonable efforts to cooperate to address it (Section 11.5).

MRC also has particular obligations under the Joinder Agreement to certain Joining Members, based upon their status under the Existing Agreements, which are stated in Exhibit B, set out in Table A, and are summarized in the Executive Summary.

3. Are there any exceptions to the MRC's; Town's; and Joining Member, original Charter, Amending Charter and Equity Municipalities' obligations under the Proposed Documents?

Exceptions to these parties' obligations are noted in Tables A, B and C and in this Memorandum. The differences largely are: 1) What these classes of Joining Members are entitled to receive under Exhibit B of the Joinder Agreement and 2) What they are required to pay toward any Delivery Sufficiency Agreement assessed upon MRC.

4. The meaning and effect of the indemnification and insurance and dispute resolution provisions in the Proposed Documents.

A. Joinder Agreement

This agreement contains two indemnification provisions – one regarding delivery of Unacceptable Waste and one for non-performance. There are no insurance provisions or requirements.

1) **Unacceptable Waste. Indemnification.** If a Joining Member or its hauler delivers Unacceptable Waste to the Facility, the Joining Member is responsible to pay the "full cost for" and to indemnify and hold harmless Fiberight, MRC and their respective members, directors, officers and agents, from and against any liability, claim or damages arising out of the delivery (Section 3.5). Therefore, if Unacceptable Waste, such as construction or demolition debris; sludge; hazardous wastes; biological wastes; waste oil; flammable wastes; and others listed in Exhibit A to the Master Waste Supply Agreement were delivered to the Facility, the Joining Member would be liable under this Agreement to pay MRC and Fiberight for the full costs of remediation, whether the Unacceptable Waste is delivered by the Joining Member or by a hauler on its behalf. If contamination were to spread to adjoining property or personal injury were to result, the Joining Member would be liable.

Section 4.3 of the Master Waste Supply Agreement provides that if Fiberight finds Unacceptable Waste after the hauler has left the Facility, Fiberight will dispose of the Unacceptable Waste properly. Fiberight reserves the right to pass along uninsured handling and disposal costs and any environmental cleanup and remediation costs to the hauler, but if it cannot be identified or costs cannot be recovered, may pass these on to the Joining Member, if known. If the Joining Member will not pay, MRC will be billed, and if a Joining Member cannot be identified, costs will be offset against rebate payments. Under the Joinder Agreement, the Town would be obligated to defend MRC and Fiberight and pay any damages awarded to third parties against them or for any environmental enforcement and response actions by a governmental agency, such as DEP. In the case of hazardous wastes, these costs could also include Maine DEP response costs, if necessary, and fines assessed for any violation of Maine environmental laws and regulations.

This is a broader defense and payment obligation than currently exists. Currently, a municipality that sends MSW to PERC has the obligation to either remove hazardous or Unacceptable Waste delivered to the Orrington Facility or to reimburse PERC for all costs it incurs in cleanup (Article IX A and B, Second Amended and Restated Agreement), but the Second Amended and Restated Agreement does not require the municipality to defend, indemnify and hold harmless PERC.

Also, by accepting these obligations, the Town could be waiving the general immunity and liability caps offered by the Maine Tort Claims Act (MTCA); MRC has amended the language of Section 8.8 to prevent possible waiver of the MTCA protections; adding it to Section 6.8 of Master Waste Supply Agreement also may help.

Given the Town's increased potential indemnification liability for Unacceptable Waste under the Proposed Documents, the Town should be careful, in any contract it may enter into with solid waste haulers to collect and/or transport MSW to the Facility, to prohibit the hauler from collecting, transporting and delivering Unacceptable Waste to the Facility; clearly define "Unacceptable Waste" consistent with the Proposed Documents; place the burden on contract haulers to defend, indemnify and hold the Town harmless for any claim, damages or liability of

MRC or Fiberight resulting from delivery of Unacceptable Waste to the Facility and Back-up Facility; and make sure that the contract hauler has sufficient insurance to meet that obligation. In the alternative, the Joining Members could try to place this burden onto Fiberight, which would require haulers to enter into access agreements to use the Facility or to screen more.

2) **Parties' Indemnification.** Under Article 8, each party agrees to defend, indemnify and hold harmless the other (and all other Joining Members) as well as all of their respective members, directors, elected officials, officers, agents and employees) for any claims, liability, claims, causes of action, judgments, damages, losses, costs or expenses, including reasonable attorney's fees, **resulting directly** (this has been amended to read "to the extent resulting from") from any failure by the other party "to perform fully, in any respect, its obligations under this Agreement." (Sections 8.1 and 8.2). Please note that the Town's indemnification obligation not only runs to MRC, which is understandable, but also to the other Joining Members. Indemnification payments are required when the claims payable exceed the *de minimus* limit of $25,000 (Section 8.6).

The Second Amended and Restated Agreement does not contain a cross-indemnification. However, such provisions are common in agreements between private entities, and so private entities often require indemnification clauses in contracts with public entities. Legal counsel for Maine municipal and quasi-municipal bodies – towns, cities, schools, water districts and sewer districts – and for the State and its agencies usually push back against these provisions. This is because of the general immunity and the liability caps on entity and employee liability provided by the MTCA. Most of the Town's obligations under the Joinder Agreement, though, would result in breach of contract claims – not tort claims for property damage or personal injury or harm, and so the MTCA may not provide much protection to the Town for the types of claims that could arise under this Agreement. However, to protect the Town as much as possible, we recommend revising Section 8.8 to clarify that the Town does not waive its MTCA (and other) immunities; and MRC has amended the "No Waiver of Immunities" language at Section 8.8.

Also, the reference in Section 8.5 to the dispute resolution provisions of the Joinder Agreement is incorrect – it is not Section 14.5, but Section 11.8.

4) **Dispute Resolution**. Section 11.8 provides for binding arbitration of disputes under this Agreement if the parties are unable to resolve their disputes informally within 14 days of written notice of dispute (sent by certified mail). Arbitration would be under the rules of the American Arbitration Association and would be before a single arbitrator agreed upon by the parties, or before a panel of three arbitrators if they do not agree. Each party will bear its own costs of arbitration, and will share equally the cost of an arbitrator. (Section 11.8(d) also mentions a "mediator," which none of the rest of the Section mentions; this seems to be a stray reference to an earlier version of the agreement that contemplated mediation of disputes.) We have made suggestions for improvements in the time to make claims and when claim periods begin, and MRC has incorporated these.

Either party could seek a temporary or permanent injunction against the other in the court system, but this would be only for maintaining the status quo, or requiring action or compliance -

- not to obtain money damages for violation of the agreement. Section 10.4 entitled MRC to seek specific performance of a Joining Member under the Joinder Member.

Binding arbitration is the dispute resolution method currently in place under the Second Amended and Restated Agreement (Article XXXII). The use of binding arbitration has increased in the commercial setting because of the cost and length of litigation in the courts. However, some believe that arbitrators are more likely than courts to offer each side something and prefer litigation to binding arbitration.

B. Master Waste Supply Agreement

1) **Indemnification.** Under Section 6.1, Fiberight agrees to defend, indemnify and hold harmless MRC, each Joining Member, and their respective members, directors, elected (should add "and appointed") officials, officers, agents, and employees against any claims, liabilities, damages, costs or expenses resulting directly from any negligent or willful act or omission of Fiberight, from its failure to properly process or dispose of MSW, or from its failure to fully perform its obligations.

2) **Insurance.** No provisions or requirements.

3) **Dispute Resolution.** The parties may submit indemnification disputes to discussion and arbitration under Section 14.5. Otherwise, any dispute under that Agreement is subject to a 14-day informal resolution period, followed by binding arbitration.

C. Site Lease. See Table B, Summary and Comments, for details.

1) **Indemnification**. Under Section 14 of the Lease, the Tenant has the following indemnification obligations:

> The Tenant shall indemnify, defend and hold the Landlord harmless against any and all claims, liability, loss, or damage whatever (including without limitation attorneys' and experts' fees) arising from acts or omissions of the Tenant or its employees, officers, agents, licensees or invitees in, on or about the Leased Premises, or a breach by the Tenant of its obligations or representations and warranties under this Lease, except in either case to the extent arising from the gross negligence or willful misconduct of the Landlord, its agents, or employees.

This provision obligates the Tenant (Fiberight) to indemnify and defend Landlord (MRC) against liabilities arising from acts of the Tenant on or about the Leased Premises or from a breach of the Tenant's obligations or representations and warranties under the Lease. We recommend that it be strengthened to include all acts of Tenant, not just on our about the Leased Premises. The indemnification obligation should apply to a broader class of types of damages for the avoidance of doubt (suits, judgments, expenses and costs). The Joining Members, MRC's Affiliates (if any), and their respective elected and appointed officials, officers, directors, employees, and agents should expressly be included as indemnified parties. The Tenant should indemnify the Landlord for any breach of any provision of the Lease, not only for a breach of Tenant's

"obligations or representations and warranties." The obligation also should be to defend the Landlord in any suit, whether directly against Landlord or in which Landlord is impleaded. Finally, it is important to state that the indemnification obligation applies regardless of any workers' compensation immunity.

