

COMMONWEALTH OF MASSACHUSETTS  
Energy Facilities Siting Board

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In the Matter of the Petition and Application )  
of Berkshire Power Development, Inc. )  
for a Certificate )  
of Environmental Impact and Public Interest )  
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EFSB 98-6

FINAL DECISION

M. Kathryn Sedor  
Hearing Officer  
September 3, 1999

On the Decision:

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William Febiger  
Jolette Westbrook

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The Energy Facilities Board ("Siting Board") hereby APPROVES subject to conditions the Petition and Application of Berkshire Power Development, Inc. for a Certificate of Environmental Impact and Public Interest, with respect to a fuel oil storage license denied by the Agawam City Council pursuant to G.L. c. 148, § 13.

I. INTRODUCTION

Pursuant to G.L. c. 164, §§ 69K½-69O½, Berkshire Power Development, Inc. ("Berkshire" or "Company") has petitioned the Siting Board for a Certificate of Environmental Impact and Public Interest ("Certificate") with respect to a local license that is required for the storage of fuel oil at the Company's electric generating facility in the Town of Agawam ("Agawam" or "Town"), Massachusetts (Exhs. BPD-12; BPD-13). If issued by the Siting Board, a Certificate would have the effect of granting the local license, notwithstanding the October 5, 1998 denial by the Agawam City Council ("City Council") of Berkshire's application for such a license. G.L. c. 164, § 69K½.

A. Procedural History

Pursuant to G.L. c. 164, § 69J, Berkshire filed with the Siting Board on June 20, 1995 a petition to construct ("Petition to Construct") a new 252 MW gas-fired electric generating facility ("Facility") in the Town of Agawam (Exh. BPD-1A, 1B, 1C (95-1)). On June 16, 1996, the Siting Board issued a Final Decision conditionally approving Berkshire's Petition to Construct. Berkshire Power Development, Inc., 4 DOMSB 221 (June 16, 1996) ("Berkshire Decision"). As approved by the Siting Board in the Berkshire Decision, the Facility will be fueled primarily with natural gas, and also will be capable of burning low-sulfur fuel oil as a backup fuel for up to thirty days per year (Berkshire Decision, 4 DOMSB 221, at 361-364; Exh. BPD-13, at 21-22).<sup>1</sup> The Facility as initially approved

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<sup>1</sup> The Massachusetts Department of Environmental Protection ("DEP") also has approved the use of oil as a backup fuel for operation of the Facility. Berkshire  
(continued...)

included an on-site, aboveground fuel oil storage tank (Berkshire Decision, 4 DOMSB 221, at 342).

On June 27, 1996, Berkshire entered into a Settlement Agreement with the Town of Agawam and the Agawam Zoning Board of Appeals ("ZBA") which incorporated, *inter alia*, the Special Permit issued by the ZBA for the Facility on January 4, 1996 ("ZBA Settlement Agreement")(Exh. HO-RR-9b). The Special Permit contains 47 Conditions, three of which pertain to the Facility's use or storage of fuel oil as proposed by the Company and approved by the Siting Board in the Facility approval proceeding. Thus, upon entering into the ZBA Settlement Agreement, Berkshire agreed to comply with these Conditions. First, Berkshire agreed to make a "good faith" effort "to eliminate the need for [an] on-site oil storage tank, using only natural gas to propel the turbines"(Exh. HO-RR-9b, at 5-6, ¶ 4). Second, "failing to get DEP approval for eliminating [an] oil storage tank", Berkshire agreed that the Facility's tank would be "below forty feet" in height, and that its volume would be "reduced by 50%" (*id.*). Third, Berkshire agreed to limit fuel oil deliveries to those hours specified in the ZBA Settlement Agreement (Exh. HO-RR-9b, at 8, ¶ 25).

On October 21, 1996, Berkshire filed a petition with the Department of Public Utilities ("Department")<sup>2</sup> seeking an exemption for the Facility from the provisions of the Agawam Zoning Code. Berkshire Power Development, Inc., D.P.U. 96-104 (October 22, 1997)("Berkshire Zoning Exemption Decision"), at 1. On October 22, 1997, the Department issued an Order granting Berkshire's petition. Berkshire Zoning Exemption Decision, D.P.U. 96-104, at 46.

On November 25, 1997, Berkshire submitted to the Siting Board a Compliance Filing relative to certain conditions set forth in the Berkshire Decision and to certain project

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<sup>1</sup>(...continued)

Decision, 4 DOMSB 221, at 360-374; Exh. HO-E-26 , att. (Berkshire Power Project PSD/Air Plan Approval Application).

<sup>2</sup> As part of the Electric Restructuring Act, enacted on November 25, 1997, the Department of Public Utilities was renamed, and is now the Department of Telecommunications and Energy. See St. 1997, § 6.



changes. Berkshire Power Development, Inc., EFSB 95-1, Final Decision on Compliance, December 22, 1997)("Berkshire Compliance Decision"), at 1-2. On December 22, 1997, the Siting Board issued a Final Decision finding that Berkshire had satisfied the four conditions set forth in the Berkshire Decision and finding that project changes reported by Berkshire did not require further inquiry by the Siting Board. Berkshire Compliance Decision, EFSB 95-1, at 13. The project changes that Berkshire reported to the Siting Board included the three conditions in the ZBA Settlement Agreement pertaining to the on-site storage of fuel oil at the Facility. Berkshire Compliance Decision, EFSB 95-1, at 10-12. The Siting Board found that the project changes that would result from Berkshire's compliance with these conditions would "not alter in any substantive way" the Board's conclusions in the Facility approval proceeding regarding the safety, viability or environmental impacts of the Company's project. Berkshire Compliance Decision, EFSB 95-1, at 11.<sup>3</sup>

Pursuant to G.L. c. 148, § 13, a license ("Section 13 License") must be obtained from "the local licensing authority" in order to use land for the storage of explosive or inflammable materials. Accordingly, on or about July 29, 1998, Berkshire filed with the City Council an application for a Section 13 License (Exh. BPD-12, at 9). On October 5, 1998, the City Council denied Berkshire's application (id. at 10). Pursuant to G.L. c. 164, § 69K½, on October 23, 1998, Berkshire filed with the Siting Board an Initial Petition for a Certificate ("Initial Petition") with respect to the City Council's denial of the Company's Section 13 License application (Exh. BPD-12).

On November 16, 1998, the Chair of the Siting Board issued a decision on Berkshire's Initial Petition, holding that the Siting Board would defer a decision on the merits of the Petition, and instead would adjudicate concurrently both the merits of the Petition and the merits of the Company's Application for a Certificate ("Application"). Berkshire Power Development, Inc., EFSB 98-6, Procedural Order Re Initial Petition for Certificate of Environmental Impact and Public Interest (November 16, 1998) ("November

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<sup>3</sup> The record in the instant proceeding includes the record in the Facility approval proceeding and the record in the Facility compliance proceeding. G.L. c. 164, § 69O½.

16 Procedural Order") at 3. Pursuant to G.L. c. 164, § 69L½, Berkshire filed its Application on February 11, 1999 (Exh. BPD-13).

Six persons were granted status as intervenors in the proceeding: the City Council; the Concerned Citizens and Businesses of Agawam ("CCBA"); Michael DelNegro ("Mr. DelNegro"); Dean Harrison;<sup>4</sup> Theresa Lecrenski/Five Star Transportation, Inc. ("Lecrenski/Five Star"); and Leo Vergnani ("Mr. Vergnani"). Two persons, Country Estates of Agawam ("Country Estates") and Louis J. Russo ("Mr. Russo"), were granted status as interested persons. Berkshire Power Development, Inc., EFSB 98-6, Procedural Order Re Petitions to Intervene, Designation of Party Representatives, Scope of the Proceeding (March 26, 1999) ("March 26 Procedural Order"), at 7-8.

Adjudicatory hearings were held on April 27, April 28, and May 4, 1999.<sup>5</sup> Berkshire presented the testimony of two witnesses: Kenneth Roberts, Sr., former Chief Operating Officer of Berkshire and a consultant to the Company, who testified regarding storage tank design, construction and safety matters, and general project matters; and Frederick M. Sellars, environmental consultant to the Company, who testified regarding environmental and safety matters. The City Council presented two witnesses: Robert Magovern, a City Councilor, and David Rheault, President of the City Council, each of whom testified regarding the bases for City Council's denial of Berkshire's Section 13 License application. The intervenor Theresa Lecrenski/Five Star presented one witness, Theresa Lecrenski, who testified regarding traffic matters.

The Company, the City Council, the CCBA, Lecrenski/Five Star, Mr. DelNegro and Mr. Vergnani each filed an Initial Brief. The Company and Mr. DelNegro each filed a Reply Brief.

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<sup>4</sup> Mr. Harrison subsequently withdrew as an individual intervenor, and participated in the proceeding as a member of the CCBA. Berkshire Power Development, Inc., EFSB 98-6, Procedural Order Re Status of Intervenor Dean Harrison and Re CCBA Representation (April 16, 1999), at 1.

<sup>5</sup> The hearings in this proceeding were the first conducted by the Siting Board under G.L. c. 164, §§ 69K½- 69O½. Accordingly, this Tentative Decision is the first such Decision issued.

The Hearing Officer entered 197 exhibits into the record, consisting primarily of information request responses and record request responses. The Company entered 13 exhibits into the record. The CCBA entered seven exhibits into the record. The City Council entered eight exhibits into the record. Mr. DelNegro entered one exhibit into the record.

1. Scope of the Proceeding

In the March 26 Procedural Order, the Hearing Officer ruled that the scope of this proceeding, as contrasted to the proceeding in which the Facility as a whole was reviewed by the Siting Board, would be limited to the potential health, environmental and safety impacts of the Company's proposal to store fuel oil at the Facility (March 26 Procedural Order at 9-10). The Hearing Officer also ruled that the scope of the proceeding would be limited to health, environmental and safety issues associated with the storage, as opposed to the combustion, of fuel oil (id.).

Asserting that the scope of the proceeding had been drawn too narrowly in the March 26 Procedural Order, on April 8, 1999, the intervenor Lecrenski/Five Star filed a motion for reconsideration. Berkshire and the City Council each filed a response to the motion.

On the first day of hearings, the Hearing Officer issued an oral ruling stating that she had reconsidered the issue of the appropriate scope of the proceeding (Tr. 1, at 5-6). The Hearing Officer reaffirmed that the scope of the proceeding would be limited as set forth in the March 26 Procedural Order (id.). The Hearing Officer informed the parties that a written ruling on the motion for reconsideration would follow (id.).

A written ruling affirming the scope of the proceeding as it had been set forth in the March 26 Procedural Order was issued on May 25, 1999. Berkshire Power Development, Inc., EFSB 98-6, Procedural Order re Motion for Reconsideration on Scope of Proceeding (May 25, 1999) ("May 25 Procedural Order").

2. Motions to Dismiss

On the first day of hearings, Mr. Vergnani and the City Council each filed a motion to dismiss the Company's Application for lack of jurisdiction, based on the Company's admitted failure to obtain a necessary permit from the State Fire Marshal for construction and use of the proposed oil storage tank.<sup>6</sup> The City Council requested, in the alternative, that the proceeding be stayed until the Company had demonstrated to the Siting Board that it had obtained such a permit. At the hearing, Mr. Vergnani, the City Council and the Company each were permitted to present oral argument relative to the motions to dismiss (Tr. 1, at 18-28). In a ruling issued on July 16, 1999, the Hearing Officer found that the Company's failure to obtain a necessary permit for the project prior to the filing of its Application with the Siting Board did not constitute a basis for dismissal of the Application, and denied the motions to dismiss the Company's Application or, in the alternative, to stay the proceeding. Berkshire Power Development, Inc., EFSB 98-6, Hearing Officer Ruling on Motions to Dismiss (July 16, 1999) ("July 16 Hearing Officer Ruling").<sup>7</sup>

B. Description of the Oil Storage Tank

The Company stated during the proceeding that it has substantially completed the construction of a 500,000 gallon aboveground fuel oil storage tank on the Facility site (Exh. CCBA-17, att.). Specifically, the Company stated that construction of the tank itself had been completed, and that completion of its associated spill containment systems was anticipated by June, 1999 (Exh. CCBA-17).

