Exhibit 5

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VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

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Re: Public Health Council Recommendation on Palmer Renewable Energy, LLC.

Dear Attorney Moore:

On June 15, 2016, the Public Health Council (PHC) voted 6 to 2 to recommend that Helen Caulton-Harris initiate site assignment proceedings under G.L. c. 111, § 143 for Palmer Renewable Energy, LLC's (PRE) proposed biomass project on Page Boulevard in Springfield, in her role as the Springfield Board of Health. For all of the reasons spelled out in PRE's prior correspondence and submittals to the PHC and for the reasons articulated below related to the stated justification for the PHC's vote, PRE strongly encourages her not to institute such proceedings. We ask that you share this letter with Director Caulton-Harris and intend that it be part of the official record of Board of Health proceedings.

We note that from the outset Director Caulton-Harris recused herself from the PHC proceedings and did not participate in the deliberations or the final vote. She served solely to facilitate the Public Hearing in her role as Director. Thus, none of the sentiments in this letter regarding the PHC's actions or failure to act are directed at her. We are confident that as the duly constituted Board of Health, with the Law Department's able advice, Director Caulton-Harris will discharge her duties in a lawful and responsible fashion.

As acknowledged repeatedly during the public hearing process, under governing law the PHC's recommendation is strictly advisory and the ultimate decision lies with Director Caulton-Harris, acting as the City's Board of Health. She is not bound to follow the PHC's recommendation. However, to the extent their vote informs her thinking, it is critical to pay attention to what the PHC did not find after its extended public hearing. Specifically, the PHC did not make a finding that PRE will constitute a nuisance or an injurious trade or employment within the meaning of G.L. c. 111, § 143. Holding further public hearings on the same question would be duplicative and futile.

The relevant legal standard requires that her decision be based upon substantial evidence in the record, not be arbitrary or capricious and not be inconsistent with the law. For the reasons outlined by PRE in prior correspondence, we believe that a decision imposing a site assignment requirement would run afoul of all of these legal standards, particularly now in light of the very serious procedural and substantive failures of the PHC and the lack of a finding by the PHC.

As demonstrated below, virtually all of the reasons advanced for recommending a site assignment during the PHC deliberation session were patently incorrect or misinformed. In virtually every case, definitive statements were directly contrary to the evidence before the PHC. For example, as described below, the claim that emissions from truck traffic were not evaluated is plainly wrong. A simple reading of Mr. Raczynski's two Statements to the PHC would have made this clear. Likewise, the claim that greenhouse gases were not evaluated is also plainly wrong, as shown by the extensive discussion of that issue in the two MassDEP decisions from the adjudicatory hearing.

To the contrary, statements made by the voting members of the PHC appeared to simply echo the incredibly sparse, vague and non-site specific materials submitted by the project opponents. (A critique of the opponent's materials is in my letter to the PHC dated February 3, 2016.) The project opponents did not submit any evaluation of the air quality, traffic, noise, odor or any other site specific impacts. Their submittals were comprised of cut and pasted materials from generally available policy statements or letters, none of which addressed in any detailed or specific manner the scientific and technical issues at hand. Nevertheless, their "fears" and "concerns" were given loud voice, so loud as to drown out any factual truths advanced by PRE. There is simply no evidence supporting the PHC's recommendation, let alone "substantial evidence."

Finally, with regard to the apparently cavalier approach taken by the voting members of the PHC, in not a single case did a single member of the PHC discuss, reference, evaluate or compare any of PRE's extensive, scientific and fact-based submittals. Instead they parroted the speculative and unsubstantiated claims of project opponents. To call the June 16 meeting a "deliberation session" is a stretch. Rather than soberly and independently review the evidence the PHC simply rubber stamped the opponent's specious assertions, without any thoughtful evaluation or reference to the evidence presented. To follow the recommendations of such an obviously flawed process would itself be outrageous.

The balance of this letter addresses the reasons articulated by PHC members at the deliberation session. At the outset, it is critical to note that Ms. Clancy abstained from voting. Before that, she repeatedly questioned the legality of voting based upon "unanswered questions" as opposed to actual findings. Her sentiments are consistent with the governing law.

Ms. Clancy's questions and "abstention" vote were appropriate. Claiming lack of information to make a finding is not the same as finding that there is a threat to the health of the residents. Despite a five month public hearing process, the PHC made no such finding.

Wood Waste of Boston v. Board of Health of Everett, 52 Mass. App. Ct. 330 (2001), dealt with a very similar situation, where a board of health denied a site assignment, because it claimed it lacked the requisite information to make a finding. Both the Superior Court and the Massachusetts Appeals Court rejected the board's ruling. The Appeals Court noted in particular that "[t]here is no indication in the record that the board questioned the completeness of the application, or made any requests to Wood Waste for further data or information prior to its decision." *Id.* at 335. The Appeals Court also "noted the board has made no claim that it was not provided with an adequate opportunity for review, or that the statutory and regulatory procedures were inadequate, or that it was unable to marshal appropriate resources properly to review Wood Waste's application." *Id.* at 337.

Here, the PHC commenced the public hearing on January 20, 2016. PRE submitted extensive materials addressing all of the potential public health issues and provided extensive supplemental materials on February 3, 2016. The PHC held the public hearing record open for over five months, until May 19, 2016. During that five month period all of PRE's submittals were available for review on the City's website yet no rebuttal or supplemental information was submitted by any project opponent to the PHC during that time frame. PRE attended every meeting of the PHC in the intervening months. At no time during that five month public hearing process did the PHC request any additional information from PRE.

The Motion that was passed by the PHC was ostensibly based solely upon lack of information. This defies common sense. It is also legally untenable under the *Wood Waste* case, because the PHC never asked PRE for any further information. Despite the fact that PRE did not have the burden of coming forward with any evidence, PRE made its air quality expert (Dale Raczynski, P.E. of Epsilon Associates) and public health expert (Dr. Peter Valberg of Gradient) available for PHC questioning at the PHC hearing, filed rebuttals to the information proffered by project opponents, and was at every PHC meeting over five months to answer PHC questions. In the face of the overwhelming evidence presented by PRE and available to the PHC, any claim of unanswered questions is factually untrue.