We recommend the following revised language for Section 14.1 (which MRC has adopted):

> The Tenant shall indemnify, defend, and hold the Landlord, Affiliates, and the Joining Members and their respective elected and appointed officials, officers, directors, employees, agents, licensees and invitees (the "Indemnified Parties"), harmless from and against any and all claims, liabilities, losses, damages, suits, judgments, and expenses whatsoever (including without limitation attorneys' and experts' fees): (i) arising from Tenant's possession, use, occupation, or control of the Leased Premises, (ii) occurring while on or about the Leased Premises, or (iii) arising from a breach by the Tenant of this Lease, except in any case to the extent arising from the gross negligence or willful misconduct of the Landlord, its agents, or employees. Tenant shall, at its own cost and expense, defend any and all suits or actions (just or unjust) that may be brought against the Indemnified Parties or in which the Indemnified Parties may be impleaded with others upon any such above-mentioned matter. Tenant agrees that the foregoing agreement to defend, hold harmless, and indemnify the Indemnified Parties extends to claims, liabilities, losses, damages, suits, judgments, expenses and costs (including reasonable attorneys' and experts' fees) without regard to any immunity, statutory or otherwise, including any immunity under workers' compensation laws.

We also recommend adding a specific environmental indemnity to Section 23 (Environmental), as follows, which MRC has adopted:

> 23.4. Tenant expressly acknowledges and agrees that it will reimburse, indemnify, defend (with counsel reasonably acceptable to Landlord), and hold the Indemnified Parties harmless from and against any and all liabilities, claims, damages, penalties, suits, proceedings, judgments, expenditures, losses, charges, expenses and costs (including, but not limited to, all costs of investigation, monitoring, legal fees, remedial response, removal, restoration, or permit acquisition) that may now or in the future be undertaken, suffered, paid, awarded, assessed, or otherwise incurred as a result of Tenant's violation of any of the matters referred to in this Section 23.

2) **Insurance.** Section 15 of the Lease obligates the Tenant to keep all improvements insured against loss or damage by fire and the extended coverage hazards for the full replacement value (or actual cash value during any renewal), with loss payable to Landlord and Tenant as their interests appear. The Tenant is also obligated to maintain for the benefit of the Tenant and the Landlord, as a named additional insured, such other insurance coverages as are customary in the industry, including without limitation commercial general liability insurance, including products and completed operations coverage, against any claims for personal injury, death, and property damage; workers' compensation insurance; employer's liability insurance; automobile liability insurance; and environmental impairment insurance. The

Tenant's contractors must also maintain commercial general liability insurance, including products and completed operations coverage, against claims for personal injury, death, and property damage; workers' compensation insurance; employer's liability insurance; automobile liability insurance; and, for subcontractors engaged in work reasonably determined to pose an environmental threat, environmental impairment insurance.

These types of insurance coverage requirements are standard for this type of lease; however, the Lease should also require the Tenant to carry an umbrella liability insurance policy and builder's risk insurance for the construction of the facility and any other construction undertaken on the Leased Premises, which MRC has added. The adequate dollar amount of insurance coverage is beyond the scope of this memorandum and should be determined by the parties, after consulting with their insurers.

3) **Dispute Resolution**. Section 25 of the Lease provides procedures for dispute resolution. If the parties are not able to resolve a dispute informally, either party may submit the dispute to binding arbitration. The time-frame within which to submit a dispute to arbitration is quite short, only one year from the date on which the claim arose. There is no definition of how a claim arises – the Lease does not address whether a claim arises when the act or event giving rise to it occurs or is discovered. We recommend either eliminating the one-year requirement or significantly enlarging it – MRC has increased this to two years. This provision should also address the definition of when a claim is deemed to arise. Each party bears its own costs in connection with any dispute resolution, which is typical.

Parties generally prefer arbitration to litigation because it is quicker and far less costly. Arbitration is not without its risks, however, and some parties prefer the ability to appeal a court's decision.

D. Development Agreement

1) **Indemnification.** MRC and Fiberight each agreed to indemnify and hold the other party harmless from any and all liabilities, losses and damages and costs suffered or incurred by the other "as a consequence of activity undertaken by the Indemnifying Party, its employees or agents, or a breach by the Indemnifying Party of its obligations hereunder. However, neither party is liable to the other "for indirect, special, or consequential damages or for loss of anticipated profits."

2) **Insurance.** Fiberight shall maintain adequate insurance policies (general liability, property and casualty, builders' risk, workers' compensation and other appropriate coverage for Project Site and Facility) with limits not less than customary in the industry. MRC is to be named as an additional named insured on all liability and casualty policies – we recommend also adding "the Joining Members and their respective elected and appointed officials, directors, officers, agents and employees" as named insureds to correspond with Fiberight's indemnification obligation under Section 6.12 of the Master Waste Supply Agreement.

5. How the Proposed Documents and obligations for Joining Members affect the Existing Agreements for MRC and equity municipalities.

The Proposed Documents appear to be designed and intended to establish a clear break between PERC and the Fiberight proposed Facility, so that there should be no conflict between the two operationally for Joining Members. Those Joining Members that are obligated as Charter Municipalities to deliver Acceptable Waste to PERC under the Existing Agreements will do so until those agreements expire on March 31, 2018. If Fiberight requires MSW for start-up tests prior to that date, it will attempt to obtain that MSW elsewhere, and MRC is not required to divert or interfere with Charter Municipalities' MSW deliveries to PERC under the Second Amended and Restated Agreement so long as PERC is accepting those deliveries (Section 3.4 of Master Waste Supply Agreement). The assumed Commercial Operation Date for Fiberight is April 1, 2018, after the PERC obligations have expired.

6. Outline of potential liabilities and options to Joining Member municipalities should MRC's proposed Fiberight project fail or not meet expectations.

There are several ways in which the proposed Fiberight project could fail. Fiberight could fail to obtain financing or fail to secure land use and environmental permits; construction might not occur; MRC could unilaterally withdraw from, or the parties could terminate the Development Agreement; MSW delivery commitments may be insufficient; the technology could fail to operate wholly or in part; there could be bankruptcy or insolvency on the part of Fiberight, or Joining Member terminations could cause a loss of needed MSW deliveries.

If the Fiberight project fails or does not commence, Joining Members shall deliver their MSW to the Crossroads Landfill in Norridgewock during the 10 to 20 year term of the agreement MRC has entered into for disposal of two MSW streams at this "Backup Facility." The two MSW streams described in Section 6.2 are:

- Bridge Capacity Waste – Acceptable Waste generated after the projected April 1, 2018 start date until the Commercial Operation Date; and

- Bypass Waste – Acceptable Waste Collected and delivered to the Facility by the Joining Member, but which cannot be accepted for processing because the Facility has not yet achieved Commercial Operation at the end of the Excused Delay Period or the Facility is out of service for maintenance or repair or because of Force Majeure "or otherwise."

(Please note that the Joinder Agreement does not require MRC to provide, obtain or maintain a Backup Facility for MSW, but Section 6.2 simply requires the Joining Member to acknowledge that MRC has entered into the Crossroads Landfill Agreement.)

Also, please note that the use of Crossroads Landfill if Fiberight fails is not an option – it is required. The Crossroads Landfill Agreement in Section 1 requires MRC to "cause to be delivered to Crossroads Landfill, on an **exclusive basis**," all MSW designated by a Participating Member of MRC – a Joining Member – as By-Pass or Bridge Capacity. Section 6.2 of the Joinder Agreement requires MRC to consult with Joining Members before implementing delivery of MSW to Crossroads Landfill, but there is no option for the Town to deliver MSW

elsewhere unless it or MRC terminates the Joinder Agreement or Fiberight terminates the Master Waste Supply Agreement and the Crossroads Landfill Agreement expires.

If there is insufficient MSW to permit operation of the Facility at full capacity, Section 3.6 of the Master Waste Supply Agreement requires Fiberight to make reasonable commercial efforts to attract MSW and MRC is obligated to support those efforts.

Otherwise, the Joining Member's option would be to terminate to the extent permitted under the Joinder Agreement (see Question 7).

Site Lease

MRC is required to purchase the property prior to entering into the Lease, which represents a risk. Once the Lease is in effect, there are several ways in which Fiberight may avoid its obligation to perform under the Lease, which exposes the MRC, and ultimately the Joining Members, to the risks of having invested time and money in acquiring the Property and installing the infrastructure while not having the benefit of the Facility. In addition, if an event of Force Majeure prevents Fiberight from performing under the Lease, the Lease specifically contemplates the possibility of passing the costs of addressing such an event through to MRC and/or the Joining Municipalities and does not require Fiberight to shoulder any of such costs.