The Company stated that it intends to store low-sulfur (0.05%) No. 2 distillate fuel oil in the tank (Exh. BPD-11, at 3). The Company indicated that the tank is constructed of welded steel, and is 34 feet high and 53½ feet in diameter (Exh. EFSB 1-4a, att. A). The Company

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<sup>6</sup> The State Fire Marshal permit is discussed in further detail in Sections I.C and III.C.1, below.

<sup>7</sup> The Siting Board received a brief from the City Council, dated May 27, 1999, in support of the Council's motion. Because the Procedural Schedule in this case did not provide for the submission of briefs relative to the motions, the Hearing Officer's Ruling did not rely upon arguments presented in the City Council's brief.

stated that the tank is located on the south side of the Facility's main access road, approximately 200 feet east-southeast of the site entrance and security access point (Exh. EFSB 1-6, att.).

The Company indicated that a concrete diked containment area will surround the tank, and that this containment area will be capable of storing up to 110 percent of the tank's maximum capacity in the event of a tank leak or rupture (Tr. 3, at 570-571).<sup>8</sup> The Company stated that the tank will be equipped with a foam-based fire suppression system (Exhs. EFSB 1-4, att. 1-4c; HO-RR-4; Tr. 1, at 50-53).

### C. Facility Permitting Status

In its Initial Petition, Berkshire stated that, with the exception of a Section 13 License, the Company had "obtained all other necessary approvals and permits" for construction and operation of the Facility (Exhs. BPD-12, at 10; EFSB-2, at 1). In its Application, however, the Company stated that there were three additional permits which had not yet been acquired: an NPDES permit from the U.S. Environmental Protection Agency; a cross-connection permit from the DEP; and an occupancy permit from the Agawam Department of Public Works (Exh. BPD-13, at 28).

On April 23, 1999, Berkshire informed the Siting Board that the Company also did not have, and would need to apply for, a permit issued by the Massachusetts State Fire Marshal's Office pursuant to G. L. c. 148, § 37 ("Section 37 Permit") (Exh. EFSB 2-3). Such permits are required prior to the construction or use of aboveground storage tanks with the capacity to store more than 10,000 gallons of liquids other than water. G.L. c. 148, 37; Exh. EFSB-2. On April 23, 1999, the State Fire Marshal issued an Order of Notice requiring Berkshire to "refrain from filling the tank with any fluid pending further investigation and/or action by State Fire Marshal" (Exh. EFSB-1). At that time, Berkshire had neither applied for nor obtained a Section 37 Permit, but construction of the proposed fuel oil storage tank had already been substantially completed (Exh. CCBA-17). On May 10, 1999, Berkshire filed with the State Fire Marshal's

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<sup>8</sup> The spill containment system for the tank and its associated tanker truck unloading area are discussed further in Sections III.C.1 and III.C.3(a), below. The tank's fire suppression system is discussed in further detail in Section III.C.1 below.

Office an application for a Section 37 Permit (Exh. HO-RR-1S, at 60). If the State Fire Marshal issues a Section 37 Permit for the Facility, Berkshire is required to file a copy with the Siting Board (Exh. HO-RR-2). To date, Berkshire has not made such a filing.

D. Jurisdiction

Berkshire's Initial Petition for a Certificate and its Application for a Certificate each are reviewable by Siting Board pursuant to G.L. c. 164, § 69H, which requires the Siting Board to implement the energy policies in its statute to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. The Company's Initial Petition also is reviewable pursuant to G.L. c. 164, § 69K½, which provides that any applicant proposing to construct or operate a generating facility may petition the Siting Board for a Certificate with respect to that facility. Likewise, the Company's Application is reviewable by the Siting Board pursuant to G.L. c. 164, § 69L½, which requires any applicant seeking a Certificate pursuant to section 69K½ to file with the Siting Board an Application containing the information specified in section 69L½.

II. THE INITIAL PETITION

A. Standard of Review

Any person who proposes to construct or operate a generating facility in the Commonwealth may seek a Certificate from the Siting Board. G.L. c. 164, § 69K½. The applicant first must file an Initial Petition for a Certificate. Id. The Siting Board may grant an Initial Petition if (1) the applicant asserts one or more of the seven grounds for a Petition set forth in G.L. c. 164, § 69K½; and (2) the Siting Board determines that, on the merits, at least one of the grounds asserted constitutes a valid basis for granting the Petition. Id.<sup>9</sup>

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<sup>9</sup> Within seven days of the filing of an Initial Petition for a Certificate, the Siting Board must decide either to hold a hearing on the merits of the grounds asserted in the Petition, or to accept an Application for a Certificate and to defer decision on the merits of the Petition until the hearing on the Application. 980 CMR § 6.02(4). In this case the Siting Board deferred its review of the merits of Berkshire's Initial Petition until the hearing on  
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B. The Company's Initial Petition

Berkshire asserts in its Initial Petition three of the seven statutory grounds on which an Initial Petition may be based.

First, Berkshire asserts that the City Council's denial is a "burdensome condition which has a substantial impact on the Siting Board's responsibilities" because the Company will not be able to use oil as a backup fuel without a Section 13 License, notwithstanding the Siting Board's approval of oil as a backup fuel for the Facility (Exh. BPD-12, at 12; G.L.

c. 164, § 69K½, para. 2). Second, the Company asserts that the City Council's denial of Berkshire's application for a Section 13 License is inconsistent with the fuel strategy for the Facility that has been approved by other state agencies, including the Siting Board, thus "resulting in inconsistencies among resource use permits" (Exh. BPD-12, at 11-22; G.L. c. 164, § 69K½(iii)). Finally, the Company asserts that one of the City Council members "likely" violated the State Ethics Law by declining to recuse herself from consideration of Berkshire's License application and, therefore, that the City Council's denial resulted from an "improper consideration of nonregulatory issues" (Exh. BPD-11, at 12; G.L. c. 164, § 69K½(iv)).

C. Analysis and Findings

In a ruling issued on July 16, 1999, the Hearing Officer found that the allegations set forth in Berkshire's Initial Petition satisfied the pleading requirements of G.L. c. 164, § 69K½. July 16 Hearing Officer Ruling, at 4-5. Accordingly, the Siting Board turns now to address the merits of the Company's allegations.

1. A Burdensome Condition

G.L. c. 164, § 69K½, para. 2, provides that an Initial Petition may be granted if the Siting Board finds "that any state or local agency has imposed a burdensome condition or limitation on

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<sup>9</sup>(...continued)

the Company's Application. November 16 Procedural Order at 3.

any license or permit which has a substantial impact on the responsibilities of the board as set forth pursuant to section 69H.” Pursuant to G.L. c. 164, § 69H, the Siting Board’s responsibility in this proceeding is to implement the provisions of G.L. c. 164, §§ 69H-69Q “so as to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost.”

Berkshire's Petition to Construct included the Company’s proposal to burn oil as a backup fuel for up to thirty days per year, and to store an approximately three day supply of fuel oil on the Facility site (Exh. BP 1A, at 2-2(95-1). The Siting Board in the Berkshire Decision approved the Company’s Petition to Construct, including its fuel oil combustion and storage components. The Siting Board specifically found that the Company’s proposal to use both natural gas and fuel oil to operate the Facility “would minimize environmental impacts, consistent with the minimization of cost.” Berkshire Decision, 4 DOMSB 221, at 441.

Pursuant to its mandates under G.L. c. 164, §§ 69H and 69J, the Siting Board in the Facility approval proceeding conducted a comprehensive review of Berkshire’s proposed Facility, including the need for the project, the site selection process used by the Company, and the viability, environmental impacts and costs of the project. The Facility’s ability to burn oil for up to thirty days per year, and the availability of an on-site supply of fuel oil to burn, were part of, and were material to, the Siting Board’s review and ultimate approval of the project.

The City Council’s denial of a permit that Berkshire must obtain in order to construct and operate the Facility as approved by the Siting Board precludes full implementation of the Berkshire Decision. It thus constitutes a burdensome limitation on a permit, with a substantial impact on the responsibilities of the Siting Board under G.L. c. 164, § 69H.

Based on the above, the Siting Board finds that the Company has stated a valid ground for the granting of its Initial Petition, in accordance with G.L. c. 164, § 69K½, para. 2.

## 2. Inconsistencies Among Resource Use Permits

G.L. c. 164, § 69K½(iii) provides that “inconsistencies among resource use permits issued by state or local agencies” for a generating facility will support the granting of an Initial Petition. In the Berkshire Decision, and in the Berkshire Compliance Decision, the Siting Board



approved Berkshire's proposal to burn fuel oil, and to store it on-site at the Facility. Berkshire Decision, 4 DOMSB 221, at 237; Berkshire Compliance Decision, EFSB 95-1, at 11-12. The Massachusetts DEP also has approved the burning of fuel oil by the Facility (Exh. HO-E-26, att.). Thus, Berkshire is accurate in stating that the City Council's denial of its Section 13 License application is inconsistent with permits that have been issued for the Facility by State agencies.<sup>10</sup>

Based on the above, the Siting Board finds that the Company has raised a valid ground for the granting of its Initial Petition, in accordance with G.L. c. 164, § 69K½(iii).

### 3. Nonregulatory Issues or Conditions

G.L. c. 164, § 69K½(iv) provides that an Initial Petition will be granted if "a nonregulatory issue or condition has been raised or imposed by such state or local agencies, such as, but not limited to, aesthetics and recreation."

Berkshire has claimed that one member of the City Council "likely" violated conflict of interest provisions in the State Ethics Law (G.L. c. 268A), based on that member's prior legal representation of the CCBA, an organization which has opposed construction of the Facility in several proceedings, including the Facility approval proceeding (Exh. BPD-11, App. A, att. a-c). The record shows that the Councilor in question has previously represented the CCBA in legal proceedings (id.). However, the record also shows that she prepared disclosure statements relative to her representation of the CCBA, prior to voting on the Company's Section 13 License application (id.).

The Siting Board notes that the record in this proceeding does not contain a determination by the State Ethics Commission, or any other credible evidence, that a violation of the State

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<sup>10</sup> Because it refers to permits that have been issued, and not to permits that have been denied, the express language of G.L. c. 164, § 69K½(iii) would appear to preclude Berkshire from invoking this provision as a basis for the granting of its Petition. As a practical matter, however, the denial of a necessary permit for a proposed project is a final agency decision which affects a project applicant at least as significantly as a decision by the agency to issue the permit, but with conditions that render it "inconsistent" with permits issued by other agencies.