Acting on the PHC's recommendation would also run afoul of *BFI v. Board of Health of Fall River,* 64 Mass. App. Ct. 1103 (2005), *review denied* 445 Mass. 1105. In that case, the Superior Court reversed the Fall River board of health's revocation of the site assignment for the BFI landfill because the board of health unlawfully placed the burden of proof on BFI. The court also found that the board's concerns that the landfill might cause contamination of the City's water supply were unsubstantiated. The same has occurred here, the PHC has essentially put the burden of proof on PRE to prove a negative and has recommended a site assignment based upon mere concerns or questions not actual evidence or proof of a problem that needs rectification. This is simply an insufficient foundation for Director Caulton-Harris to take site assignment action against PRE. She is legally obliged to hew to the relevant statutory standard which in this instance is not met.

While the public hearing remained open, whether lawful or not, representatives of the PHC met with the MassDEP to gain further information about the project. According to the statements

at the PHC's deliberation session, the MassDEP stated that it had issued a very tight permit and that the plant is as good as it can be. The MassDEP also reportedly stated that the emissions from the stack would not change measurable pollution and that PRE's project is a very advanced model. It was clear from these statements that the emissions from the project itself passed PHC muster. None of the PHC members disagreed with this observation and no evidence was presented to the contrary.

Concerns over environmental justice were raised during deliberations, but they do not provide any basis for finding that the facility will be engaged in a noisome trade or justify directing PRE to pursue a site assignment. PRE complied with the requirements of the state's Environmental Justice Policy during the permitting process for the air permit from MassDEP. Furthermore, standing alone, or taken in combination with the other concerns raised, the mere presence of an environmental justice community does not render the project either a nuisance or a threat to public health. Also, sentiment was expressed that the board of health require a rigorous health impact assessment." As PRE documented in the public hearing process, it has already prepared a Health Risk Assessment that rigorously assessed all of the public health impacts of the project and concluded that the project met all health risk based standards by a wide margin. There has been no demonstration of how a health impact assessment would advance the City's understanding of the health impacts of the PRE project within the confines of its statutory authority under G.L. c. 111, § 143, that go beyond the analysis already performed and accepted at multiple levels of government. Merely wishing that such an assessment could be performed is a far cry from finding that the project requires a c. 111, § 143 site assignment because of deleterious health impacts. Moreover, there is absolutely no legal foundation for requiring such as assessment.

It was claimed during deliberations that the environmental reviews did not reflect emissions from truck traffic. Nothing could be further from the truth. As specifically described in Section 40 of the Statement of Dale T. Raczynski, P.E. and Section 12 of his Supplemental Statement filed with the PHC, Epsilon estimated the emissions from the truck traffic using the maximum daily traffic to the facility, combined it with projected emissions from the project site, including any fugitive emissions from the wood fuel handling and storage, added the combined projected emissions to worst case background air pollution and modeled the resultant ambient air quality impacts from all these emissions including trucks. As specifically described in Sections 6 through 8 of his Statement to the PHC, Dr. Valberg compared these worst case impacts in his Health Risk Assessment to health based standards and found that none of the levels pose any danger to public health or otherwise. Nobody from the PHC asked any truck traffic impact questions of either of these two experts during their oral presentation or thereafter that would indicate dissatisfaction with the amount of information available on this point. The opponents presented no contrary evidence. Any residual concern is based upon pure speculation.

PRE has all along carefully evaluated the impact on asthma. As Sections 5-10 of Dr. Valberg's statement demonstrate, he assessed the impact of emissions from PRE on each of the several schools in the area of the project to ensure that they would not cause respiratory irritation. In addition to evaluating the public health impact of criteria air pollutants and assessing the

chronic inhalation of non-cancer and cancer health risks from air toxics, Dr. Valberg performed an acute exposure evaluation for respiratory irritants. This included air emissions from the PRE facility stack as well as associated vehicle exhaust and fugitive dust emission sources. He concluded that the project's air emissions will not lead to adverse effects on the health of nearby residents, school children or sensitive populations. He also performed a detailed analysis of the baseline community health status of Springfield and nearby communities that included summaries of the rates of cancer, asthma and cardiovascular disease, plus data on blood-lead levels. He took into account the specific local incidence in these health outcomes and the specific levels of expected impacts from PRE in concluding that "the health risk assessment refutes any speculation that operation of PRE will affect community baseline health conditions." Dr. Valberg revisited these analyses, local health statistics and air quality monitoring data for purposes of the PHC hearing. He concluded that the changes do not have a significant impact on the HRA results and conclusions, as maximum ground level concentrations from PRE emissions remain below levels of regulatory and health-effect concern. Dr. Valberg noted that the very significant improvement in Springfield's ambient air quality will result in better overall air quality as compared to the NAAQS now than when the project was permitted. Data presented by Dr. Valberg also demonstrate that there is not likely a link between asthma rates in Springfield and ambient air quality. Absolutely no evidence to the contrary has been presented to the PHC. Thus, based upon the substantial evidence test, there is no foundation for finding that PRE triggers the requirement for a noisome trade site assignment because of air quality concerns.

At the deliberations it was also asserted that the trucking industry is engaged in widespread violation of EPA's diesel engine standards by disabling emissions control systems, analogizing from the Volkswagen situation and based upon a member's "search of the internet." No such information is in the record with regard to this assertion. Regardless, although PRE very thoughtfully agreed to very significant diesel retrofits as part of its extensive mitigation package, Mr. Raczynski's estimate of truck emissions was not based upon any such retrofit. Mr. Raczynski used emissions factors for truck traffic that do not account for any enhanced retrofits, in order to present the worst case scenario. Mr. Raczynski "assum[ed] the worst case mix of heavy duty diesel vehicles . . . that would have been based on a worst case of uncontrolled diesel engines. . . ." Supplemental Statement at Section 12.

Moreover, truck traffic is simply NOT a "trade or employment" within the meaning of G.L. c. 111, § 143. The statute clearly speaks to a "trade or employment" established "in such a location." It specifically references "assigning certain places for the exercise of any trade or employment." Truck traffic is simply not amenable to such regulation. And if it is, there are many much larger sources of diesel truck emissions and truck traffic throughout the City of Springfield, including the school buses specifically referenced at the deliberation session, that contribute much more air pollution than the PRE project traffic would ever generate. There was absolutely no evidence before the PHC that truck traffic attributable to PRE is different from or will be more harmful than any other truck or bus traffic in the City. Indeed, the only evidence that does exist is precisely to the contrary, that PRE fully evaluated the potential health impacts from truck traffic and despite a finding of no harm, agreed to extensive, costly and voluntary mitigation that the City has never required of any other business.

