

STATE OF MAINE
CUMBERLAND, SS.

BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-AP-16-15

PENOBSCOT ENERGY RECOVERY)
COMPANY, LP,)
USA ENERGY GROUP, LLC, and)
EXETER AGRI-ENERGY, LLC,)
)
Petitioners,)
)
v.)
)
MAINE DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
MUNICIPAL REVIEW)
COMMITTEE, INC., and)
FIBERIGHT, LLC,)
)
Respondents.)
)

**ORDER ON PETITIONERS’ MOTION
TO TAKE ADDITIONAL EVIDENCE**

Petitioners Penobscot Energy Recovery Company, LP, USA Energy Group, LLC, and Exeter Agri-Energy, LLC (collectively “Petitioners”) filed a motion to have that this appeal of final agency action be remanded to the Maine Department of Environmental Protection (“DEP”) for the taking of additional evidence before the agency. Based on the following, Petitioners’ motion is denied.

I. BACKGROUND

Respondents Fiberight, LLC (“Fiberight”) and Municipal Review Committee, Inc. (“MRC”) filed an application with DEP in June 2015 for an Air Emission License for a proposed municipal solid waste processing facility located in Hampden, Maine. (R. A-2 at 1.) The application concerned two boilers at the facility. (R. A-1 at 1.) The primary fuel for the boilers are post-hydrolysis solids produced by Fiberight (“PHS”). (*Id.*) Fiberight has self-certified, pursuant to federal regulation 40 CFR Part 241.3, that PHS are a non-hazardous secondary

material and not considered “waste” under federal regulation. (R. A-1 at 16.) Because Fiberight chose to “self-certify” pursuant to 40 CFR Part 241.3, no determination from the federal Environmental Protection Agency (“EPA”) was required. (*Id.*) However, in 2013, Fiberight submitted its self-certification to EPA and asked for determination whether PHS were “non-waste” under federal regulations. (*Id.*) At the time Fiberight and MRC applied for their license from DEP, no determination had been made by the EPA. (*Id.*) Fiberight and MRC requested that DEP process their application for an Air Emissions License based on their self-certification that PHS were “non-waste.” (*Id.*) DEP issued an Air Emissions License to Fiberight and MRC on July 14, 2016. (*Id.* at 46.)

Petitioners filed their petition for review of a final agency action pursuant to § 11002 of the Maine Administrative Procedures Act (the “APA”) and Maine Rule of Civil Procedure 80C on August 12, 2016. This appeal was transferred to the Business and Consumer Docket on October 14, 2016. DEP filed the administrative record with the court on October 19, 2016.¹ Petitioners filed their motion for taking of additional evidence on October 31, 2016. Petitioners request that this appeal be remanded to DEP for the taking of additional evidence regarding the EPA’s determination of whether PHS constitute “waste” or “non-waste” under federal regulation. (Pets. Mot. Add’l Evid. 2.) Respondents DEP, Fiberight, and MRC each filed an opposition to the motion on November 21, 2016. Petitioners filed their reply November 28, 2016, and oral argument on the motion was conducted telephonically on January 4, 2017.

II. STANDARD OF REVIEW

Pursuant to Maine Rule of Civil Procedure Rule 80C(e) and § 11006(1) of the APA, a party seeking judicial review of a final agency action may file a motion requesting that the court

¹ DEP also filed a supplemental record on December 1, 2016.

order the taking of additional evidence before the agency. M.R. Civ. P. 80C(e); 5 M.R.S. § 11006(1)(B). The motion shall be supported by a “detailed statement, in the nature of an offer of proof, of the evidence intended to be taken.” M.R. Civ. P. 80C(e). The moving party’s detailed statement must be sufficient to permit the court to determine whether the taking of additional evidence is appropriate. *Id.*

Section 11006(1)(B) of the APA provides that the court may order the taking of additional evidence by the agency if: (1) the court finds that that the additional evidence is necessary to deciding the petition for review; or (2) if the moving party demonstrates (a) that the additional evidence is material to the issues presented in the review; and (b) the additional evidence could not have been presented or was erroneously disallowed in the proceedings before the agency. 5 M.R.S. § 11006(1)(B). After the taking of additional evidence, the agency may modify its findings and decisions. *Id.* The agency shall file the additional evidence and any new findings or decisions with the court, which shall become part of the record for review. *Id.*

III. ANALYSIS

Foremost, Petitioners have failed to file a detailed offer of proof regarding the additional evidence intended to be taken as required by Rule 80C(e). Thus, the court lacks the requisite offer of proof to make a determination regarding the taking of additional evidence. Because Petitioners have failed to satisfy the procedural requirements of Rule 80C(e), Petitioners are not entitled to a remand for the taking of additional evidence pursuant to § 11006(1)(B) of the APA and Rule 80C(e).

Even if Petitioners had provided the requisite offer of proof, Petitioners would still not be entitled to a remand for the taking of additional evidence because Petitioners concede that the additional evidence to be taken does not yet exist. In their initial motion, Petitioners assert that

there is “likely” additional information concerning the status of the EPA’s determination regarding the PHS, not available before, that is material to their appeal. (Pets. Mot. Add’l Evid. 2-6.) However, in their reply brief, Petitioners concede that as of November 18, 2016, no determination had been made by the EPA. (Pets. Reply to Resp’t Opp’n 3-4.) During oral argument on January 4, 2017, it was further stated that there has still been no determination by the EPA and that there is no timeline for a determination. Nevertheless, Petitioners assert that this appeal should be remanded to DEP for the taking of additional evidence as soon as the EPA makes a determination. (*Id.*)

Section 11006(1)(B) does not permit the court to issue an open-ended remand to an agency for the taking of hypothetical evidence if and when such evidence becomes available. The court may order the taking of additional evidence only if court finds that the additional evidence is necessary to deciding the petition for review or the moving party demonstrates that the evidence is material and could not have been presented previously or was erroneously disallowed. 5 M.R.S. § 11006(1)(B). When acting in an appellate capacity pursuant to Rule 80C and the APA, the court reviews the agency’s decision for abuse of discretion, error of law, or findings not supported by the evidence. *Guar. Tr. Life Ins. Co. v. Superintendent of Ins.*, 2013 ME 102, ¶ 16, 82 A.3d 121; 5 M.R.S. § 11007(4)(C).

Because the additional evidence did not exist at the time DEP issued the Air Emission License, and still does not exist, the additional evidence is neither necessary nor material to the court’s determination of whether DEP committed an abuse of discretion or error of law in reaching its decision or whether its findings are not supported by the evidence when the decision was made. *See FPL Energy Maine Hydro, LLC v. State*, 2009 Me. Super. LEXIS 53, at *10-11 (Feb. 9, 2009) (“using evidence that did not exist at the time the [agency] made its decision to

fairly review the [agency's] decision runs completely counter to the purpose of Rule 80C review. ... Such post-decisional evidence would, accordingly, appear to be immaterial to the issues presented on review..."). Furthermore, because the additional evidence did not exist at the time DEP issued the Air Emission License, it could not have been erroneously disallowed during the proceeding before the agency. Therefore, even if Petitioners had provided the requisite offer of proof, Petitioners would not be entitled to a remand for the taking of additional evidence.

IV. CONCLUSION

Based the foregoing, Petitioners Penobscot Energy Recovery Company, LP, USA Energy Group, LLC, and Exeter Agri-Energy, LLC's motion for the taking of additional evidence by the agency is **DENIED**.

Pursuant to Maine Rule Civil Procedure 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated 1/6/17

s// _____
M. Michaela Murphy
Justice, Business and Consumer Court