Ethics Law did, in fact, occur in connection with the City Council's review of Berkshire's License application. An Initial Petition, however, requires as its foundation a specific agency action that has occurred, as opposed to mere speculation, or even belief, that an action has occurred.<sup>11</sup>

Based on the above, the Siting Board finds that the Company has not stated a valid ground for the granting of an Initial Petition pursuant to G.L. c. 164, § 69K½(iv).<sup>12</sup>

D. Decision

Pursuant to the Siting Board's enabling statute, the Siting Board shall grant an Initial Petition for a Certificate of Environmental Impact and Public Necessity provided that (1) the petitioner asserts in its Initial Petition one or more of the seven grounds on which Siting Board jurisdiction to consider an Initial Petition may be based, as set forth in G.L. c. 164, § 69K½ and (2) the Siting Board finds that at least one of the grounds asserted is a substantively valid basis for the granting of the Initial Petition. G.L. c. 164, § 69K½.

In Section II.C, above, the Siting Board has found that the Company asserted in its Initial Petition three of the seven grounds on which Siting Board jurisdiction to consider an Initial Petition may be based. In Section II.C, above, the Siting Board also has found that two of the grounds asserted constitute substantively valid bases for the granting of the Company's Initial Petition. Either of these grounds alone would be sufficient, pursuant to G.L. c. 164, § 69K½, to support the granting of a Petition.

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<sup>11</sup> Each of the seven statutory bases on which an Initial Petition may be based is derived from the occurrence of a concrete, verifiable action (or failure to act) by a decisionmaking body. Thus, for example, an Initial Petition may be based upon the imposition of certain standards which preclude the building of a generating facility; by a permit denial that precludes building of the facility; or by an agency's failure to timely issue a necessary permit. See, G.L. c. 164, § 69K½(i);(v);(ii).

<sup>12</sup> Substantively, G.L. c. 164, § 69K½(iv) is intended to allow applicants to seek a Certificate where the agency in question has required the applicant to comply with a particular condition, or to take other specific action, which the agency lacks the legal authority to require. Thus, the Siting Board notes that a violation of G.L. c. 268A by an agency member, even if established in the record of a particular proceeding, would not constitute the type of agency action contemplated by G.L. c. 164, § 69K½(iv).

Accordingly, the Siting Board GRANTS the Company's Initial Petition for a Certificate of Environmental Impact and Public Interest.

### III. THE APPLICATION

#### A. Standard of Review

Pursuant to G.L. c. 164, § 69O½, the Siting Board must make four findings to support the issuance of a Certificate of Environmental Impact and Public Interest for a generating facility. First, the Board must determine that the issues raised by the agency, or agencies, whose actions are at issue in the Certificate proceeding have been addressed in a comprehensive manner by the Board, either in its prior approval of the generating facility or in the Certificate proceeding itself.

The Siting Board's decision also must include the Board's "findings and opinions" with respect to: (1) the compatibility of the generating facility with considerations of environmental protection, public health, and public safety; (2) the extent to which construction and operation of the generating facility will fail to conform with existing state or local laws, and, if the facility will not conform in some respect, the reasonableness of exempting it from conformance, consistent with implementation of the energy policies in the Siting statute; and (3) the public interest or convenience requiring construction and operation of the generating facility.

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#### B. The Issues

In this proceeding, the agency action at issue is the decision by the Agawam City Council to deny Berkshire's application for a Section 13 License. Thus, the Siting Board must (1) identify the issues raised by the City Council in its review and ultimate denial of Berkshire's application; (2) determine which of those issues are within the appropriate scope of this proceeding;<sup>13</sup> and (3)

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<sup>13</sup> The Siting Board does not interpret G.L. c. 164, § 69O½ as requiring that all issues  
(continued...)

determine whether the issues that are properly before the Board been comprehensively addressed, either in the Facility approval proceeding or in the instant proceeding.

Consistent with established principles of due process, in attempting to identify the issues that were raised by an agency in its denial of a permit, the Siting Board looks to the statement of reasons set forth in the agency's final decision in the permit proceeding, rather than to issues that may subsequently be raised by the agency in other documents or other forums. See, e.g., G.L. c. 30A, § 11.<sup>14</sup> Thus, if the agency's final decision includes a statement of reasons, the Siting Board's inquiry into the "issues raised" for purposes of the Board's review under G.L. c. 164, § 69O½ is complete.

In those cases where the agency in question has not issued a statement of reasons contemporaneous with its final decision, the Siting Board may seek other contemporaneous indicators of the bases for the agency's action. Thus, for example, in the absence of a statement of reasons, the Siting Board may look to the official record of the proceeding in which the agency considered and acted upon the permit at issue. Finally, in the absence of any contemporaneous indicator of the bases for the agency's decision, the Siting Board may consider statements made by the agency after the agency's final decision was issued. These ex post facto statements are, however, the least reliable source of information regarding the concerns that formed the basis for the agency's final decision, since it may not be possible to discern from them which issues were in fact raised by the agency during the permit proceeding, and which issues have arisen or been added since the proceeding was concluded.

#### 1. Issues Raised by the City Council

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<sup>13</sup>(...continued)

raised by agency, without exception, be comprehensively addressed in a Certificate proceeding. Where an agency raises issues that are not within the Siting Board's jurisdiction to determine, are not properly within the scope of a Certificate proceeding, or otherwise are not properly before the Board, G.L. c. 164, § 69K½ does not require that such issues be comprehensively addressed.

<sup>14</sup> The Siting Board notes that the requirements of G.L. c. 30A, the State Administrative Procedure Act, apply only to state agencies. G.L. c. 30A, § 1. Accordingly, not every agency whose actions may be the subject of a Certificate proceeding will have issued a written statement of reasons.

The Agawam City Council issued a written denial of the Company's Section 13 License application that did not contain a statement of reasons (Exh. BPD-11, att. a). Thus, the Siting Board is unable to determine from the City Council's decision those issues upon which the City Council based its denial of the Company's application.

The record in this proceeding contains the transcripts of two public hearings conducted by the City Council, during which the Company's application for a Section 13 License was discussed. The hearing on the Company's application began at the City Council's meeting on September 8, 1998 (Exh. BPD-11, att. c) and was continued for approximately one month, to the Council's October 5, 1998 meeting (*id.* at 53). The Company's application was denied, by a vote of eight to three, at the October 5, 1998 Council meeting (Exh. BPD-11, att. c, at 33). The transcripts of the public hearings show that the City Council, as well as members of the local community, asked Company representatives numerous questions, and expressed certain concerns, regarding the proposed oil storage tank (Exh. BPD-11, att. c, at 11-53; att. d, at 1-33). The transcripts also show that the Company offered to supply responses to many of the questions and concerns raised (*e.g.*, Exh. BPD-11, att. c, at 16-17, 20; att. d, at 15-17; att. f). Thus, it cannot be determined from the transcripts whether, or to what extent, some of the concerns raised during the public hearing may have been resolved to the City Council's satisfaction. More importantly, since the City Council did not, at the time it denied Berkshire's application, cite any of the questions or concerns that were raised during the public hearings as grounds for that denial, it cannot be determined from the transcripts whether, or to what extent, some of the concerns raised constituted a basis for the Council's ultimate denial of the Section 13 License (BPD-11, att. d, at 33). Accordingly, the specific issues on which the City Council based its decision to deny Berkshire's Section 13 License cannot be conclusively determined from the public hearing transcripts in this case.

In response to pre-hearing discovery issued by Siting Board staff regarding the bases for the City Council's denial of Berkshire's application, the City Council on April 22, 1999 filed two documents, each of which was prepared by the City Council President subsequent to the City Council hearing and subsequent to the Council's denial of the application. The first document is a letter from the City Council President to the State Fire Marshal, dated October 20, 1998, which

identifies four "concerns" of Council members who voted to deny the License (Exh. HO-ACC-1a-C)("October 20 Letter"). The second, dated April 22, 1999, is a response by the City Council President to a Siting Board information request, which lists thirteen items which the Council President asserts were "factors" in the City Council's decision to deny the Section 13 License (Exh.HO-ACC-1b) ("April 22 List").

Having found no contemporaneous record of the issues raised by the City Council when it reviewed and denied Berkshire's Section 13 License application, the Siting Board turns below to a discussion of the issues set forth in the October 20 Letter and the April 22 List, the available ex post facto sources of this information.

a. Issues Outside the Scope of the Proceeding

Taken together, the City Council's October 20 Letter and the April 22 List set forth seventeen issues. However, certain of these issues are not issues cognizable by the Siting Board in this proceeding.

Three of the issues cited by the City Council in its April 22 List pertain not to the storage of fuel oil, but instead to its use or combustion (Exh. HO-ACC-1b, ¶¶ 3, 9, 10). First, the Council asserts that Berkshire will "definitely" burn fuel oil for thirty days per year, rather than three days per year as the Company had represented (Exh. HO-ACC-1b, at 1b, ¶ 3). Second, the Council suggests that there is no need in Massachusetts for electric generating facilities with the capacity to use oil as a backup fuel (Exh. HO-ACC-1b, ¶ 9). Third, the Council asserts that the burning of fuel oil will create acid mist, which in turn will damage the equipment and structures of neighboring landowners (Exh. HO-ACC-1b, ¶ 10).

In addition, one of the issues cited by the City Council in the April 22 List does not pertain to the City Council's decision to deny Berkshire's Section 13 License application, but instead pertains to the interpretation of the ZBA Settlement Agreement, a written settlement agreement between Berkshire, the Zoning Board of Appeals and the Town of Agawam that incorporates the Facility's Special Permit (Exhs. HO-ACC-1b, ¶ 8; HO-RR-9, att.). Specifically, the City Council asserts that Berkshire was unable to establish during its Section 13 License proceeding that the Company had complied with Condition Four of its Special

Permit, which requires, in part, that the Company make a "good faith" effort to eliminate the need for oil storage on the Facility site.<sup>15</sup>

In determining whether an "issue raised" by a state or local agency is properly within the scope of a Certificate proceeding, the Siting Board looks primarily to four factors: (1) whether, as a threshold matter, the issue is one that may be addressed by the Siting Board, consistent with the Board's statutory authority and mandates; and (2) whether the issue has been comprehensively addressed by the Board in the prior Facility approval proceeding; (3) the extent to which the issue falls within the purview of the agency whose action is the subject of the proceeding; and (4) whether addressing the issue in the Certificate proceeding would be consistent with considerations of due process and of administrative efficiency.<sup>16</sup>

With respect to the three issues concerning the combustion, as opposed to the storage, of fuel oil, the Siting Board finds that assessing the appropriateness of the fuel strategy for a proposed new generating facility, including the potential environmental impacts of such a strategy, is a function wholly consistent with the Board's broad statutory mandate to review the proposed construction and operation of such facilities, and in so doing, to implement the policies in the Siting statute "to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost". G.L. c. 164, §§ 69H; 69J; 69J¼. The Siting Board also finds that the Berkshire Decision comprehensively addressed the Company's proposal to construct a generating facility with the capacity to burn both natural gas and oil, including the reliability of such a facility, as well as its anticipated environmental impacts, including its air quality impacts, water-related impacts, and traffic impacts. See Berkshire Decision, 4 DOMSB 221, at 339-346, 360-374, 406-409.<sup>17</sup>

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<sup>15</sup> Condition Four of the Company's Special Permit provides, in relevant part, that the "applicant shall make every 'good faith' effort to eliminate the need for on-site oil storage tank, using only natural gas to propel the turbines."

<sup>16</sup> See also, May 25 Hearing Officer Ruling at 6-7, n.7.

<sup>17</sup> The Siting Board's review in the Facility approval proceeding of issues related to the  
(continued...)

