# *MEMORANDUM*

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| TO: | MRC Board of Directors |
| FROM: | George Aronson, CRMC |
| RE: | Contract Language to Protect Against Tipping Fee Increases |
| DATE: | 1 February 2016 |

This memo presents the contract language in the Joinder Agreement and the Master Waste Supply Agreement that protects Joining Members from increased tip fees or additional capital contributions beyond or in variance to those identified in the original agreements. The contract language prevents the Joining Members from being a funding source in the event the Fiberight technology fails to perform as intended. The memo is intended as a supplement to e-mail correspondence from the MRC General Counsel, Dan McKay, Esq., dated January 29, 2016, a copy of which is provided at the end of the memo.

Article 4.1 of the Joinder Agreement defines the Tipping Fee to be paid by Joining Members as follows:

> "Joining Member agrees to pay tipping fees for Acceptable Waste and other wastes delivered and credited to its account in the amount of $70.00 per ton, subject to annual increase equal to the amount of annual increase in the CPI, as provided in the Master Waste Supply Agreement." Joinder Agreement, Article 4.1.

Section 5.1(i) of the Master Waste Supply Agreement provides the following language:

> "The initial Tipping Fee charged each month for MSW delivered to the Facility by or for the account of Joining Members shall be Seventy Dollars ($70.00) per ton, subject to adjustment as of each January 1 during the Term to reflect any annual percentage increase in the CPI since January 1 of the calendar year that includes the Commercial Operation Date, in the case of the first such adjustment, or the effective date of the last adjustment, in the case of each subsequent annual adjustment." Master Waste Supply Agreement, Section 5.1(i).

Thus, both agreements provide for a Tipping Fee as a fixed per-ton number that escalates once per year with the annual change in CPI. Fiberight cannot use its discretion to increase the Tipping Fee. There are no pass-through costs in either agreement that could be used to raise tipping fees through a back door mechanism. Nor can Fiberight use its discretion to make the Joining Members provide capital contributions or otherwise be a source of funds to support Fiberight's compliance with its contractual commitments to the MRC under the Master Waste Supply Agreement and the Site Lease. If the Fiberight technology fails to perform as anticipated due to construction delays or cost overruns, operating or maintenance costs overruns, performance shortfalls or product market revenue shortfalls, Fiberight must still comply with its obligations. In particular:

- To clarify that neither the MRC nor Joining Members are responsible for construction cost overruns, Section 7.1 of the Site Lease states that "The Tenant shall construct the Facility … at the Tenant's sole cost and expense." Fiberight (the Tenant) has no right to seek payment of construction cost overruns from the MRC or from Joining Members.

- If Fiberight fails to fulfill its material obligations under the Master Waste Supply Agreement or the Site Lease, then the MRC can provide Fiberight with a notice of default under either agreement or both agreements. If the default is not cured timely, the MRC can terminate both the Master Waste Supply Agreement (Section 11.0), at which point Fiberight has no right to receive further Tipping Fees from Joining Members, and can terminate the Site Lease (Section 18.1), at which point Fiberight must leave the Site.

- If Fiberight does not start construction by January 1, 2017, or does not reach commercial operation by January 1, 2020, then the MRC can terminate the Master Waste Supply Agreement and the Site Lease at its discretion (Site Lease, Section 18.0). In such event, Fiberight would have no right to receive further Tipping Fees from Joining Members, and must leave the Site.

- The MRC cannot cause an increase in Tipping Fees through waiver of contractual provisions in the Joinder Agreement or the Master Waste Supply Agreement unless there is explicit approval of each Joining Member. In this context, Article 4.5 of the Joinder Agreement provides the following:

> "The Tipping Fee is governed by both this Article 4 and by Section 5.1 of the Master Waste Supply Agreement. *The MRC hereby acknowledges that, except in cases of Force Majeure or actions of the Joining Member or the MRC contrary to the terms of this Agreement or the Master Waste Supply Agreement, it cannot agree to amendments to the Tipping Fee that might be proposed by the Company unless Joining Member explicitly authorizes the MRC to amend the Tipping Fee by amending this Joinder Agreement.* In the event that the Company provides a formal proposal for amendment of the Tipping Fee that the MRC agrees is reasonable and necessary for the Company to continue operation of the Facility on a sustainable basis, the MRC will facilitate presentation by the Company of such proposed amendment to Joining Member for its consideration, and Joining Member agrees to consider such amendment in good faith." Joinder Agreement, Article 4.5., emphasis added.

Similarly, Section 5.1 of the Master Waste Supply Agreement states the following:

> "(ii) The Company and MRC acknowledge that determination of the Tipping Fee is governed by both this Section 5.1 and Section 4.1 of the Joinder Agreements. Accordingly*, the MRC cannot agree to amendments to the Tipping Fee that might be proposed by the Company unless each Joining Member explicitly authorizes the MRC to amend the Tipping Fee by amending its Joinder Agreement with the MRC*." Master Waste Supply Agreement, Section 5.1, emphasis added.