Greenhouse gases that PRE will emit and the specter of climate change were also raised in deliberations. It was falsely or mistakenly claimed that PRE did not evaluate the greenhouse gas impacts of the project including the truck traffic. Again, this is plainly wrong and directly contrary to the evidence. At the request of and following the direct instructions of the Executive Office of Environmental Affairs (EOEEA), the MassDEP and the Department of Energy Resources, PRE performed a greenhouse gas evaluation in compliance with the EOEEA's Greenhouse Gas Policy. That analysis included PRE's plant emissions and emissions attributable to truck traffic. The adequacy of PRE's analysis and the MassDEP's review of the analysis were fully litigated in the Adjudicatory Hearing in which project opponents Bewsee et. al. were parties and are legally bound. The Commissioner of the MassDEP found that PRE and the MassDEP complied with all legal requirements respecting greenhouse gases and climate change impacts. According to the MassDEP Presiding Officer's Recommended Final Decision After Remand filed with the PHC, "PRE performed a GHG analysis when it submitted its Notice of Project Change during the MEPA process that ultimately led to a number of provisions being incorporated into the Permit to increase efficiency and reduce GHG emissions." According to that Recommended Decision the MassDEP "did analyze and incorporate measures to reduce GHG emissions." The Commissioner's Final Decision fully endorsed these findings. *See* Final Decision at n. 2.

Moreover, there is no merit to assertions that PRE's biogenic carbon emissions will contribute to climate change. PRE will not be using the types of forest harvested wood that were the subject of the Manomet study and concerns about GHG impacts from other forms of biomass. The Manomet study (Page 110) (and various other expressions by the USEPA and the European Union) have expressly acknowledged much lower or neutral GHG impacts from the types of wood PRE will use. PRE's opponents presented absolutely no evidence to the contrary to the PHC nor is there any such information in the record before the PHC.

Finally, regardless of the adequacy of past reviews for greenhouse gas impacts, climate change concerns do not fall within the public health and nuisance ambit of G.L. c. 111, § 143. The Global Warming Solutions Act cited at the deliberation session applies to state government agencies, not local boards of health. Moreover, greenhouse gas emissions are believed to contribute to climate change cumulatively on a global scale, and do not have direct local impacts. Whether PRE is built in Springfield or elsewhere, the climate change impact, which PRE asserts will be neutral or positive, will be the same. Moreover, there is nothing unique or unusual about PRE's location in Springfield, the local population or the nature of its operations that makes it any more or less "harmful" than any other similar source of carbon dioxide emissions in the City, the Commonwealth, the United States, or the world for that matter.

Several other equally misdirected ancillary reasons were cited for recommending a site assignment. For example, although it was conceded that in 2009 the PRE facility was "not a bad response" to the Commonwealth's renewable energy goals, it was asserted that the Commonwealth is no longer favoring biomass as a renewable energy source but shifting towards solar and wind as preferred sources. Whether or not PRE is entitled to treatment as a renewable energy resource is

strictly a matter of state energy policy and has no bearing on whether it should be considered a nuisance or a public health threat to the residents of Springfield.

An assertion was made that since 2009 studies have shown a link between pollution and health impacts at levels below the regulatory standards. Dr. Valberg testified directly at the public hearing that there are no such studies showing significant health impacts at the levels to be expected from PRE. The project opponents have come forward with no study showing such impacts and none has been cited by the PHC. Indeed, PRE provided the PHC with direct evidence to the contrary, including evidence of the much improved air quality in the Springfield area and the very low ambient impacts from PRE's emissions compared to health based standards. As is fully documented in the MassDEP Comprehensive Plan Approval and the Final Decision in the Adjudicatory Proceeding provided to the PHC by PRE, in 2012 the EPA issued new National Ambient Air Quality Standards for particulate matter exposures on an annual average basis, that reflect the latest health science after a five year review process. During its permitting process, PRE used an even more stringent standard than the one finally adopted by the US EPA to demonstrate no ill health effect. Despite allusions to the contrary at the deliberation session, neither the MassDEP nor the federal air pollution control regulations regarding the public health impact of permitting of a facility such as PRE have changed from those reviewed in PRE's permitting process. PRE meets the most stringent of all current health based standards. Indeed the emissions from the PRE facility are so low and well controlled as to officially be considered "deminimis" under applicable regulations.

It was conceded at the deliberation session that the concerns regarding fuel storage expressed by the project opponent from Plainfield, Connecticut were addressed by Mr. Raczynski's evidence that the Plainfield facility fuel is very different construction and demolition debris wood as opposed to PRE's green wood chips and that the Plainfield wood fuel storage area is not enclosed or controlled as the PRE greenwood chip storage will be. Thus, concerns cited regarding unanswered questions about "debris and smells" have no foundation in the record before the PHC and were directly addressed by PRE's wood fuel storage design and operational plan. Moreover, as amply demonstrated by Mr. Raczynski's Supplemental Statement, fugitive impacts from the wood storage and handling were fully evaluated and mitigated by the use of an enclosed wood storage area and other preventative measures not employed in Plainfield. Any assertion to the contrary is sheer speculation.

Finally, it bears repetition that in its May 16, 2011 letter, the MassDEP informed the City that "with respect to the substance of the 'noisome' or nuisance conditions that you have raised in your letter, please note that the MassDEP draft Non-Major Comprehensive Plan Approval (Plan Approval) contains conditions that address these types of 'noisome' or nuisance conditions, including odor, noise and fugitive emissions." Thus, since it was conceded by the PHC that the so-called "fixed emissions" were adequately regulated, and because the MassDEP permit already addresses the so-called 'noisome' or nuisance conditions, there is nothing to justify a Section 143 site assignment.

MACKIE SHEA PC

For the foregoing reasons, PRE respectfully requests that Director Caulton-Harris decline to initiate site assignment proceedings under G.L. c. 111, § 143 and communicate that determination to PRE as soon as possible to put an end to the uncertainty and delay these lengthy proceedings have caused.

Very truly yours,

Thomas A. Mackie

enclosures

WOOD WASTE OF BOSTON, INC. *vs.* BOARD OF HEALTH OF EVERETT.

No. 99-P-1042.

Middlesex. February 12, 2001. - August 24, 2001.