With respect to the third factor set forth above, the Siting Board does not presume to interpret in this proceeding the precise scope of the City Council's authority to review a License application under G.L. c. 148, § 13. However, in order to determine whether a particular issue could, in fact, have been raised by a State or local agency in a permit proceeding, the Siting Board will look to the statutory or regulatory authority governing that proceeding for guidance. The permit that is the basis for the Application in this case is a local land-use license, required under State law for the storage of explosive or flammable materials. G.L. c. 148, § 13; Exh. EFSB-2, at 2. Pursuant to G.L. c. 148, § 13, no building or structure may be used "for the keeping, storage, manufacture or sale" of explosive or inflammable materials, "unless the local licensing authority shall have granted a license to use the land" for such purpose. G.L. c. 148, § 13, par. 1. The Siting Board finds nothing in the language of G.L. c. 148, § 13 to support a conclusion that issues pertaining to the choice of a fuel supply strategy for an electric generating facility, or to the environmental impacts that may be associated with the use of a particular fuel, are within the subject matter of a Section 13 License proceeding.

With respect to the fourth factor, the Siting Board finds that to allow the City Council, or any other party, to raise issues in the instant proceeding pertaining to the Company's proposed fuel strategy for the Facility would run counter to considerations of both fairness and administrative efficiency. The Siting Board possesses the statutory authority to address issues associated with the Facility's fuel use capabilities, and has already done so in a comprehensive manner in the Facility approval proceeding. It is the Siting Board's view that, as a general rule, a Certificate proceeding should not serve as a vehicle for the re-litigation of issues that have already been fully and fairly determined in the related facility approval proceeding, particularly where the issue in question is one that is central to the Board's fulfillment of its statutory obligations. To allow it to do so would effectively render the Facility approval proceeding meaningless. It also would violate accepted principles of due process for those parties, including the project applicant, who participated

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<sup>17</sup>(...continued)

the combustion of fuel oil is discussed in further detail in Section III.D, below.



in the facility approval proceeding, litigated the issues in question, and justifiably held the expectation that they could rely upon the finality of the Siting Board's Final Decision in that proceeding.<sup>18</sup>

Based on the above, the Siting Board finds that those issues pertaining to the combustion of oil, and cited by the City Council in its April 22 List, at paragraphs three, nine and ten, are outside the proper scope of this proceeding.

With respect to the issue of the Company's alleged noncompliance with Condition Four of its Special Permit, the Siting Board finds that, as a threshold matter, this is not an issue that may be addressed in this proceeding. First, Berkshire's Application does not seek a Certificate relative to the ZBA's issuance of the Company's Special Permit, or relative to the ZBA Settlement Agreement into which the Special Permit subsequently was incorporated. Only one agency action is the subject of the Company's Application and, therefore, only one agency action may be the subject of this proceeding: the denial by the City Council of Berkshire's application for a Section 13 License. See G.L. c. 164, §§ 69K½, 69L½. In addition, the City Council's allegation that Berkshire has failed to comply with Condition Four of its Special Permit is, in essence, a request by the City Council that the Siting Board interpret and enforce the meaning of "good faith" in Condition Four, as negotiated and understood by the Company and the Zoning Board of Appeals. However, nothing in the Siting statute empowers the Siting Board, in the context of a Certificate proceeding or otherwise, to interpret or enforce the conditions contained in permits issued by other State or local agencies. The Siting Board notes further that, even if so empowered, the Board would be particularly hesitant to interpret the permit condition at issue here, due to the highly subjective nature of the term "good faith," and due to the fact that only one of the parties to the ZBA Settlement Agreement, Berkshire, is a party to this proceeding.<sup>19</sup>

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<sup>18</sup> Part of the parties' expectation of finality includes the knowledge that Final Decisions of the Siting Board may be appealed only to the Supreme Judicial Court. G.L. c. 25, § 5.

<sup>19</sup> The Siting Board notes that the Special Permit specifies the procedure to be followed in the event of alleged noncompliance by Berkshire with a permit condition (Exh. HO- RR-9, att. 9b, ¶ 43). The Settlement Agreement also provides for the amendment of  
(continued...)

Based on the above, the Siting Board finds that Berkshire's compliance with Condition Four of its Special Permit is an issue that may not be addressed by the Siting Board consistent with its statutory authority and mandates.<sup>20, 21, 22</sup>

## 2. Issues Within the Scope of the Proceeding

The remaining twelve issues raised by the City Council in the October 20 Letter and in the April 22 List, which overlap in places, may be divided into five general categories:

(1) the Company's construction of the proposed tank without governmental oversight (see Exh. HO-ACC-1b, ¶ 4); (2) the location of the tank in relation to the Facility's natural gas supply and

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<sup>19</sup>(...continued)

permit conditions upon petition by Berkshire to the Zoning Board of Appeals (Exh. HO-RR-9, att. at 2).

<sup>20</sup> The Siting Board notes that, even if interpretation and enforcement of the ZBA Settlement Agreement were within the scope of the Siting Board's statutory authority (which it is not), the issue that is raised by the City Council goes beyond the issue of fuel oil storage. Thus, like the other three issues raised by the City Council which pertain to the use or combustion of oil, the issue also lies outside the scope of the proceeding on substantive grounds.

<sup>21</sup> For jurisdictional reasons, the Siting Board does not address Berkshire's compliance with the terms and conditions of the ZBA Settlement Agreement in this proceeding. Substantively, however, we note that in the Berkshire Compliance Decision, Berkshire requested that the Siting Board defer to the conditions imposed by the ZBA Settlement Agreement concerning oil storage. In that case we determined that compliance with the ZBA conditions would not alter in any substantive way the conclusions reached by the Siting Board in the Facility approval proceeding. Further, in granting Berkshire's request for a zoning exemption, the Department relied on the terms and conditions of the ZBA Agreement. The Siting Board notes the importance of the Company's continued compliance with the ZBA Settlement Agreement, and emphasizes that nothing in this Decision is intended to be inconsistent with or to otherwise interfere with the parties' rights and obligations under that Agreement.

<sup>22</sup> For similar reasons, Mr. DelNegro's assertion that Berkshire has not complied with another part of Condition Four, pertaining to the allowable volume of the oil storage tank, is an issue that may not be addressed by the Siting Board consistent with its statutory authority and mandates. See DelNegro Reply Brief at 2.

the abutting L.V. Heliport (see Exh. HO-ACC-1b, ¶¶ 5, 11); (3) evacuation of the area surrounding the tank in the event of emergency (see Exh. HO-ACC-1b, ¶¶ 1, 6, 13; HO-ACC-1a-C; and (4) tanker truck traffic generated by fuel oil deliveries (see Exh. HO-ACC-1b, at 1-1b, ¶ 2, 7, 12; HO-ACC-1a-C. Each of these four groups of issues is addressed in Section D, below.<sup>23</sup>

In addition to the issues raised by the City Council, the Siting Board also addresses a matter not specifically raised in the Council's October 20 Letter or April 22 List. Pursuant to its statutory mandate under G.L. c. 164, § 690½ to address environmental, health and safety considerations, the Siting Board during this proceeding conducted inquiry regarding the Company's oil spill prevention and response plans. These plans are addressed in Section III. C.3, below.

### C. Analysis of the Issues Raised

#### 1. Tank Design and Construction

In its April 22 List, the City Council stated that the tank was constructed by the Company without any supervision at all from the State Fire Marshal as required by G.L. c. 148, § 37 and, as a result, without oversight from any governmental authority (Exh. HO-ACC-1b).<sup>24</sup>

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<sup>23</sup> The October 20 Letter also references, but does not raise the issue of, fire and explosion hazards (Exh. EFSB 1-1a(3), at 1). The Siting Board notes that fire-related issues, including the potential for fire, fire suppression, and emergency evacuation planning, are addressed in Sections III.C.1 and III.C.4, below. Explosion-related issues, including the potential for explosion and emergency evacuation planning, also are discussed in Sections III.C.1 and III.C.4.

<sup>24</sup> CCBA, Mr. DelNegro, and Mr. Vergnani also argued that the oil storage tank has been illegally constructed because Berkshire failed to obtain the requisite permits from the State Fire Marshal governing the construction and inspection of the oil  
(continued...)

The Company stated that the oil storage tank has a 500,000 gallon capacity and is made of welded steel (EFSB 1-4, att. 1-4A). The Company also stated that the tank is 53 ½ feet in diameter, 34 feet in height, and has a shell and roof thickness of ¼ inch, with a bottom thickness of 5/16 inch (id.). Berkshire provided detailed information as to the specific tests that have been performed on the tank, including material and fabrication certifications (Exhs. CCBA-5-C, D, E, H).<sup>25</sup>

In order to allow for expansion of fuel oil vapors, Berkshire stated that it would not allow the tank to be filled past 95 percent of its capacity, or 475,000 gallons (Tr. 2, at 314; Exhs. CCBA-5-C, D, E, H). With respect to the potential for explosion, the Company stated that No. 2 fuel oil exhibits a low volatility, thus making it highly unlikely that oil vapors within the storage tank could ignite or explode (Exh. EFSB 1-7). The Company's witness, Mr. Roberts, testified that the risk of explosion is minimized when a tank is filled to capacity, because internal vapor area is minimized (Tr. 2, at 386-388, 391-393). However, Mr. Roberts added that a partially-filled or empty oil tank is not unsafe (id. at 391).

The Company stated that in the unlikely event of an oil tank explosion, the results of a computer modeling analysis demonstrate that minor damage could occur to area buildings within a half-mile radius of the facility due to the explosion's over pressure shockwave (Exh. EFSB 1-7). The Company stated that the computer analysis demonstrates that any significant damage from such an explosion would be limited to structures within the boundaries of the Facility (id.).

The Company asserted that the oil storage tank has a state-of-the-art proximity fire suppression system (Company Initial Brief at 13). Specifically, the Company stated that a foam fire protection system would be activated either automatically via temperature sensors that are

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<sup>24</sup>(...continued)

storage tank (CCBA Brief at 2-3; DelNegro Reply Brief at 2-5; Vergnani Brief at 1-2).

<sup>25</sup> Berkshire indicated that these tests and certifications also included on-site hydrostatic and pneumatic test reports, an ultrasonic test map, and final certification from the manufacturer that the tank meets American Petroleum Institute design code 650 (id.).

mounted externally along the top of the oil storage tank, or manually by a remote activator (Exhs. EFSB 1-4; HO-RR-4, att.).<sup>26</sup> Further, the Company indicated that a foam storage tank would be enclosed in a 10-foot by 12-foot foam storage house located on-site at the power plant, and that associated piping would deliver the contents of the foam storage tank to the area of the oil storage tank in the event of a fire (Exh. EFSB 1-4-C). The Company provided a letter from the Agawam Fire Chief to City Councilor George Bitzas, in which the Fire Chief stated his confidence in the Fire Department's ability to respond to a fire at the Agawam Facility site (Exh. BPD-11, App. C, att. C). The letter states that the Fire Department maintains a supply of foam suppressant, that Berkshire will be required to maintain an on-site supply of foam suppressant for the Fire Department's use, and that the Fire Department can summon large foam trucks from neighboring air force bases if necessary (*id.*). The letter also notes that Berkshire has committed to fund training aids, fire fighting equipment, and supplies to further prepare the Fire Department for dealing with any problem that may arise at the Agawam Facility (*id.*).

\_\_\_\_\_The Company stated that the fuel oil tank was fabricated, erected and vessel tested between August 3, 1998 and October 12, 1998 and that a secondary containment and unloading area was to be completed by June 1, 1999 (Exh. CCBA-17). The Company stated that it has not received a permit from the State Fire Marshal pursuant to G.L. c. 148, § 37 because it was under the mistaken impression that such a permit was not required (Exh. EFSB 2-3; Tr. 1, at 23-24). In correspondence to the Siting Board dated March 17, 1999, the State Fire Marshal confirmed that Berkshire had not filed an application for the construction and use permits required under Section 37.<sup>27 28</sup> The State Fire Marshal subsequently issued an Order of Notice to Berkshire on April 23, 1999 ordering Berkshire to refrain from filling the oil storage tank with any fluid pending further investigation and/or action by the State Fire Marshal (Exh. EFSB-1). In addition, the Fire

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<sup>26</sup> The Company indicated that three temperature sensors would be spaced 120 degrees apart on the roof, at a radius of 26 feet from the tank's center (Exh. HO-RR-4, att.).