The one potential exception to the fixed nature of the Tipping Fee is the case of an Event of Force Majeure. Force Majeure events are defined in the Master Waste Supply Agreement (and similarly in the Joinder Agreement and Site Lease) as follows:

> ""**Force Majeure**" shall mean any unforeseeable act, event or condition, not in effect as of the Effective Date, that has had, or may reasonably expected to have, a material adverse impact on the rights or the obligations of either party under this Agreement; or a material adverse effect on the Facility, the Property or the Infrastructure or on the construction, ownership, possession or operation of the Facility, the Property or the Infrastructure, provided that such act, event or condition (a) is beyond the reasonable control of the party relying thereon as justification for not performing an obligation or complying with any condition required of such party under this Agreement; (b) is not the result of willful or negligent action, inaction or fault of the party relying thereon; and (c) which, by the exercise of reasonable diligence, such party is unable to prevent or overcome." Master Waste Supply Agreement, Section 2, Definitions, emphasis added.

Force Majeure events might include earthquakes or terrorist attacks or other unforeseeable cataclysmic events, or changes in federal or state laws that have adverse effects on the operation of the Facility. In such cases, *Fiberight would have the right to propose* an increase in the Tipping Fee as part of its plan for addressing a Force Majeure event (Site Lease, Section 17). However, *the MRC would have no obligation to accept* any increase in the Tipping Fee that was proposed. The MRC could not accept an increase in Tipping Fees without a vote of the Joining Members. If the MRC rejects any proposed increase in the Tipping Fee, and no alternative agreement is reached with Fiberight, then the MRC can terminate the Master Waste Supply Agreement and the Site Lease. Fiberight would get no more Tipping Fees and would need to vacate the Site.

**Attachment A**
**Correspondence from the MRC General Counsel, Dan McKay, Esq.,**
**Related to the Tipping Fee**

Section 4.1 of the Joinder Agreement and Section 5.1 of the Master Waste Supply Agreement each explicitly state that the tipping fee at Fiberight will be fixed at $70/ton, subject to an annual CPI increase. Each section also makes reference to a supplemental payment of $2.21/ton which is payable by Non-Charters and rejoining Equity Charters to the MRC over the initial 15 year term as a "make-up payment" for those not contributing to the initial reserve funds.

There is no re-opener for this pricing provision. However, in the event of a Force Majeure, there is provision in both the Joinder Agreement (Article 11) and the Master Waste Supply Agreement (Article 13) for development of a Force Majeure Plan. Such a plan could include revisions to the tipping fee or rebate regimes although that would not necessarily be the case. Under both the Master Waste Supply Agreement and the Joinder Agreement, the MRC is obligated to inform all MRC members of any such plan, identify the impact on tipping fees and rebates, afford members an opportunity to be heard with respect to the plan, and consider in good faith any concerns raised. The MRC then has the option of accepting or rejecting the Plan. After affording the membership an opportunity to be heard, if the MRC Board proposes to accept the Plan, and if the effect would be to either increase tipping fees or to alter the rebate structure, adoption of the Plan would be a "Fundamental Matter" under the Bylaws and would be subject to a membership vote if requested by members controlling at least 60,000 tons of MSW. If a sufficient number of members do not call for a special meeting to vote on the Plan, or if a special meeting is called and the Plan is approved by vote of the membership, then the Plan could be implemented and all members would be bound by its terms. If no agreement between Fiberight and the MRC can be reached with respect to a Plan of Force Majeure, or if the MRC membership votes down the Plan, then the Plan would not be implemented and either the MRC or Fiberight could terminate the Master Waste Supply Agreement.

In summary, the tipping fee is fixed. The only situation in which it could be altered would be in the event of a Force Majeure. In that situation, the MRC would work with Fiberight to negotiate a Plan of Force Majeure which could, if appropriate, include a revision to the tipping fee and/or rebate regimes. Any such plan would have to be vetted by the MRC with its membership and, if it involved an increase in tipping fees or a change to the rebate formula, it would be subject to a vote of the membership before being implemented. If it were voted down, it would not be implemented. Thus, the membership as a whole has effective veto power over such a Force Majeure Plan, but individual members do not have a unilateral right to reject it.

The only capital contribution that the MRC is required to make to the project is to fund up to $5 million for acquisition of the project site and related infrastructure development (i.e., access road and utilities). That $5 million will be drawn from existing reserves in the Tip Fee Stabilization Account. Fiberight is responsible for all other capital expenditures. See Joinder Agreement, Exhibit B, paragraph 2. Again, it is possible that, in the event of a Force Majeure, a Plan of Force Majeure could be proposed that included additional MRC capital contributions, but any such Plan would be subject to the approval regime described above.

Finally, it is worth noting that the increase in tip fees experienced by the MRC membership in the early '90's, which I know is of concern to some members, was negotiated outside of the original PERC agreements and was not mandated by them. In that circumstance, each member had its own waste disposal agreement with PERC and had the option to accept or reject the proposed tipping fee increases. Most accepted. A few did not. The net result was that, had enough towns refused to accept a tipping fee increase, a minority of the MRC membership could have toppled the project to the disadvantage of a majority of the membership. This time around, fundamental decisions are to be made collectively in the first instance by the MRC Board and then, in the case of Fundamental Matters, by majority vote of the membership (measured by tonnage) if enough members so request. Members are then bound by the will of the majority. This structure is designed, in part, to prevent a "tyranny of the minority" by which a minority of members could effectively topple the project against the will of the majority.

I hope that this explanation is helpful. Let me know if you have questions.

Dan

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