Prior to the Construction Date, Fiberight is allowed to terminate the Lease with 90 days' prior notice if it determines that construction or operation of the Facility is uneconomic or practically infeasible. This is a subjective standard that gives Fiberight great discretion, which, if exercised, leaves the MRC holding the Property with no facility.

Fiberight is excused from causing the Commercial Operation Date to occur by April 1, 2018, if a permit contains a term that would preclude construction or operation on "commercially reasonable terms." This arguably allows Fiberight to determine in its discretion that a permit condition proves too costly and to abandon the project. Fiberight also is excused if a "Force Majeure" or "Change in Law" occurs that would preclude construction or operation on "commercially reasonable terms." "Uncontrollable Circumstance" is not defined in the Lease and has been removed. "Change in Law" is broadly defined to include any change that is "inconsistent with and more stringent than" previously existing law. Taken together, these provisions provide the Fiberight with significant latitude to avoid performance under the Lease. Fiberight may also be excused from performance if it has not obtained financing. Fiberight is only required to use "diligent efforts" to obtain financing, with no objective financing terms that are deemed sufficient for Tenant to perform (for example, a loan of at least $x, for a term of at least y years, at an interest rate of z%). The ability of Tenant under these provisions to avoid its obligation to perform leaves the Landlord, and therefore the member municipalities, exposed to a fairly significant risk that MRC is left having purchased the real estate and perhaps expended funds on infrastructure with no facility for treatment of the MSW.

In the event the Facility fails because one party is unable to perform due to Force Majeure, the Lease could be terminated. One impact of a Force Majeure event is that the party claiming it must prepare a Force Majeure Plan. The Plan must include "a proposal for costs to be passed

through to the MRC and/or Joining Member Municipalities as part of the proposed response to address the Force Majeure, which might involve one time payments, an increase in the Tip Fee under the Master Waste Supply Agreement and Joinder Agreements, or other changes to payment provisions as well as any impact on the value of the Facility building as set forth in Exhibit C [to the Lease]." This has been reworded. The Lease should also require Fiberight to bear some of the risks associated with the failure of the Facility due to Force Majeure.

7. Provisions in the Proposed Documents that would allow a Joining Member municipality to terminate the agreements before the termination date and if there are none, whether there should be.

If the Joining Municipality exercises its rights to Extension Terms, the full term of the Joinder Agreement is 40 years – a 15-year Initial Term plus five five-year Extension Terms, each requiring at least one year's written notice of extension prior to termination. Section 2.1.

A Joining Municipality could terminate its Joinder Agreement prior to the 40-year maximum term by electing, after the 15-year Initial Term or after any Extension Term, not to extend the Joinder Agreement. Section 2.1. (MRC also may terminate the Joinder Agreement before the maximum 40-year term. Section 2.2 provides that MRC has the right at the end of the Initial Term and of any Extension Term to terminate the Joinder Agreement with nine months' written notice of termination to all Joining Members, even if Joining Members have provided notice of exercise of Extension Term rights.) MRC would have to provide Fiberight with at least 9 months' written notice of termination under the Master Waste Supply Agreement and Site Lease.

However, depending upon how many Joining Members decide not to extend their Joinder Agreements, a termination under the Joinder Agreement could cause problems for MRC and Fiberight and their ability to perform under the Master Waste Supply Agreement, and Site Lease.

A Joining Municipality has no other ability to terminate the Joinder Agreement before the termination of the Initial Term and any Extension Terms. If MRC fails to fulfill its obligations under the Joinder Agreement and does not cure the default within 30 days (or other appropriate cure period) of its receipt of written notice of default from the Joining Member, unless it is not possible to cure the default; or if MRC files or has filed against it a petition in bankruptcy or reorganization, or is adjudicated bankrupt or a receiver is appointed on its behalf, or MRC requests appointment of a receiver or MRC makes a general assignment for the benefit of creditors, or MRC has its bank accounts, property or receivables attached, and these proceedings are dismissed within 60 days, it is an event of default by MRC. MRC has revised the Joinder Agreement to authorize the Joining Member to terminate due to MRC's default except in the context of an assignment of the agreement by MRC in violation of its terms.

Note that Fiberight may terminate after the Initial Term or any Extension Term on 18 months' notice, under the Master Waste Supply Agreement and the Site Lease.

Section 10.3 provides that the Joinder Agreement shall terminate upon expiration of the Master Waste Supply Agreement. These dates should be coterminous if both agreements commence (as they should) on the same Commercial Operation Date, but what if the Joining

Member sooner terminates under Section 2.1? In that case, MRC would have an obligation to try to contract with other municipalities for the lost MSW tonnage and its inability to do so could give rise to Delivery Sufficiency Payments owed to Fiberight.

Also, while MRC and Fiberight may terminate the Development Agreement if Fiberight fails to obtain adequate financing by January 1, 2017, or fails to achieve Commercial Operation by January 1, 2020, neither the Joinder Agreement nor the Master Waste Supply Agreement addresses these potential termination dates.

Site Lease

While the Joining Members do not have any direct rights under the Lease, the MRC's rights as Landlord impact the municipalities.

The Lease does not require the Landlord to begin construction of the access road and electric, water, and sewer lines if (i) Joinder Agreements have not yet been executed with commitments for 150,000 tons of acceptable waste per year; (ii) any permit necessary for construction of the Facility has not yet been issued, or Tenant has determined that there is a provision in a permit that would preclude construction or operation of the Facility on commercially reasonable terms; (iii) an event of Force Majeure has occurred and is ongoing and would preclude construction or operation of the facility on commercially reasonable terms; or (iv) the Tenant has not obtained financing. The Lease does not state it expressly, but as written, if these conditions are never met the Landlord need not construct the access road and install the infrastructure; the project would be abandoned.

The Landlord may terminate the Lease in the event of a default by Tenant. The Lease requires the Landlord to provide the Tenant with written notice of default and a 60-day opportunity to cure for nonpayment defaults. This is an overly long cure period, ands MRC has shortened it to 45 days. There is no notice requirement for payment defaults, but a payment default does not occur until 30 days after a payment is due. This period should be stated as well.

If the Landlord is unable to perform under the Lease due to an event of Force Majeure, the Landlord's obligations under the Lease are suspended during the occurrence of the event. The Landlord would need to provide to the Tenant a Force Majeure Plan that (i) addresses the impacts of the event on the performance of the Facility, (ii) measures required to address the Force Majeure event, and (iii) includes a proposal for costs to be passed through to the MRC and/or Joining Members, as discussed in response to item 6 above. If the parties are unable to agree on a Force Majeure Plan, the dispute is to be resolved by arbitration, and 90 days after receipt of the original Force Majeure Plan, either party may terminate the Lease. If the Landlord is the party terminating the Lease, it must provide the Tenant with offers to purchase the Building and to sell the Property to the Tenant for the prices set forth in Exhibit C to the Lease.

Once the Landlord has begun construction of the access road and the infrastructure, the Landlord has no ability to terminate the Lease until after the Initial Term, other than in the event of default or possibly as a result of a Force Majeure event. Whether the Tenant desires to renew the Lease at the end of the Initial Term or any Extension Term, the Landlord nonetheless has the right to

terminate the Lease if Joining Members have provided termination notices to the MRC such that the sum of the Estimated Delivery Amounts (as defined in the Master Waste Supply Agreement) of the Joining Members that have not provided notices would be less than 150,000 tons. In that case, the Landlord must provide the Tenant with an offer to purchase the building together with and an offer to sell the property to the Tenant, both at the prices set forth in Exhibit C. The worst-case scenario for the Landlord would be if the Landlord desires to terminate the Lease (presumably because the Facility is inoperative), and the Tenant accepts the Landlord's offer to purchase the building. In that case, the Landlord would be forced to pay for the building but would not have an operating Facility.

8. Provisions in the Proposed Documents that would allow a joining or member municipality to increase or decrease the tonnage of MSW it is required to provide if the municipality deems it necessary to do so, and if there are none, whether there should be?

The provisions of concern are those in the Joinder Agreement, and these contemplate adjustments that likely are reductions in MSW tonnage delivered to the Facility. It may be helpful to address increases, to ensure sufficient capacity for the Joining Members' MSW.

Under Section 3.3(b) of the Joinder Agreement, a Joining Member is required to state its Estimated Delivery Amount – the number of tons of Acceptable Waste it agrees to provide per Contract Year – after consulting with MRC and consistent with MRC's guidelines. This Estimated Delivery Amount will not include any MSW the Joining Member is recycling on its own or through the single stream Recycling Program Fiberight will offer.

This provision directs the Joining Member and MRC "to review this commitment" at either party's written request, made no more frequently than every five years, or "for good cause shown" on request made at least 60 days before the end of the current calendar year.