<sup>27</sup> The State Fire Marshal also indicated that a Section 13 License is a precondition to the Marshal accepting an application for a Section 37 Permit (Exh. EFSB-2).

<sup>28</sup> Berkshire subsequently filed an application for a Section 37 Permit on May 10, 1999 (Exh. HO-RR-1S, at 60).

Marshal stated that even if the Siting Board grants Berkshire's request regarding its oil storage permit it is important that Berkshire still be required to meet the requirements of a Section 37 Permit and the applicable construction requirements of 527 CMR 9.00 to ensure that: (1) the storage tank is constructed according to state regulatory specifications for structural integrity and fire prevention; and (2) the tank is inspected and permitted on an annual basis (Exh. EFSB-2).

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a. Analysis

\_\_\_\_\_ In the underlying Facility case, the Siting Board reviewed evidence concerning the oil storage tank (See, e.g., Exhs. BP-1A at 5-7; HO-V-17; 4 DOMSB at 317 n.103, 342). Additional evidence regarding the design and construction of the tank was examined in this case. The record shows that the oil storage tank has been subjected to a series of structural tests and has received material, fabrication and design certifications. The record also shows that, due to the low volatility of fuel oil, tank explosion would be unlikely. In the unlikely event of an explosion, the Company's computer modeling indicates that significant damage from such explosion would be limited to the structures within the boundaries of the Facility. The record also shows that a foam fire suppression system would be automatically activated if necessary via temperature sensors mounted on top of the storage tank. All of these indicators suggest that the tank has been designed and constructed with considerations of public safety.

However, the Siting Board cannot overlook the fact that Berkshire constructed its tank without design approval or oversight from the State Fire Marshal who has the responsibility for enforcing state regulatory specifications for structural integrity and fire prevention. In the absence of an approval from the State agency charged with ensuring that regulatory requirements are met, the Siting Board cannot definitively determine whether the fuel oil storage tank is well designed and structurally sound. Consequently, as a condition of issuing a Certificate in this proceeding, the Siting Board will require that the Company obtain a Section 37 Permit from the State Fire Marshal.

Subject to the above condition, the Siting Board finds that Berkshire has established that the fuel oil storage tank has been designed and constructed in a manner compatible with considerations of environmental protection, public health and public safety. Subject to the above

condition, the Siting Board further finds that the record does not demonstrate any applicable area of non-conformance under local or state laws, ordinances, bylaws, rules or regulations with to design and construction of the oil storage tank.

## 2. Tank Location

The Agawam City Council has raised two concerns with regard to the location of Berkshire's fuel oil tank – its proximity to the natural gas supply for the Berkshire generating facility, and its proximity to L.V. Heliport. Specifically, the City Council expressed concern that the fuel oil tank's proximity to the natural gas supply could increase the risk to the surrounding community in the event of a catastrophe, and that the oil tank is located in an area with a higher risk of helicopter crashes, particularly during conditions of reduced visibility. The Siting Board addresses the public safety issues reflected in each of these concerns, below.

### a. Gas Line Proximity

The City Council asserted that it denied Berkshire's Application for fuel oil storage due in part to the proximity of the oil storage tank to the natural gas supply for the Berkshire generating facility (Exh. HO-ACC-1b). City Council President Rheault testified that, while he was not familiar with the construction of gas pipelines and the regulations governing them, or the exact distance between the gas pipeline and the oil tank, he believed that it would make sense to further separate the two fuel supply systems in order to minimize public safety concerns in case of a catastrophe (Tr. 1, at 131-32).

Berkshire provided a site plan which indicates that the natural gas pipeline enters the Berkshire property at a point south of the oil tank along Shoemaker Lane, proceeds north, parallels the eastern edge of the oil tank's secondary containment wall for approximately its last 80 feet, and terminates at an on-site gas meter station (Exh. EFSB 1-6). Berkshire indicated that the oil storage tank is located nearly 100 feet from the fenced area surrounding the meter station (Tr. 2, at 299-301). The Company noted that the distance from the fenced area to the oil tank's secondary containment wall is 80 feet, the distance from the fenced area to the outside wall of the

oil tank itself is 95 feet, and the distance from the closest gas metering apparatus within the fenced area to the oil tank's wall is approximately 110 to 115 feet (id.)

Berkshire provided sections of National Fire Protection Association ("NFPA") Standard 30, which governs minimum separation between tanks designed to store flammable and combustible liquids and the "Nearest Important Building on the Same Property", together with a letter from CIGNA Property and Casualty ("CIGNA letter") interpreting those standards as they apply to the subject oil tank (Exhs. CC-RR-1, 1-A, 1-B, 1-C). The CIGNA letter states that the minimum spacing permitted under NFPA Standard 30 between the oil storage tank and the gas meter station is 12.5 feet (Exh. CC-RR-1-C). In addition, Berkshire asserted that the American Gas Association ("AGA") code, which governs natural gas facilities such as the gas meter station, permits "any" activity outside the fenced area surrounding the meter station (Tr. 2, at 299).

The record indicates that Berkshire's oil storage tank is separated from the above-ground natural gas meter station by 110 to 115 feet, or approximately nine times the distance required by NFPA Standard 30, and that the portions of the underground pipeline nearest the oil tank are a similar distance away. The record also indicates that the relative locations of the oil tank and the gas meter station are in compliance with the applicable AGA code. Consequently, the Siting Board finds that the oil tank's location relative to the gas supply and metering facilities is compatible with considerations of environmental protection, public health, and public safety. Further, the Siting Board finds that the record does not demonstrate any applicable area of non-conformance under local or state laws, ordinances, by-laws, rules, or regulations with respect to the oil storage tank's location in proximity to the gas supply and meter facilities.

b. Heliport Proximity

The City Council asserted that it denied Berkshire's Application for fuel oil storage due in part to the proximity of the oil storage tank to an operating heliport (Exh. HO-ACC-1b). Leo Vergnani, owner of the L.V. Heliport, a private heliport/helipad located at 111 Industrial Lane in Agawam, argues that the close proximity (400 to 600 feet) of the oil storage tank to the helipad poses a significant public safety issue (Vergnani Brief at 1-2). Mr. Vergnani provided



documentation that the L.V. Heliport is registered with both the U.S. Department of Transportation - Federal Aviation Administration (“FAA”) and the Massachusetts Aeronautics Commission (Exh. HO-RR-8, atts.).

Berkshire indicated that its oil storage tank is located approximately 450 feet from its property line with the heliport and approximately 600 feet from the heliport takeoff and landing pad (Exhs. BPD-13, at Figs. 7.6.1, 7.6.2; LV-1; HO-RR-8; Tr. 1, at 36-41). The Company’s witness, Mr. Roberts, stated that the heliport is used infrequently<sup>29</sup> (Tr. 1, at 41, 46-47). Mr. Roberts testified that, in the event of a collision involving the helicopter and the oil storage tank, the tank’s foam fire suppression system would activate and suppress any resulting fire (*id.* at 50-51). Thus, Mr. Roberts concluded that risk from such an event would be limited to the helicopter pilot and passengers and persons on the Berkshire site, and that such an event would not pose a broader public safety risk (*id.*). In addition, the Company provided documentation that the FAA does not consider the 190-foot stack of the Berkshire generating facility to be an obstruction or a hazard to air navigation, and that it has not required marking and lighting on the Berkshire site (Exh. CCBA-RR-3-A and B).

The record indicates that a private, restricted-landing area heliport known as L.V. Heliport, with an associated landing/takeoff pad, is located approximately 600 feet from the oil storage tank. The heliport/helipad is registered with both the FAA and the Massachusetts Aeronautics Commission. Although the City Council alleges that the oil tank’s proximity to the heliport carries with it an increased risk that a helicopter crash could lead to an oil tank fire, it has not offered any evidence (*e.g.*, accident records or references to industry or regulatory standards) either to support this allegation or to quantify the level of risk involved.<sup>30</sup> The record does

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<sup>29</sup> Mr. Roberts asserted that no one from either Berkshire Power Development or its construction company had seen a helicopter take off or land during the one and a half year construction period for the generation facility, and stated that the heliport owner, Leo Vergnani, had indicated that he flew his helicopter infrequently due to ill health (Tr. 1, at 41-42, 46-47). Neither the City Council nor Mr. Vergnani offered contradictory testimony.

<sup>30</sup> The Siting Board notes that the risk of a helicopter crash in any specific location  
(continued...)

indicate that the oil tank has an on-tank fire suppression system (including on-site foam storage) and that the Agawam Fire Chief is confident of the Fire Department's ability to handle fires at the Agawam Facility site. The Company, in conjunction with the Agawam Fire Chief, also has prepared a plan for evacuating residents within one-half mile of the Berkshire generating facility in case of an emergency such as an out-of-control fire (see Section III.C.4, below).

Based on the record, the Siting Board finds that the location of the oil tank with respect to the L.V. Heliport is compatible with considerations of environmental protection, public health, and public safety. Further, the Siting Board finds that the record does not demonstrate any applicable area of non-conformance under local or state laws, ordinances, by-laws, rules, or regulations with respect to the oil storage tank's location in proximity to the heliport/helipad.

### 3. Spill Prevention and Response

In order to determine whether Berkshire's fuel oil storage tank is compatible with environmental protection considerations, the Siting Board must review the adequacy of Berkshire's plans to prevent and to address potential oil spills. During the course of this proceeding, Berkshire provided "draft sample" versions of the Spill Prevention Control and Countermeasures Plan ("SPCC Plan") and the Spill Contingency and Emergency Response Plan ("SCER Plan") required by 40 CFR §112 (Exhs. HO-RR-5-A; HO-RR-5-B). The Company's witness, Mr. Sellars, explained that such draft plans are typically in place during the construction period (Tr. 1, at 53-54). Mr. Sellars indicated that the operational versions of the SPCC and SCER Plans must be certified by a Massachusetts registered professional engineer following inspection of the completed generating facility (id.). Berkshire indicated that it expected to have "current approved plans" in place by September or October 1999 to use in training the generating facility operators (id. at 60). The Siting Board reviews the draft plans submitted to it, below.

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<sup>30</sup>(...continued)

presumably would be dependant upon factors such as frequency of helicopter flights, the flight path used, surrounding structures, and typical meteorological conditions, as well as the distance to the helipad.

a. Spill Prevention Control and Countermeasure Plan

Berkshire's draft sample SPCC Plan, dated March, 1998, lists oil use and storage locations at the Agawam Facility and the measures taken to minimize or eliminate the potential for spills and/or leaks which may contaminate navigable waters of the United States (Exh. HO-RR-5-A at 2-1).<sup>31</sup> The oil storage tank and two associated oil/water separators are described by function and location (id. at 3-4).

The SPCC Plan outlines fuel oil delivery procedures that include verification of oil storage tank level, disabling of delivery truck's drive transmission during oil delivery, and the presence of both the truck's driver and a Berkshire employee during oil delivery (id. at 3-7). The SPCC Plan also requires an operational test of a high oil level alarm before oil transfer begins, and further provides that in the event of an accidental fuel oil spill during oil delivery, the oil transfer will stop and a spill contingency plan (discussed below) will commence (id.). A bucket/catchment will be placed under the transfer connections during oil transfers to the tank in order to prevent any accidental oil discharge (id. at 3-7, 4-6). The SPCC plan requires that tank volume and proper valve and equipment positions be verified following the oil transfer, and that the delivery truck be visually inspected before it is allowed to move (id. at 3-7).