Present: JACOBS, KAPLAN, & DUFFLY, JJ.

Solid Waste Management. Municipal Corporations, Board of health. *Department of Environmental Protection.*

A Superior Court judge did not err by reversing a decision by a city's board of health denying the plaintiff's application for a determination of site suitability under G. L. c. 111, § 150A, in order to construct buildings on its current site so as to enclose its operations, and by ordering the board to issue the site assignment requested by the plaintiff, where the board made no claim that it was not provided with an adequate opportunity for review, or that the statutory and regulatory procedures were inadequate, or that it was unable to marshal appropriate resources to review the plaintiff's application. [332-338]

CIVIL ACTION commenced in the Superior Court Department on May 3, 1996.

The case was heard by *Martha B. Sosman,* J., on a motion for judgment on the pleadings.

John W. Giorgio & Christopher J. Pollart, for the defendant, submitted a brief.

JACOBS, J. The board of health of Everett (board) appeals from a Superior Court judgment ordering it to issue a site assignment requested by Wood Waste of Boston, Inc. (Wood Waste), under G. L. c. 111, § 150A. We affirm.

Background. In 1993, Wood Waste, which owns and operates a facility on a site in Everett for processing of construction and demolition waste materials, applied to the board and the Department of Environmental Protection (DEP) for a determination of site suitability under G. L. c. 111, § 150A.[1] Wood Waste's operations were at that time conducted outdoors and involved separation of the construction and demolition materials and transportation to other sites for disposal. No materials are disposed of on the Everett site. The record indicates that Wood Waste proposed to construct buildings on the site so as to enclose its operations, including temporary storage of materials, and, as noted by the judge, did not plan to expand either the types or volume of wastes handled at the facility. Simultaneously with its application, Wood Waste negotiated with DEP for an administrative consent order, which was issued in 1995, and under which Wood Waste has been allowed to continue its operations pending issuance or denial of site assignment and required permits. Prior to issuing that order, DEP reported that Wood Waste's application met the statutory and regulatory site suitability criteria under § 150A½.[2] After receiving the DEP report, the board held a public hearing. At the conclusion of its review, the board, in April, 1996, denied the application. Wood Waste appealed the board's decision to the Superior Court under G. L. c. 30A, § 14. A Superior Court judge, acting on the parties' cross motions for judgment on the pleadings, allowed that of Wood Waste, essentially concluding that the board had failed to apply the statutory standard of review, and had improperly denied Wood Waste's application.

Site assignment procedure. General Laws c. 111, § 150A, as

[1]"In response to a shortage of solid waste facilities in the Commonwealth in the mid-1980's, the Legislature amended [§ 150A]." *TBI, Inc.* v. *Board of Health of N. Andover,* 431 Mass. 9, 11 (2000). See St. 1987, c. 584, § 16. The amendment significantly changed the process for assignment of sites for solid waste facilities. The sole approval authority previously vested in local boards was replaced with a two-step process in which the Department of Environmental Protection and the local board independently must find that the proposed siting meets specific criteria designed to protect the public and the environment. Those criteria are set forth in § 150A½. Although various amendments have been made in §§ 150A and 150A½, and the regulations thereunder, since the time of Wood Waste's application, no claim is made, nor do we discern, that those changes are of significance to this decision.

[2]General Laws c. 111, § 150A½, authorizes the DEP, in cooperation with the Department of Public Health, to promulgate rules and regulations to establish site suitability standards and criteria for siting of facilities, setting forth seventeen areas of potential impact on public health, safety, and the environment which must be considered by the DEP and a local board in a siting decision.

more information in order to make a determination of site suitability, "is not a 'finding' . . . and is thus not a basis on which an application may be denied."

The board also made either implicit or express findings of danger with respect to the criteria on air quality, size of the site, and traffic impacts. After a detailed review of the record, the judge correctly concluded the board's findings of danger[8] to public health, safety, or the environment were either not supported in the record or were based upon factors to be considered in a later design and operations review procedure.[9]

The board may not reasonably claim that sufficient information was not available to it during the application process. It

expansion thereof, as may be necessary to ensure that the facility or expansion thereof will not present a threat to the public health, safety or the environment." 310 Code Mass. Regs. § 16.20(12) (1992).

[8]Danger is not defined in the statute or regulations. In any event, nothing in the present case turns on the meaning of that term.

[9]As to air quality and traffic impact, the judge determined, see note 5, *supra*, that the record did not support the board's findings of danger. The board partially based those findings on details of design and operation. The judge noted that the board failed to afford Wood Waste the presumption pursuant to 310 Code Mass. Regs. § 16.40(1)(c)(1) (1992) (a board "shall . . . evaluate[] [an application] with the presumption that the proposed facility shall be designed and constructed to meet all relevant state and federal statutory, regulatory and policy requirements"). She correctly noted that such details are "not to be part of the site assignment consideration unless DEP (not the Board on its own) decides that such details are necessary at [this] stage," and that the DEP had not requested such details for Wood Waste's application. She nevertheless analyzed the record and implicitly determined that the board had not introduced evidence tending to rebut the presumption by showing that Wood Waste would later be unable to meet the applicable requirements.

As to issues concerning the size of the site, the judge correctly noted that "[t]here was no evidence that the current operation, which would be upgraded and enclosed but operating at the same volume under the new plan, had encountered size problems . . . and certainly no evidence that the size contraints would result in a danger to public health or safety." The board also purported to find a danger from the trucks awaiting entry to the site. As indicated by the judge, this finding is not supported by substantial evidence. Any other site size issues were properly treated by the judge as operational details to be addressed at a later stage of the statutory process.

While the board found that Wood Waste's site plan did not bear a stamp indicating it was prepared by a registered surveyor as required by regulation, the board does not rely on this ground in its brief. In any event, this alleged failing, while a proper basis for a request for resubmission of a conforming plan, is not sufficient as a ground for the board's rejection of the site application.

was presented with a substantial record prior to the deadline for its decision,[10] and had an opportunity to comment on its completeness and substance.[11] It selected and engaged an expert to review the application and report its analysis and conclusions to the board.[12] If the board believed the evidence before it at the hearing to be lacking, it could have requested that the hearing officer ask Wood Waste to provide further evidence.[13] See *TBI, Inc.* v. *Board of Health of N. Andover*, 431 Mass. 9, 13-14 (2000). An environmental impact review record, established in conformity with the Massachusetts Environmental Policy Act (MEPA), was available to the board.[14] Finally, the board received the report of the DEP which determined the application met the site suitability criteria. There is no indication in the record that the board questioned the completeness of the application, or made any requests to Wood Waste for further data or information prior to its decision.[15]

[10]An applicant is required to use forms provided by the DEP and to provide "sufficient data and other relevant information to allow the Department and the board of health to determine, independent of additional information, whether the site is suitable." 310 Code Mass. Regs. § 16.08(5)(a) (1992).