In addition to being able to request an adjustment in the Estimated Delivery Amount up to every five years or for good cause shown, the Joining Member may alter its responsibility to deliver MSW, presumably to decrease the tonnage of MSW it will deliver to support reduction, recycling or reuse of MSW under Section 3.4. Section 3.4(a) requires a Joining Member to provide at least 60 days' notice to MRC of the proposed change of MSW amounts and to consult with MRC before its implementation, which will advise the Joining Member and all other Joining Members of any "contract compliance impacts" from that change. Section 3.4(b) requires not only the 60 days' notice and consultation with MRC as in Section 3.4(a), but also requires the prior consent of Fiberight if the Joining Member proposes new or significant or material expansion of existing programs to divert organic portions of MSW through facilities or programs other than the Facility. Section 3.4(b) of the Joinder Agreement does permit a Joining Member to institute "Pay As You Throw" programs, which do result in MSW reduction without MRC's prior approval so long as all other MSW generated within its borders and under its control is delivered to the Facility. MRC has revised the Joinder Agreement to clarify these exceptions to the delivery commitment

Table A

Perkins Thompson Joinder Agreement Summary and Comments
(December 4, 2015 Draft and December 30, 2015 Revisions)

Capitalized terms have the meanings ascribed to them in the Joinder Agreement or the Master Water Supply Agreement.

Section	*Description*	*PT Comments*
Parties	Signed by the Municipality ("Joining Member") and MRC	
2.0 Term	2.1 Initial Term of 15 years, begins on Effective Date and continues until later of April 1, 2033 or 15th anniversary of Commercial Operation Date, and may be extended for up to five consecutive five-year periods at Joining Member's discretion; with at least 12 months' written notice to MRC to exercise the right of extension. Agreement then is automatically extended unless Joining Member is in default. 2.2 However, even if Joining Member gives timely written notice to extend to MRC, MRC has right to terminate by written notice to Joining Member at least 9 months before expiration of that term, but MRC must simultaneously provide written notice of termination to all Joining Members for termination to be valid.	Joining Member's ability to terminate at end of Initial Term or extension is constrained, since there are four agreements to consider, and if too much MSW tonnage departs, the Project could fail. Section 10.3 provides that the Joinder Agreement terminates when the Master Waste Supply Agreement expires, the Site Lease allows for termination at end of Initial Term or extension if MRC also offers to purchase building or sell Site, and there are waste delivery obligations referenced in the Crossroads Landfill Agreement, which have a different term. MRC can terminate for any reason – no restriction on basis for termination.
3.0 Delivery of Waste	3.1. Delivery. Joining Member agrees to deliver or cause to be delivered to Fiberight "all Acceptable Waste generated within its borders the collection and disposition of which is under its control." Obligation begins on the Commercial Operation Date (defined under the Master Waste Agreement as being the later of (i) the date on which the Performance Test was completed and accepted; and (ii) April 1, 2018). Obligation is exclusive – Joining Member must deliver or have delivered the Acceptable	Contains the most critical municipal obligations under the Joinder Agreement. Fiberight obligated under Section 4.1 of Master Waste Supply Agreement to operate Facility and accept all deliveries of Acceptable Waste beginning on Commercial Operation Date. "Control" has been defined as suggested by us.

Section	*Description*	*PT Comments*
	Waste exclusively to Fiberight, and to no other solid waste disposal facility. 3.2. Diversion of Waste. Joining Member agrees violation of Section 3.1 delivery requirements could have material adverse effect on Fiberight facility's ("Facility") financial performance and on Joining Members. Joining Member is not required to institute flow control. Also recognizes Joining Member's right, at its sole option, "to establish, continue, expand or discontinue" existing or future MSW reduction, reuse or recycling programs, subject to Section 3.4, without being deemed a violation of the Section 3.1 delivery requirements. Second paragraph of Section 3.2 obligates Joining Member to pay a Delivery Diversion Charge "if it diverts Acceptable Waste under its control to facilities other than the Facility" for reasons other than the allowed ones – establish, continue, expand or discontinue existing or future MSW reduction, reuse or recycling programs. Delivery Diversion Charge is in two parts – one calculated as the product of the number of tons of waste diverted and the applicable tipping fee, and other being the Joining Member's share of any penalty billed by Fiberight to MRC as a result of the diversion (also called a "Delivery Diversion Charge" under Section 3.3(d)(i)). 3.3 Aggregate Delivery Requirements. Under Section 3.3(a) and (b), Joining Member acknowledges MRC is obligated under Master Waste Supply Agreement to cause at least 150,000 TPY of Acceptable Waste per Contract Year to be delivered to the Facility by or on behalf of the Joining Member or may be liable for Delivery Sufficiency Payments if MRC minimum delivery requirement is not met. Each Joining Member agrees to an estimated amount of its annual	A solid waste flow control ordinance may be an unconstitutional method to control solid waste anyway under these circumstances as explained in the Memorandum. As a result, a Joining Municipality will only be able to control what it collects curbside or transfer station and delivers, itself or by its contractor, to the Facility or Backup Facility. Similarly, Bridge Waste and Bypass also must be delivered exclusively to Crossroads Landfill during term of Waste management Agreement if Fiberight is unavailable. Delivery Diversion Charges are deposited in Delivery Assessment Reserve Fund that is used to pay any Delivery Sufficiency Payment assessed by Fiberight against MRC under the Master Waste Agreement. Calculated on the basis of share of tons delivered for Contract Year in question. No charge for permitted recycling added as requested Master Waste Supply Agreement defines "Contract Year" to be from the Commercial Operation Date to end of calendar year, and then each calendar year thereafter; therefore, first year's and last year's obligations should be prorated, since MRC and Fiberight project an April 1, 2018 Commercial Operation Date. This was done in in Master Waste Supply Agreement but not Site Lease, and was

Section	*Description*	*PT Comments*
	contribution of Acceptable Waste. This "Estimated Delivery Amount" does not include recyclables, whether recycled under any Single Stream Recycling Program under Section 5.2 of the Master Waste Supply Agreement, or separately recycled. Although, Section 3.3(b) of the Joinder Agreement sets out the Joining Member's agreement that the stated Estimated Delivery Amount is a reasonable "estimate." This Section also states Joining Member and MRC "shall review this commitment" at specified times for appropriate adjustment. Section 3.3(c) MRC sets aside funds in a Delivery Assessment Reserve Fund in event Delivery Commitment is not met in any year. Section 3.3(d). If Fiberight assesses Delivery Sufficiency Payment on MRC because one or more Joining Members have not delivered all MSW under their control required to be delivered, each such Joining Member is assessed a Delivery Diversion Charge, which is its "ratable share" of the Delivery Sufficiency Payment "as determined by the MRC on the basis of tons of Acceptable Waste delivered," and amount assessed is applied against Delivery Sufficiency Payment. (A Delivery Diversion Charge also can be assessed separately under Section 3.2 for unpermitted diversion of MSW to another facility.) If the Delivery Sufficiency Payment remains unsatisfied: 1. The portion allocable to Charter Members (should be "Municipalities") is paid from Delivery Assessment Reserve Fund; 2. Non-Charter Members (should be "Non-Charter	changed as we suggested. The Master Waste Supply Agreement at Article 3 consistently uses "commitment" to refer to MSW delivery obligations of Joining Members. Therefore, a Joining Member should be careful to review its historical MSW deliveries and its historical recycling, to take into account future waste reduction, reuse and recycling programs and governmental requirements and to consider what MSW actually is under its control, since solid waste flow control ordinances cannot be used here, before agreeing to an Estimated Delivery Amount. A consultant with a background in MSW management and knowledge of industry trends may be helpful to Joining Members. While the Estimated Delivery Amount may not be a "Guaranteed Annual Tonnage" as under the PERC arrangement, it nonetheless is a "commitment," and failure to meet it can result in penalties, such as a Delivery Diversion Charge for MSW diversion without permission, and/or a portion of Delivery Sufficiency Payments if assessed by Fiberight against MRC. Language will be added to ensure that if the Charge or payment is made or MRC meets its Delivery Commitment, a Joining Member's failure to meet its Estimated Delivery amount is not a violation the Joinder Agreement.