The SPCC Plan also assesses potential discharge pathways and discusses discharge prevention techniques (id. at 4-1 to 4-6, 5-1 to 5-9). The plan indicates that storm water runoff from the 0.6 acre drainage area associated with the oil storage tank will be contained within an impervious secondary containment structure and drained manually only after a trained operator verifies that the water is free of oil contamination (id. at 4-2). The SPCC Plan also indicates that precipitation collected in the containment area will be directed first to a concrete oil/water separator ("OWS") at the northeast corner of the secondary containment structure, then released into a swale leading to a detention pond (id.). The OWS can hold approximately twenty gallons of oil, and will be inspected periodically and cleaned as required (id.). The SPCC Plan notes that

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<sup>31</sup> The SPCC Plan is required by 40 CFR § 112 because oil will be stored aboveground at the Agawam facility in quantities exceeding 1320 gallons (Exh. HO-RR-5-A at 2-2).

a second OWS with identical oil retention capacity is present at the discharge point of the detention basin (id.).

The SPCC Plan also outlines procedures for responding to an oil spill (id. at 8-1 to 8-3). The SPCC Plan indicates Berkshire will contract with Clean Harbors of Braintree, Inc., Braintree, MA for emergency response, will maintain on-site spill control kits that include containment booms, pillows, sorbent sheets, loose sorbent, and drain covers,<sup>32</sup> and will follow the procedures contained in the SCER Plan and all other applicable federal, state and local regulations (Exh. HO-RR-5-A, at 8-2 to 8-3).

b. Spill Contingency and Emergency Response Plan

Berkshire's draft sample SCER Plan, dated March, 1998, contains specific plans for addressing potential oil spills at the Facility site (Exh. HO-RR-5-B). The SCER plan includes an Emergency Response Action Plan and Emergency Response Information, including procedures for notifying appropriate response personnel and, if necessary, evacuating the plant (id. at 1-1 to 1-20, 3-1 to 3-33). The plan indicates that Berkshire has entered into a contract with two spill response and cleanup contractors – Clean Harbors, and Inland Environmental Services (id. at 3-13). The plan contains a detailed listing of emergency equipment to be maintained on-site for use by Berkshire personnel and to be provided by the emergency response contractors (id. at 3-11 to 3-16).

The SCER Plan also includes an assessment of the potential for an oil spill at the Agawam Facility site. The plan highlights the areas where the potential exists for a fuel oil spill, and reviews possible worst-case (500,000 gallon), medium-case (10,000 gallon), and small case (150 gallon) oil spill scenarios (id. at 4-7 to 4-8, 5-1 to 5-11). The SCER plan also considers the discharge characteristics of the several drainage areas on site, volumes and direction of oil movement, and oil spill behavior (id. at 7-3 to 7-10).

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<sup>32</sup> The Company indicated that these are the materials to be used for containment of a release from a tanker truck delivering oil; additional spill control equipment would be maintained on-site for control of a potential chemical release (Exh. HO-RR-5-A at 8-2 to 8-3).

The SCER Plan also calls for regular inspections of the oil tank, containment structures, alarm and communication equipment operation, operator adherence to procedures, and the presence of spill response material and equipment (id. at 6-1). The plan contains guidelines for facility self-inspection, including inspections of the oil tank, spill response equipment, and secondary containment (id. at 8-1 to 8-2). Facility drills and exercises and response training are also discussed (id. at 8-1 to 8-21).

The Siting Board has reviewed Berkshire's draft sample SPCC and SCER Plans, and concludes that both plans comprehensively address prevention of and response to minor and major spill contingencies possible with the oil storage tank and associated facilities. Therefore, the Siting Board finds that the Company's spill prevention and response strategy with respect to the oil storage tank and associated facilities is compatible with considerations of environmental protection, public health, and public safety. Further, the Siting Board finds that the record does not demonstrate any area of non-conformance with local or state laws, ordinances, by-laws, rules, or regulations with respect to the Company's spill prevention and response strategy.

#### 4. Evacuation Plan

The City Council stated that it denied Berkshire's application for a fuel oil storage license in part due to Berkshire's failure to present an acceptable evacuation plan (City Council Hearing Brief at 4). The City Council stated that the draft plan provided to it contained outdated maps, and that the Company failed to meet with residents of Doane Avenue and Losito Lane and officials from the Country Estates nursing home to discuss the evacuation plan (id.). The City Council asserted that no evacuation plan had been developed to address the safety of the residents and employees of the Country Estates nursing home (id.).

Lecrenski/Five Star asserted that the Agawam Fire Chief had offered Five Star's bus transportation services as part of a plan to evacuate the Country Estates nursing home without Five Star's prior approval or input (Five Star Brief at 3, n.1). Ms. Lecrenski testified that she has serious reservations as to the ability of Five Star to responsibly evacuate elderly or disabled residents while ensuring their safety (Tr. 2, at 357-359, 371-372).<sup>33</sup>

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<sup>33</sup> According to the Minutes of the May 4, 1998 City Council meeting, the Fire Chief  
(continued...)

Mr. DelNegro asserted that the Agawam Fire Chief had made no determination as to whether providing police control at the end of Losito Lane during an evacuation would be an appropriate response to community concerns ( Tr. 3, at 412-414; DelNegro Reply Brief at 2).

Berkshire stated that Agawam's Fire Chief, Mr. Pisano, is the emergency response officer for the Town of Agawam and is responsible for ordering evacuations when necessary (Tr. 1, at 55; Tr. 3, at 410). The Company provided information indicating that the Town currently has in place emergency response plans to address contingencies that may arise generally or at existing industrial locations such as the HP Hood facility and the water treatment plant in Agawam (Exh. BPD-4, at 18-19). Berkshire asserted that it is not required under local, state, or federal law to develop an evacuation plan for its facilities; however, Mr. Roberts indicated that, in order to be responsive to community concerns, the Company agreed to develop a Community Action Plan to provide guidance for the Fire Chief if he determines that evacuation of the area surrounding the Berkshire site is necessary (Exh. BPD-4, at 18-19).

Berkshire indicated that it submitted three drafts of its Community Action Plan to the Agawam Fire Chief: (1) an April, 1998 draft ("1998 C.A. Plan"), which was considered by the Agawam City Council at a public meeting on May 4, 1998<sup>34</sup> (Tr. 1, at 63, 84-86; Tr. 3, at 463-464; Exhs. EFSB-2-1-B; BPD-3; BPD-4); a December, 1998 draft which incorporated revisions based on input received at the May 4 City Council meeting (Exh. CCBA-RR-1, att.; Tr. 3, at 463-464); and (3) an April, 1999 draft ("1999 C.A. Plan"), incorporating revisions based on

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<sup>33</sup>(...continued)

stated that under its existing emergency response plans, the Town would rely on existing contractual arrangements for bus transport with Five Star and Pioneer Valley Transportation Authority, and for step van transport with outside agencies, to evacuate Country Estates (Exh. BPD-4, at 19).

<sup>34</sup> The Company's witness, Mr. Sellars, acknowledged that maps included in the 1998 C.A. Plan depicted the Bowles-Agawam Airport, which no longer exists, and did not depict the existing Agawam Industrial Park (Exh. EFSB-2-1-B at Fig. 4-1; Tr. 3, at 460-464). The Company indicated that Losito Lane appears in Figure 4.1 of the 1998 C.A. Plans (Exhs. EFSB-2-1-A, B at Figs. 4-1).

additional comments received from the Fire Chief<sup>35</sup> (Tr. 3, at 463-464; Exh. EFSB-2-1-A).<sup>36</sup> Berkshire provided the Siting Board with copies of all three drafts of the C.A. Plan (Exhs. EFSB-2-1-A; EFSB-2-1-B; CCBA-RR-1).

The 1999 C.A. Plan defines an evacuation zone extending one-half mile from the perimeter fence surrounding the Facility<sup>37</sup> and designates shelter locations outside the evacuation zone for use in the event of an emergency at the Facility site (Exh. EFSB-2-1-A, at 1-1 to 1-2, Appendix F, att.). The Plan provides estimates of the population within the evacuation zone<sup>38</sup> and the number of vehicles required to facilitate an evacuation (id. at 3-1 to 3-2). The Plan also identifies a network of transportation corridors that would be used to accomplish the evacuation in the event of an emergency (id. at Fig. 4-1). According to the Plan, key transportation corridors away from the Berkshire site include Silver, South, and Suffield Streets and Shoemaker Lane (id.). The Company explained that the primary means of transportation for evacuation would be the privately-owned vehicles of the evacuees (Exh. EFSB-2-1-A at 5-1).

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<sup>35</sup> The 1999 C.A. Plan includes an updated map that identifies the closest roads to the site such as Moylan and Losito Lanes, Industrial and Doane Avenues, and Almgren Drive (id.).

<sup>36</sup> In a letter dated May 11, 1999, the Agawam Fire Chief, David A. Pisano, confirmed that Berkshire's first Community Action Plan was submitted in April, 1998, and indicated that Berkshire has continually worked on revisions/updates to the documents since it was first issued (Exh. CCBA-RR-2, att.). The Fire Chief further indicated that he had met with Frank Basile, General Manager of the Berkshire Power Project, on several occasions during the past year and reviewed the updated information in the plan documents and provided his comments to Berkshire (id.). Also, at the May 4, 1998 City Council meeting, the Fire Chief indicated that he provided copies to and discussed the plan with the Agawam Police Chief, and officials from Massachusetts Emergency Response Agency and Massachusetts DEP (Exh. BPD-4, at 34).

<sup>37</sup> The Company stated that the extent of the evacuation zone was prescribed by the Agawam Fire Department (Exh. EFSB-2-1-A, att., at i).

<sup>38</sup> The Company's identification of population included transient estimates – those within the work force and at the various gathering halls – as well as facilities like schools, hospitals, and nursing homes where special conditions need to be considered (Exh. EFSB-2-1-B at 3-2).

The 1999 C.A. Plan describes the results of six evacuation scenarios<sup>39</sup> modeled under two different population assumptions – one that reflects the current aggregate population within the emergency zone (“Current Population”), and the other that assumes a population twice that of the current aggregate population within the emergency zone (“Double Population”) (Exh. EFSB-2-1-A at 5-1, 6-1 to 6-2). Evacuation simulations were performed using the NETVAC computer model, which incorporates route selection, priority traffic flow at intersections without traffic signals present, and roadway and intersection capacity calculations (id. at 5-3 to 5-6). The 1999 C.A. Plan calls for the Agawam emergency response officer to implement the notification procedures for an area determined to require evacuation (id.). Permanent populations are assumed to begin evacuation within 30 to 60 minutes of the decision to evacuate, while all transient populations are assumed to begin evacuation within 30 to 45 minutes of the evacuation decision (id. at 5-2).

Given these assumptions, the 1999 C.A. Plan estimates that 90 percent evacuation of the Current Population would occur within 65 to 90 minutes of notification, depending on the time, season and weather conditions, with 100 percent evacuation within 2 hours, 5 minutes of notification (id. at 6-1 to 6-2). The time required to evacuate the Double Population increased slightly under most scenarios, with 90 percent evacuation estimated to occur within 75 to 130 minutes of notification, and 100 percent evacuation within 2 ½ hours (id.). The Company argued that the comparability of the evacuation times for the two population cases is an indication that the road network is adequate to handle the population affected under an evacuation scenario, even with significant increases in the various population groups (id. at 6-1).