[11]It is open to a local board to comment to the DEP on the completeness of an application during a twenty-one day period after its submission. The DEP must issue a written determination of the completeness of an application, notifying the applicant and the local board. See 310 Code Mass. Regs. §§ 16.10(2), (3) (1992).

[12]Section 150A also provides that "[t]he [DEP] shall, upon request by the board of health, provide advice, guidance and technical assistance to said board during its review of a site assignment application. . . . The board of health may charge a reasonable application fee to cover the costs of conducting a hearing and reviewing technical data submitted to the board. The application fee may also include a portion of the reasonable costs of other technical assistance." G. L. c. 111, § 150A, as amended by St. 1987, c. 584, § 16.

[13]Pursuant to 310 Code Mass. Regs. § 16.30(2)(e)(1) (1992), after commencement of the public hearing a board may assess an additional technical fee to enable it to obtain data critical to the determination of site suitability where an applicant has failed to provide the evidence after being requested by the hearing officer.

[14]An applicant must demonstrate compliance with MEPA. 310 Code Mass. Regs. § 16.08(5)(d) (1992). The Secretary of Environmental Affairs issued a certificate indicating that Wood Waste's final environmental impact report complied with the requirements of MEPA. The record before the board contains the final report.

[15]There is no indication that any new information was submitted or

The judge properly evaluated the record before the board as established through the public hearing and certified to her, and correctly stated that the DEP decision was to be given no particular weight.[16] Unlike the DEP, a local board of health does not have the benefit of regulatory language expressly permitting it to deny an application based on a determination that it did not contain sufficient information. The board's request for further information in this case essentially ignores a record that adequately addressed each of the relevant criteria, and as the judge concluded, that record does not support findings of public danger.

While a local board of health is limited in the time in which it must make a decision, it receives an application at the same time as the DEP, and has ample opportunity to marshal the resources to conduct its review and ascertain any areas of concern where it may require further information from an applicant. Where, as in this case, the record, without the additional studies requested post-hearing by the board, is adequate for a determination under § 150A, those requests have no validity.

The present case is unlike *TBI, Inc.* v. *Board of Health of N. Andover*, *supra* at 14,[17] where the denial of the application resulted from an applicant's failure to respond adequately during the local board's hearing to a challenge to its ability to comply with a site suitability criterion. Here the board, rather than seeking additional evidence from Wood Waste or through its own resources during the application process, impermissibly rested its decision on a purported insufficiency of information.[18]

requested at the public hearing. The board received testimony of the board's expert, and representatives of Wood Waste, all of whom were cross-examined, and the testimony of public officials, abutters, and citizens.

[16]The determination of the DEP "is not binding on the local board which must make an independent determination whether the proposed site complies with the criteria [in § 150A1/2]." *TBI, Inc.* v. *Board of Health of N. Andover*, 431 Mass. at 11-12.

[17]That decision was issued on March 10, 2000, and was not called to our attention after the board's brief was docketed in this court on July 22, 1999. The present case was submitted to the panel on February 12, 2001, on the board's brief. No brief has been filed by Wood Waste.

[18]In *TBI, Inc.* v. *Board of Health of N. Andover*, *supra* at 13, the local board

Conclusion. General Laws c. 111, § 150A, requires a board, after review, to issue a site assignment *unless* it makes a finding that the siting would constitute a danger to the public health or safety or the environment. That finding must be supported in the record before it, and where such support is lacking, a reviewing court may, as provided in G. L. c. 30A, § 14(7), as amended by St. 1973, c. 1114, § 3, either remand the case for further proceedings before the board, or "compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced" by an unlawful or erroneous board decision. We agree with the judge that the appropriate remedy in this case is to order the issuance of the site assignment. Compare *Cohen* v. *Board of Registration in Pharmacy*, 350 Mass. 246, 253 (1966). As we have noted, the board has made no claim that it was not provided with an adequate opportunity for review, or that the statutory and regulatory procedures were inadequate, or that it was unable to marshal appropriate resources properly to review Wood Waste's application.

The board erroneously asserts that the judge's order compelling it to issue the site assignment is contrary to the board's regulatory authority to attach reasonable conditions to protect the public from threats of danger from operations at the site. Absent record evidence before the board reasonably supporting specific concerns for the environment or the health or safety of the public, a remand for the imposition of conditions is unwarranted. The judge correctly noted the site assignment in this case is "merely an interim step in a lengthy and detailed administrative process." In the circumstances of a local board's unsupported claim of insufficient information, and of danger to the public, a remand would constitute an unjustified interruption of a carefully designed and comprehensive legislative and regulatory process.

While Wood Waste's operations are controlled by an administrative consent order, they have been conducted outdoors

at the public hearing received evidence that the proposed facility would not be in compliance with air quality standards, and shifted to TBI the burden "to produce evidence that it could comply." Although given an opportunity, TBI failed to "enumerate specific techniques likely to be feasible and effective." *Id.* at 14.

and as the judge observed, "further delay in any upgrading and enclosing the facility does not serve the public interest." She noted that Wood Waste must yet undergo "significant, substantive review of the design, construction and operation of the facility," and that any persons aggrieved will have further opportunities in the course of the administrative process to seek judicial review of the decisions to be made by the DEP with respect to the application for a facility permit. Any ultimate threat of danger to the public from the construction and operation of the facility may further be addressed by appeal to the Superior Court. Moreover, § 150A also provides a board of health with a later, potent means of oversight of the operation of the facility:

> "Upon determination that the operation or maintenance of a facility results in a threat to the public health and safety or the environment, such site assignment decision by a board of health may be rescinded or suspended or may be modified through the imposition or amendment of conditions, at any time after due notice and public hearing satisfying the requirements of section eleven of chapter thirty A by the board of health of the city or town where such facility is located or by the [DEP]."