Section	*Description*	*PT Comments*
	Municipality" to be consistent with the definitions) are required to pay an assessment in an amount equal to its allocable share of the amount paid from the Delivery Assessment Reserve Fund to Charter Municipalities multiplied by the percentage deliveries by Non-Charter Municipalities bears to all deliveries by all Joining Members during the appropriate time period; 3. In addition, each Joining Member may be assessed special assessment on the basis of its ratable share of the remaining Delivery Sufficiency Payment amount after all other payment sources are applied – however, the actual formula for calculating this assessment is not stated. When Joinder Agreement terminates, remaining balance in Delivery Assessment Reserve Fund, after expenses, is returned to Joining Member as in Exhibit B. 3.4. Change in Waste Delivery Pattern. Joining Member proposing to alter the scope of its responsibility for "collection, transfer and transportation" (should state "delivery" as used in the rest of the Joinder Agreement) of MSW, as in an increase in reduction, reuse or recycling must provide MRC with at least 60 days' notice of proposed change and consult with MRC prior to any implementation of change. MRC will advise Joining Member of any contract compliance impacts of the change(s) on the Joining Member and on all Joining Members. If proposed change involves new programs or significant and material expansion in existing programs to divert organic waste from MSW from the Facility, Fiberight must provide its prior consent to the change. Section 3.4(b) allows "existing [organic waste diversion] programs substantially as operated as of the Effective Date" to	The Joinder Agreement says failure to meet the Estimated Delivery Amount alone will not justify a Delivery Diversion Charge, but an unpermitted diversion to another facility, or failure to deliver all MSW under its control required to be delivered where MRC owes a delivery Sufficiency Payment to Fiberight under the Master Waste Supply Agreement, will result in such a charge. Need to be sure all waste from Joining Member's borders, even if delivered by a private hauler, is credited to Joining Member. It appeared, but was not explicitly stated in the Joinder Agreement, that: changes in the MSW waste stream discussed with MRC under Section 3.4(a), changes in the organic waste stream made with Fiberight's consent under Section 3.4(b) and MSW reduction by Pay as You Throw programs under Section 3.4(b) all are permitted diversions of

Section	*Description*	*PT Comments*
	continue. Under 3.4(b), Joining Member may institute "Pay as you Throw" or other waste reduction programs without MRC's prior approval "so long as all MSW generated within its borders and under its control continues to be delivered to the Facility." 3.5 Unacceptable Waste. Joining Member shall not deliver Unacceptable Waste shall the Facility and to use reasonable efforts to offer local options for household hazardous waste disposal. Joining Member shall pay its full cost for and indemnify and hold harmless MRC and Fiberight for liability, claims or damage arising from its delivery of Unacceptable Waste to the Facility. 3.6 Requires Joining Member to be responsible for ensuring its independent haulers comply with delivery requirements.	MSW that will not result in a Delivery Diversion Charge under Section 3.2 for diversion or under Section 3.3(d) for partial payment of any Delivery Sufficiency Payment; MRC has made a revision to plainly state this. (Couldn't household hazardous waste disposal be a MRC service?) This indemnity could constitute a waiver of the Joining Member's Maine Tort Claims Act immunities, limits and defenses (MRC has made changes to Section 8.8 to strengthen the municipalities' defenses). This "pay full cost, indemnify and hold harmless" language is more than the obligation under the existing PERC Agreement to remove such waste from the facility or to reimburse PERC's costs incurred in the required clean-up of that waste. Also, under Section 4.3 of Master Waste Supply Agreement, Fiberight claims right to seek handling and disposal expenses and environmental clean-up and remediation costs against Joining Member, or ultimately MRC, if hauler fails to pay or is unidentified. May want Fiberight to take greater role in managing Unacceptable Waste, MRC to take greater advocacy role on behalf of Joining Member and language to be made consistent with current obligations under the PERC Agreements. The Town cannot control third-party haulers. Another solution would be to have Fiberight

Section	*Description*	*PT Comments*
		require each hauler to enter into an access agreement with Fiberight naming MRC and its members as third party beneficiaries. In any case, the Town should ensure that its agreements with its haulers contain strong indemnification and insurance provisions. Towns also can enact waste hauler licensing ordinances.
4.0 Tipping Fees and Rebates	Joining Member agrees to pay tipping fees for Acceptable Waste "and other wastes" (undefined) delivered and credited to its account. MRC reviews and accepts or disputes Fiberight's tipping fee calculations. Joining Member will receive an invoice directly from Fiberight on a weekly basis within five calendar days of the end of each calendar week and payments will be due to Fiberight within 30 days of receipt unless MRC challenges the calculation of the tipping fee. If Joining Member fails to make timely payment of tipping fees, it may be precluded from delivering Acceptable Waste to the Facility or Back-up Facility. Amendment to the Tipping Fee proposed by Fiberight requires Joining Members to authorize MRC to amend it in the Master Waste Supply Agreement by amending the Joinder Agreement; Joining Member agrees to consider in good faith a proposal for amendment that MRC agrees is reasonable and necessary for Fiberight to continue sustainable operation of Facility.) Joining Member authorizes MRC to manage rebates from Fiberight on its behalf, which MRC may direct to be spent in best interest of all Joining Members, and may offset rebates against specific charges. Fiberight to make quarterly rebate calculations acceptable to all	Latest draft sets out the $70 per ton plus CPI increase Tipping Fee as stated in Section 5.1 of the Master Waste Supply Agreement). Section 4.3(b) and (c) set out Fiberight's obligation to calculate rebates and to pay rebates to MRC, but Fiberight is not a party to this Agreement, and so is not bound by these "obligations." Unless MRC Board decides otherwise for good

Section	*Description*	*PT Comments*
	Joining Members, and MRC to review and accept or dispute calculations. MRC to pay rebates based on actual Acceptable Waste delivered to Facility and Exhibit F of Master Waste Supply Agreement. MRC to review and dispute tipping fee calculations made by Fiberight.	cause shown, Non-Charter Municipalities and readmitted Departing Municipalities are not entitled to rebates during the 15-year Initial Term. Language has been added that MRC shall review and consider in good faith any dispute of a calculation brought forward by Joining Members.
5.0 Authorization to Act for Joining Member	Joining Member acknowledges it is a member of a group of entities for which MRC administers the relationship with Fiberight; agrees to be a Joining Member, to ratify the Joinder Agreement and to be a Member of MRC; and authorizes MRC to work on behalf of it and all Joining Members to administer all agreements and Site Lease and to manage MSW disposal, including ensuring Fiberight complies with its obligations.	MRC's discretion to act should be qualified by Joining Members' rights under MRC's articles of incorporation and bylaws, and MRC's board's duties under Maine corporate law; MRC has added this language.
6.0 Transportation, Bypass and Disposition of Unacceptable Waste	Joining Member and MRC each agrees to hear the other's proposals for collective transportation of MSW to the Facility and/or for use of MSW-produced transportation fuel from the Facility. Joining Member acknowledges MRC has entered into agreement for disposal at Back-up Facility (Crossroads Landfill) for: Bridge Capacity Waste and Bypass Waste, and agrees to pay the tipping fees for Bypass Waste as if it were Acceptable Waste delivered to the Facility and for Bridge Capacity Waste as MRC directs. Joining Member agrees to comply with Back-up Facility's delivery procedures and transporter rules for Acceptable Waste delivery.	MRC has entered into separate agreement with Waste Management for disposal of residuals from Fiberight and for MSW disposal at Crossroads Landfill for 10-year term with two 5-year extensions at set tipping fee; Joining Member must deliver or have delivered its Acceptable Waste exclusively to Crossroads Landfill in event of Bridge Capacity or Bypass. Article 6 heading has been changed as suggested – Unacceptable Waste is in Section 3.5.
7.0 Disposition	MRC manages disposition of assets held by MRC for Joining	

Section	*Description*	*PT Comments*
of Assets Administered by MRC	Members that are Charter Municipalities, including Departing Municipalities, after MRC commitments expire, in accordance with Exhibit B (outlined below).	
8.0 Indemnification	Reciprocal indemnifications. Joining Member agrees to defend, indemnify and hold harmless MRC, each other Joining Member and their members, directors, elected officials, officers, agents and employees against claims resulting directly from any failure by Joining Member to perform fully in any respect, its obligations under the Joinder Agreement. MRC agrees to defend, indemnify and hold harmless Joining Member and its elected officials, of heir, agents and employees from claims resulting directly from MRC's willful or negligent act or omission and its failure to perform fully, in any respect, its obligations under the Joinder Agreement. If Joining Member asserts right of indemnification against MRC, must provide MRC with written notice of commencement of legal action or other circumstances giving rise to claim for indemnification within 10 days and 30 days, respectively. Also, indemnified party obligated to provide indemnifying party access to all records and information relating to claim, facts and circumstances, except privileged matters. Section 8.5 requires the parties to resolve disputes under Section 14.5 (should be Section 11.8), which provides for good faith informal resolution during 14 days following written notice of dispute, followed by submittal of the dispute to binding arbitration under the American Arbitration Association's commercial arbitration rules before a single arbitrator, unless they cannot agree, in which case there will be a panel of three arbitrators.	Concern as to limit on such liability -- the provision does not recognize the Joining Member's Maine Tort Claims Act immunities, limitations and cap on liability, and by so agreeing, Joining Member may be waiving its Maine Tort Claims Act protections. MRC has amended Section 8.8 and 11.7 as requested to address concerns. Raised concerns that MRC indemnity also should run to Joining Member's appointed officials. Consider whether an indemnity for claims arising "to the extent of" MRC's willful or negligent acts is more appropriate than one for claims "arising directly" from MRC's willful or negligent acts; MRC has added language to address these concerns. "Other circumstances giving rise to a claim for indemnification" is simply a catch-all. MRC has added language to reflect that there is no exception to requirement to provide access to records and information for attorney work-product, or materials made confidential by statute or by the Freedom of Access Act. Section 8.8 "No Waiver of Immunities" language has been added as requested.