The 1999 C.A. Plan identifies the intersections of Industrial and Shoemaker Lanes, and Golf Course Drive and Shoemaker Lane as likely queuing locations during an evacuation (id. at 6-2 to 6-3). The Plan recommends using traffic management/access restriction techniques at ten locations in order to facilitate the evacuation process (id. at 7-2, Table 7-1, Fig. 7-1).

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<sup>39</sup> The Company indicated that the six cases considered for a general evacuation scenario include: (1) Winter Weekday, fair conditions; (2) Winter Weekday, adverse conditions; (3) Winter Weeknight, fair conditions; (4) Winter Weeknight, adverse conditions; (5) Summer Weekend Day, fair conditions; and (6) Summer Weekend Day, adverse conditions (Exh. EFSB-2-1-A at 5-1).



The 1999 C.A. Plan separately addresses evacuation needs for populations at two special facilities, both located near the evacuation zone boundary -- the Country Estates nursing home on Suffield Road and a gymnastics training facility on Gold Street (id. at i, 3-2). The Plan calls for these facilities to receive priority notification of any evacuation, and provides for additional transportation arrangements including buses and ambulances (id. at 5-2).<sup>40</sup> The Plan indicates that two hours would be required for a full evacuation of the nursing home (id. at 5-3).

The Company indicated that, although Mr. DelNegro and other residents suggested installation of an emergency egress from the vicinity of the cul-de-sac on Losito Lane, the Fire Chief determined that such egress would not be necessary and that evacuation of all Losito Lane residents via the intersection with Shoemaker Lane would be preferable (Tr. 3, at 599).<sup>41</sup>

The Siting Board notes that, as discussed in Section III.C.1, above, the record indicates that an oil storage tank explosion is unlikely due to the low volatility of fuel oil, and that the Agawam Fire Department is well prepared to deal with any fire at the Facility site. Thus, the probability that an emergency involving the fuel oil storage tank will require the evacuation of Facility site seems remote. Nonetheless, the record indicates that Berkshire has developed several drafts of a Community Action Plan under the review auspices of the Agawam Fire Chief, with input from other state and local officials and the public. The most recent of these drafts, the 1999 C.A. Plan, contains information suitable for guiding and supporting the actions of Agawam's emergency response officer during a potential emergency at the Facility site requiring evacuation of the surrounding area, including estimated evacuation times under a variety of seasonal and weather scenarios and identification of intersections that may require traffic control during an evacuation. The 1999 C.A. Plan supplements emergency response plans already in

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<sup>40</sup> The 1999 C.A. Plan assumes that 75 percent of the 164 Country Estates residents would be evacuated by ambulances and 25 percent would be evacuated by bus (Exh. EFSB-2-1-A at 3-2). The population of 100 at the gymnastics facility would be evacuated by bus (id.).

<sup>41</sup> At the May 4, 1998 City Council meeting, the Fire Chief stated that when he reviewed the Plan, he did not think the acquisition of easements for a separate emergency egress from Losito Lane was reasonable, but he was not ruling it out (Exh. BPD-4, at 16).

place which address contingencies that may arise generally or at other target facility locations in Agawam.

The record indicates that the Country Estates nursing home, located on Suffield Avenue approximately one-half mile from the Facility, was included in the Company's C.A. Plan at the specific request of the City Council.<sup>42</sup> The Plan provides that 75 percent of Country Estate residents would be evacuated by ambulance, with bus transport being used for the remaining 25 percent of residents.<sup>43</sup> The Siting Board notes that the 1999 C.A. Plan appears to address evacuation planning issues for Country Estates residents that are not addressed in other Town emergency planning documents; this information should be reviewed and updated as appropriate based on input from Lecrenski/Five Star or other commenters to ensure its accuracy. Any such changes to emergency response plans in Agawam would be within the ongoing purview of the Agawam emergency response officer.

The Siting Board finds that the Company has established that the 1999 Community Action Plan is compatible with considerations of environmental protection, public health, and public safety. Further, the Siting Board finds that the record demonstrates no applicable area of non-conformance under local or state laws, ordinances, by-laws, rules, or regulations with respect to the 1999 Community Action Plan.

## 2. Traffic

The Agawam City Council stated that it denied the Company's application for a License for the oil storage tank, in part, because (1) tanker trucks would be traveling on Shoemaker Street, Silver Street and Garden Street during hours when children would be boarding and exiting

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<sup>42</sup> Lecrenski/Five Star claims that the Fire Chief identified Five Star to provide emergency bus transportation for elderly residents at Country Estates without prior consultation with Five Star, and questioned whether Five Star would have suitable equipment to safely transport elderly or disabled residents. However, the record indicates that the Fire Chief referenced Five Star in his comments only because he believed Five Star was among the transport companies under contract to provide emergency bus transport service, generally, in Agawam.

<sup>43</sup> The record also indicates that the Fire Chief believes that the Town may rely on step van services to evacuate populations that include disabled individuals.

school buses,<sup>44</sup> (2) Berkshire's plans included use of an "unauthorized" route through the neighboring Agawam Regional Industrial Park ("ARIP") for tanker deliveries,<sup>45</sup> (3) Berkshire presented inconsistent information as to the extent and frequency of required tanker deliveries, and (4) the area to be used for filling the oil storage tank is not large enough to handle two tankers at the same time (Tr. 1, at 188-190; Exh. ACC-1a-c; City Council Brief at 4).

The City Council and Lecrenski/Five Star argued that, given the location of Five Star Transportation, Inc. adjacent to the Facility site, tanker traffic on area roadways would pose a special concern for the school transport and other transport services provided by Five Star Transportation, Inc. (City Council Brief at 4; Lecrenski Brief at 5-6). In support, Ms. Lecrenski testified that the transport company maintains a fleet of over 100 buses at its Agawam location, including school buses and tour buses, and that approximately 70 regular and special needs school buses are dispatched from the location when schools are in session (*id.* at 347, 349). She added that service is provided for regular school bus routes in several communities surrounding Agawam, and for special needs routes in Agawam and other towns (Tr. 2, at 373-375).

The Company stated that the oil storage tank would be filled and an oil supply maintained through deliveries by tanker trucks (Exh. EFSB-1-5(b)). The Company indicated that tankers of varying capacities – 7500 gallons, 9000 gallons or 10,000 gallons – would deliver the oil; based on the smallest size of 7500 gallons, a maximum 67 tankers would be required to fill the tank (*id.*; Tr.1, at 66). The Company added that, once full, the oil storage tank would hold enough

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<sup>44</sup> Councilor Magovern testified that traffic issues concerning interference with school bus traffic was "his primary concern" (Tr. 1, at 176). The City Council noted that, although it had the option to limit the hours of tanker deliveries as a condition of a License for the tank, it had no trust that Berkshire would comply with such a condition inasmuch as Berkshire had failed to comply with construction-related conditions attached to its Zoning Board of Appeals Special Permit (Exh. HO-ACC-1b).

<sup>45</sup> Councilor Magovern indicated that the Company's plans to use a fuel oil delivery route which traverses the Agawam Regional Industrial Park had not been cleared with either the industrial park or the Fire Department (Tr. 1, at 188-190). He also expressed concern about the use of Garden Street, Shoemaker Lane, and a "right-angle turn" in the industrial park (*id.*).

fuel to allow the facility to operate continuously on oil for 1.5 days (Exh. EFSB-1-5(b)). The Company noted that, alternatively, tanker deliveries at a rate of 1.89 per hour, based on the smallest tanker size of 7500 gallons, would allow the Facility to operate continuously on oil without drawing down the oil storage tank (id.).

The Company stated that, consistent with its representations in the Facility approval proceeding, it expects that use of oil for operation of the Facility would typically not exceed 100 hours per year (id.). The Company indicated that continuous operation on oil over multiple days would be unlikely, and that a more likely scenario would be to operate the plant on oil for a few hours per day over the course of three days (id.; Tr. 2, at 383). The Company anticipated that, under this more likely scenario, it would not be necessary for tankers to continuously deliver oil to allow operation on oil for the affected period (Exh. EFSB-1-5(b)). With respect to filling the tank, the Company stated it intends to avoid uninterrupted filling, and instead would spread tanker arrivals over a period of days so as to minimize traffic concerns (id.).

The Company indicated that the route of tanker delivery in Agawam is the same as that identified in the Berkshire Decision, entering Agawam from Route 5 and continuing west along Route 57 to the Garden Street exit ramp, then across Garden Street and into the ARIP, along the planned Bowles Road Extension and Creighton Abrams Road within the ARIP, then along Shoemaker Lane and Moylan Lane (id.).<sup>46</sup> The Company further stated that it has committed to limiting fuel oil tanker deliveries to the hours of 9:00 a.m. to 2:00 p.m. Monday through Friday and 8:30 a.m. to 4:30 p.m. on Saturday, with no deliveries on Sundays and holidays (Tr. 2, at 225-226, 595). Additionally, consistent with the recommendation of the Agawam Fire Chief, the

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<sup>46</sup> The Company indicated that, in the event that the Bowles Road Extension is not completed by the time that the Facility begins operation, the tankers would still leave Route 57 via the Garden Street exit, but then would proceed east along Garden Street to the entrance to the ARIP at Creighton Abrams Road, then follow Creighton Abrams Road to its end at Shoemaker Lane, rejoining the original route (Exh. EFSB-1-5b).

Company stated that, upon arrival at the Facility, tankers delivering fuel oil or waiting to unload would remain in a staging area located entirely within the Facility property (Tr. 2, at 220).<sup>47</sup>

In the Facility approval proceeding, the Siting Board addressed traffic issues related to delivery of fuel oil to the Facility to allow backup operation on oil. Berkshire Decision. 4 DOMSB 221 at 317, 409, 413. The review included evidence as to the expected periods and overall extent of oil-fired operation, the expected frequencies and numbers of required tanker deliveries, and the expected scheduling and routing of tanker deliveries. Id.

The record in this proceeding again addresses all the traffic issues considered in the Facility approval proceeding with respect to delivery of fuel oil, and provides some additional information relevant to those traffic issues. The record indicates that, in most years, the Company expects the Facility to operate on oil for 100 hours or less – a fuel use level that would require 187 or fewer tanker deliveries over the year. The Company could unload fuel at a rate of two tanker loads per hour, but to minimize traffic concerns would limit fuel oil deliveries to five midday hours on weekdays and eight hours on Saturday – a maximum of 33 hours per week. The Company intends to avoid uninterrupted filling, and instead would spread tanker arrivals over a number of days when replenishing the tank. The Company also agreed that, after arrival, tankers would remain in a staging area within the facility property capable of accommodating a tanker unloading fuel oil and at least one additional tanker waiting to unload.

The tankers would travel to the Facility along the same route as that identified in the Berkshire Decision. Although the City Council objected to proposed routing in the ARIP area, as well as along Shoemaker Lane to the Facility site, the record provides little basis for cited concerns; in fact, it appears that routing tanker traffic through the ARIP would serve to minimize the length of travel on surrounding residential and commercial roads, including Garden Street, Poplar Street, Silver Street, and the upper part of Shoemaker Lane (Exh. BPD-11, App. C, Fig. 7.6.3 and 7.6.4).

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<sup>47</sup> Mr. Roberts testified that the time required to unload fuel, including maneuvering the tanker and handling the transfer apparatus, is approximately one-half hour per tanker (Tr. 2, at 240-241). The Company provided a diagram of the fuel oil transfer bay, indicating sufficient space for a tanker unloading fuel and one waiting tanker (Exh. BPD-10).