G. L. c. 111, § 150A, as amended by St. 1987, c. 584, § 16.

Accordingly, we conclude the judge did not err by reversing the board's decision and ordering it to issue the site assignment requested by Wood Waste.

Judgment affirmed.

COMMONWEALTH *vs.* JOHN J. KALHAUSER.

No. 98-P-1318.

Middlesex. May 18, 2001. - August 24, 2001.

Present: GREENBERG, GILLERMAN, & DOERFER, JJ.

Evidence, Impeachment of credibility, Prior conviction, Illustrative exhibit, Cross-examination. *Witness,* Impeachment. *Firearms. Assault by Means of a Dangerous Weapon.*

In a criminal case in which defense counsel, by motion in limine, moved to exclude the defendant's prior conviction for manslaughter to clear the way for the defendant's testimony, and in which defense counsel never objected to the judge's erroneous ruling that the sentence imposed on the defendant's prior conviction could be read along with the conviction for impeachment purposes and never gave the judge an opportunity to cure the error, there was no substantial risk of a miscarriage of justice given the strong forensic and circumstantial evidence pointing overwhelmingly to the defendant's guilt. [342-343, 345-346]

This court concluded that, when a party uses a prior conviction to impeach a witness in a criminal case, that party is limited to establishing the identity of the witness as the person named in the record; if the witness answers in the negative or equivocates on the answer then the questioner can use the facts contained in the record of conviction to establish the identity of the witness as the person named in the record of conviction; however, those facts do not include the details of the conviction. [343-345]

In the circumstances of a trial of a criminal defendant arising out of a shooting of the victim, the judge properly permitted the prosecutor to show the jury a handgun similar to the one witnesses saw the defendant carrying on several occasions prior to the shooting of the victim [346-347]; the defendant was not entitled to required findings of not guilty on four indictments of unlawfully carrying a firearm [347]; the judge correctly handled the question of the insufficiency of the Commonwealth's proof on the charge of assault by means of a knife relating to an earlier incident involving another [347]; there was no merit to the defendant's claim that defense counsel did not effectively shield the jury from adverse publicity about the case by moving for a change of venue or seeking a sequestration order [348]; and defense counsel's cross-examination of prosecution witnesses met the standard of *Commonwealth* v. *Saferian,* 366 Mass. 89 (1974) [348].

INDICTMENTS found and returned in the Superior Court Depart-

amended by St. 1987, c. 584, § 16, provides that an applicant "desiring to maintain or operate a site for a new [solid waste] facility or the expansion of an existing facility" shall submit an application for site assignment to the local board of health and simultaneously provide copies to the DEP, the Commonwealth's Department of Public Health (DPH), and to the board of health of any municipality within one-half mile of the proposed site. Within sixty days the DEP must issue a report stating whether the proposed site meets the criteria established under § 150A½, and the DPH must comment on any potential impact of the site on public health and safety. If the DEP affirms in its report that the siting criteria in § 150A½ have been met, the local board must hold a public hearing within thirty days of receipt of the DEP's report, and render its decision within forty-five days of the initial hearing date.[3] Any person aggrieved may appeal a board's decision under G. L. c. 30A, § 14.[4] An applicant receiving a site assignment must subsequently obtain a permit from the DEP for the construction and operation of the facility after review of detailed operating plans and specifications.

Discussion. The board in this case principally based its denial of the application on the ground that Wood Waste failed to submit adequate information from which the board could evaluate whether certain of the siting criteria were met.[5] It argues the judge erroneously concluded it was without discretion to deny the application on such a ground.

[3]The regulations generally define site assignment as "a determination by a board of health or by the [DEP] . . . that: (a) designates an area of land for one or more solid waste uses subject to conditions with respect to the extent, character and nature of the facility that may be imposed by the assigning agency after a public hearing . . . ." 310 Code Mass. Regs. § 16.02 (1992).

[4]A local board of health is declared by § 150A a state agency for appellate purposes. Among the limitations placed on agency decisions by G. L. c. 30A, § 14(7), are that they must not be in excess of statutory authority or based on error of law, and must be based on substantial evidence.

[5]The board determined that the information accompanying Wood Waste's application was deficient with respect to four site suitability criteria. Incident to holding that the board's request for more information is not a "finding," the judge addressed each of these criteria and correctly found that the record did not support the board's conclusions that further information was required. We summarize the judge's conclusions and note the sections of the regulations at 310 Code Mass. Regs. § 16.40 (1992), applicable to the specific site suitability criteria in issue.

(1) Separation between site surface and groundwater. § 16.40(3)(d)(5). The judge concluded that there was record evidence to show that groundwater was more than four to six feet below the site surface and no evidence to show that the required minimum distance of two feet in separation of groundwater from the site surface was violated or that a two-foot separation could not be maintained throughout the site.

(2) Traffic impacts. § 16.40(4)(b). The judge determined that data from actual operations did not indicate any significant contribution to traffic volume in the site area, nor were any actual safety problems observed or reported; and the record would not support an affirmative finding of danger. The judge also concluded that the board's expert did not opine that a danger existed, only that additional traffic studies were required before he could give an opinion.

(3) Air quality. § 16.40(4)(e). Because the major concern with Wood Waste's operations is dust, and it proposes to enclose its operations in buildings, it submitted information on the equipment and procedures it would use to control dust. The board's expert criticized operating and maintenance procedures, but no evidence was introduced tending to show that the proposed design or operating procedures were so inadequate as to result in an anticipated failure to meet air quality standards. Thus, the record did not support an affirmative finding of a siting problem requiring further information. In any event, the judge noted this issue is one more properly addressed in the later design and operation permit procedures.

(4) Prior use of area for disposal. § 16.40(4)(h). The judge concluded there was no record evidence indicating any prior contamination of the site that might adversely affect operations or that any such existing contamination would be disturbed by operations on the site. Accordingly, no further studies or information were required at this stage.

Section 150A provides that a local board of health "shall assign a place requested by an applicant as a site for a new facility or the expansion of an existing facility unless it makes a finding, based on the . . . siting criteria established by [§ 150A½], that the siting thereof would constitute a danger to the public health or safety or the environment."[6] G. L. c. 111, § 150A, as amended by St. 1987, c. 584, § 16. Other than allowing the imposition of conditions, the statute provides for no other disposition of an application by a board.[7] We, therefore, agree with the judge, who stated that the board's request for

[6]The standard of decision in 310 Code Mass. Regs. § 16.20(10)(k)(2) (1992), tracking § 150A, states: "A board shall determine that a site is suitable for assignment as a site for a new or expanded solid waste facility unless it makes a finding, supported by the record of the hearing, that the siting thereof would constitute a danger to the public health, safety or environment, based on the siting criteria . . . ."