Section	*Description*	*PT Comments*
	Section 8.7 contains a limitation of liability provision that bars a party's recovery of indirect and consequential damages.	Carve-out for third party claims for fraud has been added.
9.0 Assignment.	Assignment by either party is prohibited without the other party's prior written consent, but MRC may, after prior notice to Joining Members and hearing and subject to MRC Bylaws member approval rights, assign Joinder Agreement to a successor entity.	
10.0 Events of Default; Termination.	If either party fails to fulfill its obligations, and the failure is not cured within 30 days of receipt of written notice or other cure period, it is an event of default, as is bankruptcy or receivership. Termination is not a remedy listed under Section 10.4. Section 10.4 entitles MRC to seek specific performance against a Joining Member. The Joinder Agreement "shall terminate upon expiration of the Master Waste Supply Agreement" and the Joining Member remains liable for its pre-termination obligations.	Consider whether a Joining Member's expulsion from MRC or breach of its obligations as a member should specifically be called out as an event of default (see Section 3.3 of the Restated Bylaws); MRC has added this. Termination has been added, and for second breach of Agreement within two years, there is no cure period. Statute of limitations for claims extended from 1 year to 2, and claim arises when discovered or reasonably should have been discovered. Section 10.3 does not mention or coordinate expiration of this Joinder Agreement with termination under other agreements or with Joining Member decision not to extend beyond Initial Term. Development Agreement may be terminated and Master Waste Supply Agreement automatically terminates on January 1, 2020 if Commercial Operation Date, as extended, has not occurred. Master Waste Supply Agreement can be terminated for Force Majeure.
11.16	The parties are obligated to sign any reasonable papers and documents necessary to effectuate the Joinder Agreement.	

Section	*Description*	*PT Comments*
11.19	Although Fiberight is not a party to the Joinder Agreement, this section makes it a third-party beneficiary entitled to directly enforce the Joining Member's obligations.	Consider whether other Joining Members should also be third party beneficiaries of each Joinder Agreement.
Exhibit A	Executed Master Waste Supply Agreement.	
Exhibit B	Management and Disposition of Existing Municipal Assets and Project Assets. Sets out how MRC is to manage Equity Charter Municipalities and other assets held by MRC. A. List of assets held by or for MRC: 1. Two reserve accounts under PERC Agreement with combined balance of $26.6 million at end of 2015: a. Custody Account – working capital account consisting of PERC Partnership payments and proceeds from sale of Bangor Hydro warrants and used to pay distributions to Charter Municipalities; and b. Tip Fee Stabilization fund – consists of Performance Credit Funds, proceeds of sales of Bangor Hydro warrants, net cash flow distributed by PERC Partnership and fund balance earnings that exceed what is needed for distribution to Charter Municipalities. 2. The Operating Accounts managed by PERC Contracts in names of Equity Charter Municipalities, with combined balance less than $1 million. a. Operating Account funded by dues to pay MRC administrative costs; and b. Operating Budget Stabilization Fund – funds from release of reserve fund on PERC financing and one-time payment by	

Section	*Description*	*PT Comments*
	PERC Partnership to Equity Charter Municipalities. 3. Debt Service Reserve Fund – reserve account with approximately $1.33 million held in support of PERC Partnership finance during term of obligation by lender, to be paid to MRC in early 2018. 4. PERC Partnership limited partnership shares. Equity Charter Municipalities own 25.5214 percent of limited partner share in PERC Partnership, managed by MRC; PERC Partnership will be dissolved by end of 2018. B. MRC would allocate assets as follows: 1. Projected $25 to $28 million in reserve accounts, Custody Account and Tip Fee Stabilization Fund, to be distributed as follows: a. Site acquisition and infrastructure costs ("Site Capital Costs"), up to $5 million; 2. Departing Municipalities that are Equity Charter Municipalities receive a share of both reserve accounts, which will be exclusive of site capital cost-expenditures (which will be allocated to Joining Charter Municipalities) but will be less the administrative costs of payment and the holding of reserves for Departing Municipalities' share of PERC Partnership dissolution liabilities and costs. "Payments shall be made timely," after PERC Partnership dissolution and after MRC Board establishes sufficient reserve from Joining Members' accounts, to Departing Municipalities that have executed Termination Agreements.	Not really a debt service fund but a form of security for financing. Unless sooner dissolved, PERC Partnership continues until Dec. 31, 2018.

Section	*Description*	*PT Comments*
	3. Funds allocable to Equity Charter Municipalities that are Charter Members will be used to establish several reserve funds: a. Building Reserve – up to $7 million to fund a reserve in event of termination, with amounts released each year under Site Lease and distributed to Equity Charter Municipalities pro rata on basis of contributions as of April 1, 2018. b. Delivery Sufficiency Reserve Fund. $3 million to be used to make Delivery Sufficiency Payments assessed against MRC for all Charter Municipalities that are Joining Members. Unused funds will be allocated among Joining Members that are Equity Charter Municipalities pro rata at end of Joinder Agreement term. c. Reserve Fund - $1.167 million reserve for liabilities and costs related to PERC Partnership dissolution and PERC facility closure. Need for Fund to be assessed by end of 2018 and when/if released, Fund to be allocated among Equity Charter Municipalities that are Joining Members. d. Bridge Waste Transportation Fund – up to $1 million to offset Bridge Waste transportation. e. Target Value Reserve Fund – remaining amounts are to be deposited into Fund for distribution to the Charter Municipalities that become Joining Members. Would be used to supplement Fiberight rebates to Joining Members for 36 months after Commercial Operation Date. Equity Charter Municipalities would receive $5 per ton delivered to the Facility and New Charter Municipalities would receive $3 per ton delivered, to extent funds are available and are needed to	

Section	*Description*	*PT Comments*
	achieve net disposal cost after rebates of $65 per ton and $67 per ton, respectively. Afterwards, MRC Board will distribute Fund at its discretion. 4. Operating Accounts – On Expiration of PERC contract, MRC to pay allowable share of Operating Budget Stabilization Fund to Departing Municipalities, and to retain remainder in both Operating Accounts to support ongoing MRC administrative costs. 5. Debt Service Reserve Fund. Will be used to pay costs for Fund release; to pay Equity Charter Municipalities' and MRC's costs of PERC Partnership dissolution; and to distribute remainder, after any reserve is retained, among Equity Charter Municipalities on basis of waste delivered during term of relevant financing. MRC will make payments of this last amount, if at all, promptly after a review by the end of 2018 of amounts used to pay the first two categories of costs, of amounts held in reserve for anticipated costs and of amounts available for Equity Charter Municipality payments. 6. PERC Partnership Limited Partnership Interest. MRC will administer Equity Charter Municipality Interest until Partnership is dissolved or until Municipality divests itself of limited partners shares. Municipality affirms authorization to MRC to manage shares, determine share value, approve share disposition and determining allocation of share distributions. 7. Non-Charter Municipalities – will pay additional $2.21 per ton over 15-year Initial Term to be placed in Target Value Reserve Fund for Charter Municipalities. Returning Departing Municipalities must repay amounts received from reserve and operating accounts if rejoin; and are treated as Non-Charter	

Section	*Description*	*PT Comments*
	Members for purposes of this provision.	
Exhibit C	Components of Ratification To ratify the Joinder Agreement and participation, Joining Member must: • Execute Joinder Agreement, provide signed original and contact information; show authorization by legislative body (council, town meeting) and provide legal opinion on Agreement's enforceability. • Provide baseline information – value of estimated annual minimum deliveries of MSW in tons per year and geographic area to which value applies; identification of MSW sources if from separate entities, such as school administrative units; description of MSW collection and delivery method; and list of MSW diversion (including organics) and recycling programs by Joining Member as of Effective Date. • State preferences regarding: Regional approach to MSW transfer or hauling to facility; Preferred Bypass transportation – to Facility or Back-up Facility; Delivery of source-separate recyclables, clean wood or brush; Technical assistance with recycling programs; and Regional approach to management of tires, Unacceptable Waste, textiles and Residual Wastes.	

Table B

Perkins Thompson Site Lease Agreement Summary and Comments
(December 4, 2015 Draft and December 30, 2015 Revisions)

Capitalized terms have the meanings ascribed to them in the Site Lease draft dated December 4, 2015.

