



May 24, 2016

## **Information for Departing Members Signing-up with PERC**

Dear MRC Member:

As the organization that has faithfully served your municipal solid waste (MSW) interests for 25 years, we respect your decision to become a departing member of the Municipal Review Committee (MRC) in 2018.

Solid waste management is a complicated business. Before entering into any alternative MSW disposal agreement with PERC, L.P., or another entity, we strongly recommend that you retain and obtain advice from technical and legal advisors with specialized expertise in solid waste facilities operations and contracting. Given that we still represent you and that you have voted to sign up with PERC, MRC thought it appropriate to provide you an outline of our key concerns and issues with proposed contracts circulated by PERC's private partners. We recommend that you work with PERC or its successor entity on changes to the contracts before signing them in order to protect the interests of your municipality and taxpayers.

### **PERC's Post 2018 MSW Disposal Contract Offer is not Viable after December 31, 2018**

MRC questions whether PERC will actually be able to honor the contract they have made available for consideration by municipalities. We question this because the contract offer was made in the name of PERC, LP, which is the existing Partnership. This Partnership has a firm termination date of December 31, 2018. The only purpose under applicable law for which the PERC Partnership can continue its business after December 31, 2018 is for the winding up of its business.

Therefore, any contract between your entity and PERC would need to be with a new entity that would replace PERC, LP after the Partnership's assets have been liquidated and distributed to the existing owners. The MRC has requested that PERC address how it will manage the termination of PERC LP and the transfer of assets to a new entity, but has not received a response. The fact that this issue has not been addressed casts doubt on the reliability of any PERC obligation after the end of 2018 other than those related to dissolution of the partnership.

### **Proposed 6th Amendment of Partnership Agreement is not Valid after December 31, 2018**

The current General Partner of the PERC Partnership, USA Energy (USAE), distributed to the MRC membership a proposed "Sixth Amended and Restated Agreement of Limited Partnership of Penobscot Energy Recovery Company, Limited Partnership" with the implicit suggestion that the current PERC Partnership Agreement, as amended and restated, will continue on after 2018 with those current MRC members who wish to sign on remaining as limited partners.

This proposal is not valid because USAE does not have the power under the current agreement to either amend its provisions or extend its term without the prior written consent of the MRC on behalf of all Equity Charter Municipalities. At the time of this writing, given that more than 80 communities have signed up with the MRC to send their MSW to Fiberight and a majority of those are Equity Charter Members, it is evident that MRC consent will not be forthcoming, and therefore the Limited Partnership will not be continued.

Furthermore, even if its proposal could be implemented, there are inherent differences between USAE's proposed partnership agreement and the previous versions that have served the MRC membership well for more than two decades. These changes will dramatically alter the partner relationship post 2018, generally skewing powers in favor of the General Partner and limiting the checks, balances and oversight afforded currently to municipal entities. The key changes include:

- Oversight Committee Eliminated
- MRC Role as Umbrella Organization Eliminated
- Checks on General Partner Powers Removed
- Ground Rules for Partnership Distributions Eliminated
- No Limits on Admission of New Partners or Dilution of Existing Partners
- No Limits on Fees Billed by USAE or Affiliates
- No Limits on Conflict of Interest Transactions
- No Power to Remove General Partner
- Unilateral Right to Dissolve

A memo detailing the implications of these changes is [enclosed for your review](#).

### **PERC Waste Disposal Agreement: Delivery Obligation, Escalation and Deemed Termination**

As stated above, it is our view that the Waste Disposal Agreement offered in the name of PERC, LP cannot be implemented as proposed because the existing Partnership will terminate on December 31, 2018 following which the PERC Partnership can legally operate only for the purpose of winding up its business and liquidating its assets. In addition, we want to share a few of our concerns with the substantive contract terms offered in the proposed PERC Waste Disposal Agreement. In particular:

- Delivery obligation. Section 3(a) of the draft PERC agreements requires the Municipality to "...deliver all Acceptable Waste that is generated within the Municipality to the PERC Facility." You should be concerned with this contract language if there are commercial haulers active in your municipality that collect waste from private generators and can make independent decisions about where to take that waste for disposal. The contract does not say what happens if commercial haulers active in your municipality deliver such waste to a disposal facility other than PERC – but if they do, it would appear to violate the plain language of the contract, at which point PERC could put the Municipality in default and terminate the contract. Delivery of the estimated tonnage. Section 3(c)(1) of the draft PERC Agreements states that Municipality shall "deliver to the PERC facility the estimated tonnage of Solid Waste." Can PERC put the Municipality in default for failure to deliver the estimated tonnage? The answer to this question is unclear because the language of Section 3(c)(1) conflicts with the language in Section 3(a) of Schedule A.
- Escalation. Some versions of the PERC contracts would escalate the Tipping Fee four times per year rather than once – for example, Section 4 of Schedule A of one version of the contract says that the Tipping Fee "shall be increased on a quarterly basis by a percentage equal to the percentage change in "CPI" for the most recently released 12-month period ..." That is, if annual CPI increases by 2%, the tip fee would increase by 2% each quarter, or more than 8% for the year. After the MRC raised this

point, PERC began sending out contracts that corrected this clause to account for annual increases instead of quarterly increases at the annual rate – but you are advised to check your contract closely to ensure that the change has been made in the version of the contract sent to you.

- Deemed termination. Section 3(c) of Schedule A to the PERC contract allows PERC to give notice to Municipality if PERC believes that the Municipality is not delivering all of its Solid Waste to the PERC facility, and, if the dispute is not resolved, PERC has the right to declare that the contract has been deemed terminated and to collect damages under Section (b) of the contract. Those damages are based on six years of tip fees –so, if the tip fee is \$85 per ton, and the estimated delivery amount is 1,000 tons per year, the penalty would be \$510,000 --- plus PERC’s legal fees. You are advised not to accept language that would allow PERC to have the discretion to assess Municipality that level of penalty.

If the nature of these concerns causes your community to re-evaluate its decision to leave the MRC as a departing municipality, there is still time to reconsider your decision before June 30 in order to capture the full value of the MRC/Fiberight Post 2018 solution.

Whatever you decide, over the next year and a half, we will continue to work with you in an effort to make the most of our existing relationship until the existing Partnership concludes in 2018. Until that time, the MRC will continue to provide oversight of PERC operations to the best of our ability and share that information with you and all MRC charter members.

In addition, the MRC, as always, is available to work with you on any questions you may have regarding your waste disposal needs. On a personal level, I would like to say it has been an honor to represent your MSW interests for the past 22 years. Please do not hesitate to contact the MRC by phone at 664-1700 or by e-mail at [glounder@mrcmaine.org](mailto:glounder@mrcmaine.org) if you would like to discuss this letter or any questions related to this transition time.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Greg Lounder', with a long horizontal flourish extending to the right.

Greg Lounder  
MRC Executive Director

Enclosure