[7]A board may "include in any decision to grant a site assignment such limitations with respect to the extent, character and nature of the facility or

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 03-3524B

NOTIFY

BROWNING - FERRIS INDUSTRIES, INC.

v.

BOARD OF HEALTH OF FALL RIVER

MEMORANDUM OF DECISION AND ORDER OF JUDGMENT ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DEFENDANT'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Pursuant to G.L. c. 30A, § 14, the plaintiff, Browning-Ferris Industries, Inc. (BFI), filed this action, requesting judicial review of a decision from the defendant, Board of Health of Fall River (Board), following a recission of a landfill site assignment between the parties. This matter is before the court on the plaintiff's Motion for Judgment on the Pleadings under Mass. R. Civ. P. 12(c). The defendants filed a Cross-Motion for Judgment on the Pleadings. For the reasons discussed below, BFI's Motion is **ALLOWED**.

FACTUAL BACKGROUND

A landfill has been in operation in the City of Fall River, Massachusetts since the 1965. In 1987, BFI acquired and began operating the landfill. On July 7, 2003, the Department of Environmental Protection issued a final permit to BFI for the construction of "Phase III" of the

landfill.[1] Although the Board had already issued a site assignment for Phase III on September 8, 1982, it decided to review the site assignment.[2] On April 29, 2003, the Board, comprised of Dr. Jose Monteiro (Monteiro); Rick Sahady (Sahady); Roger Salpietro (Salpietro); and James Smith (Smith), served BFI with a notice of a hearing to begin on May 28, 2003. The notice informed BFI that the Board, in determining whether the operation and maintenance of Phase III would result in a threat to the public health and safety or to the environment, would consider: (1) whether bedrock fractures would allow leachate to migrate from Phase III to Watuppa Pond, thereby contaminating the City of Fall River's drinking water source; (2) whether there is a trough in bedrock slope from Phase III to Watuppa Pond which would allow leachate to migrate and thus, contaminate the City of Fall River's drinking water source; and (3) whether leachate escaping from Phase III would further contaminate Mother's Brook.

The hearing lasted six evenings, beginning on May 28, 2003 and concluding on June 16, 2003. The City of Fall River presented 116 exhibits and four witnesses while BFI presented 145 exhibits and six witnesses. On July 7, 2003, the hearing officer issued his findings of fact, conclusions of law, and recommended decision. He found that Phase III of the landfill will not result in a threat to the public health and safety or to the environment and recommended that the Board not rescind, suspend, or modify the site assignment. On July 10, 2003, the Board adopted the City of Fall River's findings of fact as its own and voted to rescind the site assignment. On July 14, 2003, the Board issued a written decision restating and reaffirming its July 10, 2003

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[1] Phase I was closed and capped shortly after BFI acquired the landfill. In 2002, Phase II approached capacity so BFI sought permits for the construction of Phase III.

[2] The Board had asked the City of Fall River's corporation counsel if it had authority to review the decision. It was informed by counsel that it may, pursuant to G.L. c. 111, § 50A, "reverse or rescind its decision if it finds the operation or maintenance of the landfill results in a threat to public health or safety or to the environment or if it finds that the site is unsuitable for a landfill no matter how carefully it may be operated."

vote.

Pursuant to G.L. c. 30A, § 14, BFI brought this action against the Board to set aside its decision. On September 17, 2003, BFI filed a Motion for Judgment on the Pleadings along with the Board's Opposition. The Board also filed a Motion for Judgment on the Pleadings along with BFI's Opposition on the same date.

DISCUSSION

Section 14 of G.L. c. 30A provides for judicial review of agency decisions when no other statutory form of judicial review or appeal exists. Any person or authority aggrieved by a decision of any agency in an adjudicatory proceeding is entitled to judicial review of that decision by the Superior Court pursuant to the procedure outlined in G.L. c. 30A, § 14. The review is conducted by the court without a jury and is confined to the record except in cases of alleged irregularities in procedure before the agency. G.L. c. 30A, 14(5).

This court may set aside or modify the decision of the Board only if it determines that the substantial rights of BFI have been prejudiced by the Board's decision because of an error of law, a lack of substantial evidence in support of the decision, or if it is otherwise arbitrary, capricious or an abuse of discretion. G.L. c. 30A, § 14(7)(a)-(g). BFI bears the burden of demonstrating the decision's invalidity. *Coggin v. Massachusetts Parole Board*, 42 Mass. App. Ct. 584, 587 (1997). In reviewing the Board's decision, "the court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G.L. c. 30A, § 14(7). The reviewing court may not substitute its judgment for that of the agency. *Southern Worcester County Regional Vocational Sch. District v. Labor Relations Committee*, 386 Mass. 414, 420-421 (1982), citing *Old Towne Liquor Store,*

Inc. v. Alcoholic Beverages Control Comm'n, 372 Mass. 152, 154 (1977).

In the case at bar, BFI asserts that the Board's decision to rescind the site assignment for development of the final phase of a landfill operated in Fall River by BFI was based on an error law and a lack of substantial evidence, and that this warrants an entry of judgment in its favor awarding it the site assignment. The asserted error of law is that the Board failed to assign the burden of persuasion by a preponderance of the evidence to the City of Fall River.

A. Error of Law

The Board rescinded the site assignment because it concluded that threat of damage and threat to public safety was not conclusively disproved. In doing so, the Board applied the wrong standard. The burden was on the City of Fall River to show the operation and maintenance of the landfill would result in a threat to the public health and safety or to the environment by a preponderance of the evidence. Liacos, et al., *Handbook of Massachusetts Evidence*, 7th ed., sec. 14.2 (1999).

Proof by the preponderance of the evidence "means simply that the party having the burden of proof must show or convince you that the fact he is attempting to prove is more likely than not— that it is more likely than not that the situation and circumstances advanced by that party are so. It is not enough that mathematically chances somewhat favor the proposition to be proved— the proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth derived from the evidence exists ...." William C. Young, John R. Pollets, & Christopher Poreda, Evidence § 102.12 at 60-61 (1998); See *Colter v. Barber-Greene Co.*, 403 Mass. 50, 68 (1988)(finding that a proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable not merely that there was a greater chance).