Section	*Description*	*PT Comments*
First Whereas Clause	States that Landlord owns or will own the Property on or before the Effective Date.	Landlord should not sign the Lease until it owns the Property.
First Whereas Clause		Exhibit A should include a legal description of the Property, or a reference to a recorded deed.
Parties	To be signed by the MRC ("Landlord") and Fiberight, LLC ("Tenant").	
1.0 Definitions	Key terms include "Change in Law" and "Force Majeure." Comments on these definitions appear in the section of this Summary discussing the section of the Lease in which the terms are used.	
2.0 Demise; Description of Leased Premises; Permitted Uses	The Leased Premises: Exhibit A, which has not yet been prepared, is to show the Property and the Project Site. The Project Site is on a portion, but not all, of the Property to be purchased by MRC pursuant to the Option Agreement (which we do not have). The "Leased Premises" are defined as the Project Site together with the appurtenant rights of access, stormwater drainage, and utility access. The Tenant will own the Facility.	Leased Property is only a portion of the Property MRC is acquiring in order to provide substantial buffer around Facility. Section 4 allows Tenant to make reasonable use on the Property outside of the Leased Premises upon prior approval by Landlord. The first line of Section 2.0 has been clarified to state the portion of the Property being leased is depicted on Exhibit A as the "Project Site." Should add book and page reference to recorded

Section	*Description*	*PT Comments*
		deed to Property.
3.0 Term	Initial term begins on the Effective Date (the date the Lease is signed) and runs through the later of April 1, 2033 or the 15th anniversary of the Commercial Operation Date (the date the facility begins operation). Tenant can extend the Agreement five times for five years each, upon 18 months' notice before the end of any term (maximum total term is 40 years). If Tenant elects not to renew at the end of the initial Term or any Extension Term, the Tenant has six months after the end of such term to remove its equipment and personal property, and title to the building passes to the Landlord. Even if Tenant has provided Landlord with 18 months' notice of renewal, Landlord may terminate with eight months' notice prior to the end of the then existing term, if too many Joining Members have terminated, provided that Landlord accompaniers its notice of termination with both (a) an offer to purchase the building, and (b) an offer to sell the Property (not just the project site) to Tenant, each for the pre-determined price set forth in Exhibit C. If Tenant does not accept either offer, then Tenant is deemed to have abandoned the building.	(Drafting needs to be clarified here but this seems to be the intent). Landlord has to provide Tenant with offers to purchase building and to sell Site in order to exercise ability to terminate Site Lease after Initial Term or any Extension Term. The worst-case scenario for Landlord is that after the Initial Term, Landlord desires to terminate because the Facility does not operate and Tenant accepts the Landlord's offer to purchase the building, in which case Landlord owns the property and the building and does not have an operating facility.
4.0 Rent, Access and Services	Tenant pays Rent per Exhibit D. Landlord constructs access road and extends access to electricity, water supply and sewer service. Landlord is responsible for all maintenance of the access road until the road is accepted by the Town of Hampden. Tenant may make reasonable temporary use of the Property outside the Leased Premises upon prior	

Section	*Description*	*PT Comments*
	approval of Landlord, not to be unreasonably withheld. Tenant connects to those enumerated services on the site and arranges all other utilities and services.	
5.0 Quiet Possession; Landlord Right of Entry; Tenant Right of Access	Tenant has right of quiet enjoyment. Tenant will keep tax incentives and environmental attributes that it creates. Tenant accepts the Leased Premises in the condition they are in on the Effective Date and assumes all risks; Landlord makes no representations and warranties, including as to environmental conditions. This section should more strongly state that Tenant has had the opportunity to conduct due diligence and is relying on its own judgment and not any representations by Landlord. Tenant acknowledges that operation of the Facility is subject to laws and regulations and Tenant covenants that it will operate the Facility in accordance with the applicable permits. The Landlord has the right to ensure that the Facility is operated in compliance with applicable permits. Tenant is only required to use "reasonable efforts" to minimize adverse environmental and nuisance impacts on residents of the surrounding areas. Tenant must provide a means for the public to report nuisances and will respond promptly and act diligently to address and make efforts to mitigate impacts that are reasonable under the circumstances. Landlord may enter the Leased Premises upon at least 24 hours' prior notice to inspect and enforce the obligations under the Lease or under applicable law. The Tenant has 24/7 access rights. The Tenant will coordinate with first responders regarding emergencies.	Section 8 specifically states that Tenant shall comply with all applicable laws, rules and regulations. This section should be consistent. Section 23, which requires Tenant to comply with all environmental laws, rules, and regulations, has been amended to state environmental conditions more strongly. Site Lease has been amended by MRC to more strongly state that it has conducted its own due diligence and is relying on its own judgment and assessment of the Leased Premises.

Section	*Description*	*PT Comments*
6.0 Development of the Facility	Tenant is responsible for causing the Construction Date to occur by 1/1/17, including design, permits and approvals, and financing. Landlord responsible for development, permitting, construction, and maintenance of access road and related electrical, water, and wastewater infrastructure. The Tenant will allow the Landlord to provide non-binding comment on permit applications and designs. The Tenant will provide the Landlord with monthly progress reports. Construction Date occurs when Tenant has obtained all permits and financing, and has authorized construction to begin. Tenant to provide notice to Landlord of each "milestone."	
7.0 Facility Construction	Tenant must only use "reasonable efforts" to cause the Commercial Operation Date to occur by April 1, 2018, subject to stated reasons for delay. Tenant is excused from performance if a permit contains a term that would preclude construction or operation on "commercially reasonable terms." Tenant is also excused if an "Uncontrollable Circumstance" or "Change in Law" occurs that would preclude construction or operation on "commercially reasonable terms." Tenant may also be excused form performance if it has not obtained financing; Tenant need only use "diligent efforts" to obtain financing. Any delays in the Commercial Operation Date for any reason "not under the control of Tenant" constitute "Excused Delay Periods" under the Master Waste Supply Agreement. The Landlord must construct the access road and	Arguably allows Tenant to decide in its discretion that a permit condition proves too costly to Tenant and to abandon the project; Landlord is left with the Property. However, MRC and members want to control Facility to obtain another operator. Uncontrollable Circumstance replaced by Force Majeure. Change in Law is broadly defined to include any change that is "inconsistent with and more stringent than" previously existing law. This provides Tenant with a broad ability to excuse its performance.

Section	*Description*	*PT Comments*
	electric, water, and sewer lines. Landlord must use "reasonable efforts" to cause the Construction Access Date and the Infrastructure Completion Date to occur as quickly as feasible. Stated reasons for delay can justify delays in the Commercial Operation Date, including lack of permits or Tenant's determination that a permit contains a condition that would preclude construction or operation of the Facility on commercially reasonable terms, a Force Majeure event, or Tenant's lack of financing. Delays for reasons not under control of Tenant allow for Excused Delay Periods under the Master Waste Supply Agreement. The Tenant and Landlord will keep an updated construction schedule to monitor delays and impacts on the Commercial Operation Date. The Tenant will conduct a Performance Test to demonstrate to the Landlord that it has achieved the Commercial Operation Date. Only requires "substantial compliance" with all permits. Tenant and Landlord to work together to establish protocols for Performance Test.	This is inconsistent with Section 8.2 and has been amended to require operation in compliance with permits.
8.0 Facility operation	The Tenant will operate and maintain the Facility. §8.1 requires Tenant to use **reasonable efforts** to ensure that the Facility meets safety requirements and complies with all permits and laws. §8.2 states that the Tenant **shall** comply with all applicable federal state and local laws. §8.2 also states that Tenant shall work with Landlord to ensure compliance with all directives of governmental authorities related to the Facility and the Leased Premises. It is unclear what the intent of this statement is if it's Tenant's obligation to comply. May create and implication that it's Landlord's obligation as well, and	MRC has amended to consistently state that Tenant is required to cause the Facility to comply with all permits and all applicable laws, rules, and regulations.

Section	*Description*	*PT Comments*
	should be clarified. The Tenant will send residual materials to the landfill per the Residuals Agreement. Both parties to keep and maintain records required for purposes of property administration of the Lease. Both parties have audit rights. Tenant to use reasonable efforts to cooperate with Landlord to maintain good community relations. The Landlord to keep the access road and related utility, sewer, and water lines in good order and repair.	
9.0 Capital Improvements	The Tenant may make Capital Improvements to the Facility subject to conditions. Second sentence of §9.1 does not make sense as written. The Landlord can review and make non-binding comments on the Capital Improvements. Tenant will update Exhibits to Lease as necessary.	
10.0 Assignments; Transfers; Bankruptcy	The Tenant may not assign the Site Lease without consent of the Landlord in Landlord's sole discretion. However, transfer of ownership of Tenant may occur with prior notice to and approval of Landlord, which approval may not be unreasonably withheld. Certain conditions must be met in the event of a transfer of ownership, and Fiberight will continue to have day to day control of the Facility. Tenant may assign the Lease to an Affiliate controlled by Fiberight or to an investor who will own/operate the Facility in connection with financing. *See Section 19.* Bankruptcy is a breach of the Lease (this is also addressed in §18).	If ownership of Fiberight has transferred to another, nonaffiliated party, Fiberight to remain in day-to-day operation to assure operational continuity unless/until MRC otherwise agrees.

Section	*Description*	*PT Comments*
11.0 Notices	Provides for notice.	
12.0 Taxes and Assessments	Tenant responsible for taxes on the Leased Premises and improvements.	
13.0 Liens	Tenant keeps Leased Premises free of liens.	
14.0 Indemnification	Tenant indemnifies Landlord against damages arising from Tenant's acts/omissions on or about the Leased Premises or breach of Lease (except for Landlord's gross negligence or willful misconduct).	MRC has made our requested changes to strengthen this by also including damage claims arising out of Tenant's possession, use, or occupation of the Leased Premises or occurring while on or about the Premises. Should also add that indemnity is without regard to any workers' compensation immunity, and by adding environmental indemnity to Section 23.
15.0 Insurance	States that insurance in adequate amounts must be maintained by Tenant.	MRC has added requirement for Tenant to maintain umbrella policy.
16.0 Right of First Offer	If the Landlord wants to sell, Tenant has first right to buy. Gives Tenant 30 days to respond to Landlord's notice.	Closing must occur now required within 45 days from Tenant's acceptance of offer.
17.0 Force Majeure	Requires the parties to notify one another as soon as a party has knowledge of an action of the government that could lead to condemnation or a Change in Law. MRC and Tenant will work together to monitor Changes in Law and condemnation and avoid adverse actions. Obligations can be suspended for an event of Force Majeure if outside the reasonable control of either party per the definition. The affected party will develop a Force Majeure Plan regarding impacts on obligations and costs for approval by the other. States that such plan will include a proposal for costs to be passed through to the MRC	The definition of Force Majeure is extremely broad; includes any unforeseeable act, event, or condition that has a material adverse effect on the rights or obligations of a party, the Facility, the Property or Infrastructure if the act, event, or condition is beyond the reasonable control of the party. In most ground leases, Force Majeure is limited to delays caused acts of God, war, civil unrest, fire/casualty, labor difficulties, and so forth, and only allows for delays in performance, not termination. This definition is overly favorable to Tenant. An obligation to pay money should be carved out as an

Section	*Description*	*PT Comments*
	and/or Joining Municipalities as part of the response to address Force majeure. If the Plan is (ultimately) accepted, it goes into effect. If rejected, and agreement cannot be reached, then either party can terminate. If MRC terminates, then MRC must either (a) buy the building from tenant; or (b) sell the property to Tenant, in either case at the price set forth in Exhibit C. If Tenant terminates, it must leave and vacate the premises within 90 days.	item that is not impacted by a claim of Force Majeure. However, MRC explains that this language has been reviewed by MRC's consultant and is standard in the industry. MRC has made language more clear that if there are costs proposed to be passed through to MRC, these will be stated. This is favorable to the Tenant and prejudicial to the Landlord; but is the business transaction agreed upon by the parties..
18.0 Default and Termination	Landlord may terminate if Tenant is in default: Tenant fails to meet deadlines for Construction Date or Commercial operation Date; Tenant breaches Master Waste Supply Agreement is a default; and other enumerated events of default. Allows Tenant a 60-day cure period for defaults (other than payment defaults). Prior to Construction Date, allows Tenant to terminate with 90 days' prior notice if Tenant reasonably determines that construction or operation of the Facility is uneconomic or practically infeasible. *This provision should be eliminated; makes it too easy for Tenant to terminate if Tenant doesn't like the economics of the deal after Landlord has purchased the Property and constructed the access road and infrastructure.*	This is an extremely long cure period; should be 30 days; MRC has reduced this to 45 days..
19.0 Investor Rights	During an event of default (should add "by Tenant"), any Investor has the right to step in and act for Tenant or to succeed to Tenant's interest in the Lease, with notice to Landlord. To do so, Investor must provide satisfactory evidence to landlord and Maine DEP that it	

Section	*Description*	*PT Comments*
	has financial capacity and technical ability to operate the Facility, and must accept the Terms of the Lease and cure Tenant's defaults.	
20.0 Reserved	The parties each waive subrogation.	
21.0 Waiver of Subrogation		
22.0 Memorandum of Lease		
23.0 Environmental	Tenant covenants not to unlawfully release Hazardous Materials, and shall remediate in the event of such a release.	MRC has added the stronger environmental indemnification provision we suggested.
24.0 Waiver		
25.0 Dispute resolution	Dispute resolution by binding arbitration. Claims are barred after one year from the date the claim arose.	This is a very short time within which to bring a claim; does not define "arose;" is it date of discovery? MRC has changed this to extend the statute of limitations from 1 year to 2 and to make claims begin when discovered or reasonably should have been discovered.
26.0 Miscellaneous	Standard provisions	
Signatures	MRC and Fiberight	

Exhibit A	Property, Leased Premises, and Project Site
Exhibit B	Description of Facility and Description of Tenant's Work
Exhibit C	Building and Property Value over the Operating Term
Exhibit D	Lease Consideration
Exhibit E	Reporting Requirements
Exhibit F	Form of Memorandum of Lease

Section	*Description*	*PT Comments*

Section	*Description*	*PT Comments*

SITE LEASE TIMELINE

	Action	Target Date	Explanation	Issues
1.	Effective Date (Introductory paragraph)	early 2015	Date signed by the parties After Effective Date, Tenant designs the facility, obtains permits, and obtains financing, and Landlord develops access road and utility infrastructure	Landlord must exercise the option prior to entering into the Lease, which exposes Landlord to the risk of holding the property and Tenant not going forward with the project for reasons allowable under the Lease.
2.	Construction Access Date (§7.2)	9/1/16	Date by which Landlord has made sufficient progress in the construction of the access road such that Tenant can have access to Project Site for construction vehicles and equipment	Landlord need not begin construction activities if (i) there are not enough joinder agreements, (ii) a necessary Facility permit has not been issued, or a permit contains a provision that would preclude construction or operation of the Facility on commercially reasonable terms, as determined by Tenant, (iii) Force Majeure, or (iv) Tenant has not yet obtained financing.
3.	Construction Date (§6.5)	1/1/17	Date by which Tenant has (a) acquired all final permits necessary for construction and related access services, and utilities; (b) "closed and/or arranged final terms of access granting to Fiberight construction financing sufficient to authorize commencement of construction;" and (c) authorized commencement of construction activities at the Leased Premises on a continuous basis as evidenced by the Tenant's issuance (*to whom?*) of a notice to proceed to start construction or equivalent.	Tenant need not begin construction if: (i) there is a permit condition that construction and operation of the Facility can't occur on "commercially reasonable terms" despite Tenant's diligent efforts; commercially reasonable is a vague standard which leaves great discretion on Tenant's part; (ii) an "Uncontrollable Circumstance" or "Change in Law has occurred (issues with these definitions are discussed in Section 7 of the Lease Summary); or (iii) Tenant has not yet obtained financing despite "diligent" efforts – this is not a high standard and should be strengthened. There could be objective measures of what constitutes adequate financing, e.g., a loan of at least x% of project costs, at y% interest, for z years.
4.	Infrastructure Completion Date	7/31/17	Date by which Landlord has completed installation of the Infrastructure such that its availability does not delay Tenant's completion of construction and	

Section	*Description*	*PT Comments*

	(§7.2)		commencement of operation of the Facility.	
5.	Commercial Operation Date (§7.4(c))	4/1/18	Later of date by which Performance Test has been completed or 4/1/18	Tenant must use "reasonable efforts" to cause this date to occur by 4/1/18. .

Table C

Timeline

Date	Event
December 1, 2015	MRC and Fiberight to agree to Master Waste Supply Agreement
May 1, 2016	Date for MRC to procure Delivery Commitments for at least 150,000 TPY Acceptable Waste
Sept. 1, 2016	Construction Access Date
January 1, 2017	Either MRC or Fiberight may terminate Development Agreement if Fiberight has not put adequate financing in place; Construction Date
July 31, 2017	Infrastructure Completion Date
March 31, 2018	Expiration of PERC Second Amended and Restated Agreements
April 1, 2018	Presumed Commercial Operation Date
December 31, 2018	Expiration of PERC Partnership
January 1, 2020	Either MRC or Fiberight may terminate Development Agreement if Commercial Operation has not been achieved; Master Waste Supply Agreement eventually terminates
March 31, 2028	Initial Term expires if MRC-Waste Management Agreement expires without Extension Terms
April 1, 2033	Expiration of Joinder Agreement, Site Lease and Master Waste Supply Agreement Initial Term; potential notices of termination and provision of offers to purchase Facility or sell Site
April 1, 2058	Expiration of Joinder Agreement, Site Lease and Master Waste Supply Agreement Extension Terms