In reaching its decision, the Board alleges that it applied the existence of a "threat" to the public health and safety or to the environment by a preponderance of the evidence. However, the Board did not apply this burden of proof as demonstrated by statements made by Board members at the July 10, 2003 meeting. At that meeting, Salpiero expressed his concern over the liner possibly leaking. He stated, "[t]here is some mention about that liner possibly leaking over years. It's just too much of a health risk, that I find; however, I'm open – still open to anything that, one way or the other, that would change my vote." Rather than finding that a threat to the public health and safety or to the environment was more likely than not, Salpiero remained undecided that a threat existed based on the weight of the evidence. Monteiro then stated that, "I'm not convinced that we cannot have bedrock fractures, or that that cannot change, how the movement of the earth, we don't know two, three years from now, four years, we can have an event." Relying on speculation about bedrock fractures and the movement of the earth rather than on the weight of the evidence and whether the bedrock fractures were more probable than not is an error of law. Moreover, Monteiro claimed that no one told him that this would not happen.[3] However, the Board was charged with finding whether the site assignment would constitute a danger, rather than finding that BFI had failed to demonstrate the absence of any danger. As noted, the burden lay with the City of Fall River to show a threat, not with BFI.

Monteiro also found that a threat was not "totally ruled out." Yet, the standard of proof was whether a threat to the public health and safety or to the environment was more than likely, not whether the threat was entirely impossible. Monteiro repeatedly made statements of this

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[3] "And if we see anybody telling me that this won't happen, but that we might have a leak that could reverse the direction, and we have talked a lot about several issues about whether the direction of the water flow and all the barriers ... I was not convinced that things might not change in the years from now ...."

nature throughout the meeting, thereby exhibiting that his findings were not based on the preponderance of the evidence but a standard of proof which was much higher. Next to speak was the Chairman of the Board, Sahady, who blatantly applied a higher standard of proof as demonstrated by his statements. Sahady stated that "I seek; and namely, that the landfill will positively not leak, not simply that it is not expected to leak." Moreover, Sahady questioned how the hearing officer came to the conclusion that any leaks would be negligible and of no consequence and inquired, "how can we be absolutely certain of this. Where is the ironclad, irrefutable evidence." The standard of proof was not one of certainty but one of probability. *Colter v. Barber-Greene, Co.*, 403 Mass. 50, 68 (1988). The Board failed to apply this burden of proof when making their decision regarding a threat to the public health and safety or to the environment. Sahady also continued to make statements which demonstrated his failure to apply the preponderance of the evidence but rather applied a higher standard requiring "ironclad assurances" and "absolute certainty."[4]

Although the Board stated it was applying the proper standard of proof, there were too many statements made to the contrary which cannot be ignored. The Board's comments reflect that the burden actually applied was on BFI and was higher than the preponderance of the evidence. Because the Board did not apply the proper burden, its decision rescinding the site assignment is vacated.

B. Substantial Evidence

Review under the substantial evidence standard is a standard of review highly deferential

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[4] Sahady made such statements as "nobody can offer ironclad assurances that the leakage of these dangerous chemicals, even in small doses, would cause no long-term health problems to consumers of our water supply" and "[i]t is painfully obvious that nobody can state with absolute certainty that allowing the Phase III expansion of the landfill will not threaten our water supply in the future."

to the agency which requires "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." *Lisbon v. Contributory Retirement Appeal Board*, 41 Mass. App. Ct. 246, 257 (1996), quoting *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992).

"In order to be supported by substantial evidence, an agency conclusion need not be based upon the 'clear weight' of the evidence or even a preponderance of the evidence, but rather only upon 'reasonable evidence', " *Id.*, citing *Medical Malpractice Joint Underwriting Assn. of Mass. v. Commissioner of Ins.*, 95 Mass 43, 54 (1985), i.e., " 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' after taking into consideration opposing evidence in the record." *Id.*, citing G.L. c. 30A, §§ 1(6), 14(8); *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466 (1981). It is well-settled law that the Board made, in its discretionary exercise of its expertise, a decision between two conflicting views and its determination reflects reasonable evidence, this court may not displace the Board's choice even though it would justifiably made a different decision had the matter been before it de novo. *Southern Worcester County Regional Vocational Sch. Dist v. Labor Relations Comm'n.*, 386 Mass. 414, 420 (1982).

After a lengthy hearing during which 261 exhibits were presented and ten witnesses testified, the hearing officer found that the operation and maintenance of the landfill would not more likely result in a threat to the public health and safety or to the environment. In determining if a threat exists the Board heard evidence that, in contrast to the earlier phases, the proposed landfilling in Phase III is approximately 1600 feet further from North Watuppa Pond. Although BFI expects an average production 10,900 gallons of leachate per day, it plans to capture and remove it daily. The type of leachate expected in Phase III is the same leachate

found in the existing BFI landfills. Moreover, although there exists fractures in the bedrock which lies underneath the site assignment, there is no evidence that it is a preferred pathway for groundwater. Evidence was also presented showing that there is a bedrock trough but because the bedrock is fractured, water does not sit on the bedrock surface but seeps into the fractures rather than moving to the City of Fall River's primary water supply source. No evidence was presented which demonstrates that leachate will escape and reach Mother's Brook in sufficient quantities of contaminants to further pollute the environment. No witness testified to any likelihood that contaminants could arrive at the intake to the filtration plant in concentrations that exceed drinking water standards.

The Board's decision to rescind the site assignment because it would pose a threat to the public health and safety or to the environment was unreasonable in light of the evidence presented. There is no substantial evidence on which the Board could base its finding that leachate from Phase III would escape and/or that it would migrate to Watuppa Pond and/or that concentrations of contaminants would even exceed drinking water standards so as to contaminate the water supply in the City of Fall River. Because the Board's decision is unreasonable and not founded on substantial evidence, its decision to rescind the site assignment is vacated.

ORDER

It is therefore **ORDERED** that the plaintiff's Motion for Judgment on the Pleadings be **ALLOWED** and the defendant's Motion for Judgment on the Pleadings be **DENIED**.

Nancy Staffier
Justice of the Superior Court

Date: January 28, 2003