Based on the agreed limitation of weekday oil deliveries to the hours of 9 a.m. to 2 p.m., interference with regular bus route schedules in Agawam would be avoided. Although Five Star operates a fleet of over 100 school and tour buses based adjacent to the Facility site, the record indicates that Berkshire's expected use of fuel oil in most years would require limited volumes of daily tanker traffic, occurring during limited periods of the year. The record does not support either a conclusion that tanker traffic or tanker accidents would significantly interfere with the dispatch of Five Star buses, or a conclusion that Five Star would be less able to meet any its service standards as a result of tanker deliveries to the Facility.

As a condition of issuing a Certificate in this proceeding, the Siting Board will require that oil tanker deliveries to the Facility be limited to the hours of 9:00 a.m. to 2:00 p.m. Monday through Friday and 8:30 a.m. to 4:30 p.m. on Saturday, with no deliveries on Sunday and holidays, and that upon arrival at the Facility, tankers delivering fuel oil or waiting to unload shall remain in a staging area located entirely within the Facility property

The Siting Board finds that, subject to the above condition, traffic impacts relating to operation of the oil storage tank are compatible with considerations of environmental protection, public health, and public safety. Further, the Siting Board finds that the record does not demonstrate any applicable area of non-conformance under local or state laws, ordinances, by-laws, rules or regulations with respect to traffic impacts relating to operation of the oil storage tank and associated facilities.

#### D. Findings

Pursuant to G. L. c. 164, § 69O½, the Siting Board must make four findings to support the issuance of a Certificate of Environmental Impact and Public Interest for a generating facility. First, the Siting Board must determine that the issues raised by the agency, or agencies, whose permits or approvals are at issue in the Certificate proceeding have been addressed in a comprehensive manner by the Board, either in its prior approval of the generating facility or in the Certificate proceeding itself. The Siting Board also must address: (1) the compatibility of the generating facility with considerations of environmental protection, public health and public safety; (2) the extent to which construction and operation of the generating facility will fail to

conform with existing state or local laws, and, if the facility will not conform in some respect, the reasonableness of exempting it from conformance, consistent with implementation of the energy policies in the Siting statute; and (3) the public interest or convenience requiring construction and operation of the generating facility.

In this section, the Siting Board addresses each of these four statutory requirements, based on its analysis in Sections III.B and III.C, above.

1. Issues Raised by the Agency

In Section III.B, above, the Siting Board determined that the Agawam City Council raised seventeen issues in its October 20 Letter and its April 22 List. Of these, three pertain to the need for and impact of the combustion, rather than the storage, of fuel oil. The Siting Board determined that these three issues were outside the scope of this proceeding. In addition, the Siting Board determined that a fourth issue, pertaining to interpretation and enforcement of the ZBA Settlement Agreement, does not fall within the scope of the Board's statutory authority, and thus is not within the scope of this proceeding. The Siting Board divided the remaining issues into four categories: (1) the Company's construction of the fuel oil tank without governmental oversight; (2) the location of the fuel oil tank in relation to the Facility's natural gas supply and the abutting L.V. Heliport; (3) evacuation of the area surrounding the fuel oil tank in the event of emergency; (4) truck traffic generated by fuel oil deliveries. Each category of issues is addressed below.

a. Issues Outside the Scope of the Proceeding

With respect to the issues related to the combustion of fuel oil and to Condition Four of the ZBA Settlement Agreement, the Siting Board first reiterates its conclusion that G.L. c. 164 § 69K½ does not require it to address issues raised by an agency, but outside the Board's jurisdiction or the proper scope of a Certificate proceeding. We have determined, above, that issues relating to the combustion of fuel oil and to Condition Four of the Company's Special Permit are outside the scope of this proceeding. However, for the sake of completeness, we here review our discussion in the Berkshire Decision and the Berkshire Compliance Decision of these issues.

In the Berkshire Decision, the Siting Board discussed at length the air quality impacts of the Facility as proposed by Berkshire. Berkshire Decision, 4 DOMSB 221 at 360-374. The Board reviewed the air emissions of the Facility under two fuel scenarios – natural gas firing for 365 days per year at 100 percent load, and 720 hours’ firing of low-sulfur distillate oil and natural gas firing for the remainder of the year, all at 100 percent load. Id. at 361.<sup>48</sup> It also reviewed the costs and reliability of two fuel-transportation scenarios – a 335-day firm contract and a 365-day firm contract. After considering these costs and comparing them with the cost of acquiring additional NOx offsets for the hours of oil firing, and taking into account the Company’s representations that it needed the flexibility provided by an air permit that allowed up to 720 hours of oil burning in a year to compete economically as a merchant plant, the Siting Board concluded that the cost of the 365-day contract would outweigh the marginal air quality benefits of completely eliminating the need for oil firing. Id. at 440. However, the Siting Board indicated that it expected Berkshire to limit its use of oil to 100 hours or less in most years, and encouraged it to modify its fuel supply arrangements if necessary to ensure that this goal is achieved. Id. at 441. Overall, the Siting Board found that, with the implementation of certain conditions relating to CO<sub>2</sub> mitigation, water supply, visual impacts, traffic impacts, monitoring of fogging and icing episodes, and noise impacts, the environmental impacts of the proposed facility would be minimized consistent with minimizing cost. Id. at 444.

The Siting Board’s decision in the Facility approval proceeding addresses the issues raised by the City Council with respect to oil burning, including the frequency with which Berkshire can be expected to burn oil, the justification for allowing some level of back-up fuel use, and the levels of pollutants, including the components of “acid mist”, which may be emitted as the result of oil burning. The Siting Board therefore finds that it has comprehensively addressed these issues in its prior approval.

In the Berkshire Compliance Decision, the Siting Board considered whether implementation by Berkshire of Conditions Four and Twenty-Five of the ZBA Settlement Agreement would require the Board to alter in any substantive way its findings in the Berkshire

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<sup>48</sup> This review specifically encompassed emissions of SO<sub>2</sub>, a primary contributor to acid deposition. Berkshire Decision, 4 DOMSB 221, at 363-364.



Decision. Berkshire Compliance Decision at 10-12. In response to Berkshire's request that the Siting Board defer to the specific conditions of the ZBA Settlement Agreement concerning oil storage and deliveries to the Facility, the Siting Board found that changes to the project as approved in the Berkshire Decision would not alter in any substantive way either the assumptions or the conclusions reached in its analysis of the Facility's environmental impacts. Id. at 11. The Siting Board specifically found that the reduction in the amount of fuel to be stored on site should not materially affect the viability of the Facility or prevent it from providing a necessary energy supply for the Commonwealth. Id. at 11-12. Accordingly, the Siting Board found that the changes in on-site fuel storage capacity did not require further inquiry. Id. at 12.

The Siting Board therefore finds that it has comprehensively addressed Condition Four of the ZBA Settlement Agreement in its prior approval.

b. Issues Within the Scope of the Proceeding

Because it was issued well before the construction of the fuel oil tank, the Berkshire Decision did not address issues of state and local construction oversight. In this proceeding, the Siting Board has developed an extensive record on the design, construction, and testing of the fuel oil storage tank, on the failure of the Company to obtain a Section 37 Permit from the State Fire Marshal prior to construction, and on the steps which the Company is taking to rectify this error. The Siting Board has required the Company to obtain a Section 37 Permit from the State Fire Marshal as a condition of approval of the Certificate. Consequently, the Siting Board finds that it has comprehensively addressed issues related to state and local construction oversight in this proceeding.

In the Berkshire Decision, the Siting Board reviewed Berkshire's site selection process; however, this review focused on the selection of the overall site, rather than on the specific location of the fuel oil tank within the site. Berkshire Decision, 4 DOMSB 221 at 347-357. In this proceeding, the Siting Board has reviewed the concerns expressed by the City Council with regard to the proximity of the fuel oil tank to natural gas transportation facilities and to an abutting heliport, and has concluded that the location of the oil tank is compatible with public

health and safety considerations. Consequently, the Siting Board finds that it has comprehensively addressed issues related to oil tank location in this proceeding.

The Siting Board's review of safety issues in the Berkshire Decision focused on materials handling and storage, and fogging and icing; it did not directly address community evacuation plans. Id. at 175-180. In this proceeding, the Siting Board has extensively reviewed the most recent version of the Community Action Plan developed by Berkshire and reviewed by the Agawam Fire Chief, and has concluded that the Plan contains information suitable for guiding and supporting the actions of Agawam's emergency response officer, and that it is compatible with considerations of public safety, public health, and environmental protection. Consequently, the Siting Board finds that it has comprehensively addressed issues related to community evacuation plans in this proceeding.

With respect to traffic issues, the Siting Board notes that it addressed delivery of fuel oil in the traffic section of the Facility approval. Berkshire Decision, 4 DOMSB 221 at 409. In this proceeding, the Siting Board has developed an extensive record on the frequency, timing, and routes for fuel oil delivery, and has addressed issues related to protection of children boarding and exiting school buses, the extent and frequency of required tanker deliveries, and the ability of the tanker staging area to accommodate a truck waiting to be unloaded. In order to ensure the safety of school children, we have required Berkshire to limit fuel deliveries to the hours of 9:00 a.m. to 2:00 p.m. Monday through Friday and 8:30 a.m. to 4:30 p.m. on Saturday, with no deliveries on Sunday and holidays. Consequently, the Siting Board finds that it has comprehensively addressed issues related to truck traffic in this proceeding.

The Siting Board has considered the issues raised by the Agawam City Council, and has determined that each has been addressed comprehensively, either in the Berkshire Decision, the Berkshire Compliance Decision<sup>49</sup> or in this proceeding. Consequently, the Siting Board finds that the issues raised by the agency whose action is at issue in this proceeding have been addressed in a comprehensive manner by the Siting Board, either in its prior approval of the generating facility or in this Certificate proceeding.

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<sup>49</sup> The Siting Board notes that the Berkshire Compliance Decision is a final decision issued in the Facility approval proceeding.

2. Compatibility With Considerations of Environmental Protection, Public Health and Public Safety

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Pursuant to G. L. c. 164, § 69O½, the Siting Board must address the compatibility of the generating facility with considerations of environmental protection, public health and public safety in its decision on an Application for a Certificate.

In the Berkshire Decision, the Siting Board conducted a comprehensive review of Berkshire's proposal to construct a nominal net 252 MW natural gas-fired, combined-cycle power plant with an on-site fuel oil tank capable of storing a three days' supply of low-sulfur oil in Agawam, MA. Berkshire Decision, 4 DOMSB 221. The Siting Board comprehensively reviewed the air quality impacts, water-related impacts, visual impacts, noise impacts, traffic impacts, safety impacts, electric and magnetic field impacts and land use impacts of the generating facility as proposed, and concluded that, upon compliance with certain conditions, the generating facility and ancillary facilities at the primary site would be consistent with providing a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost. Id. at 209.

In the Berkshire Compliance Decision, the Siting Board reviewed changes in the back-up fuel storage capacity and deliveries to the Facility resulting from Berkshire's settlement with the Agawam Zoning Board of Appeals.<sup>50</sup> The Siting Board found that these changes, which called for a good faith effort to eliminate the need for on-site oil storage through reliance on natural gas, reductions in the capacity and height of the oil storage tank if it was retained, and restricted hours for oil delivery, would not alter in any substantive way the Siting Board's analysis of the proposed project's environmental impacts. Berkshire Compliance Decision at 11.

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<sup>50</sup> The Siting Board also reviewed Berkshire's compliance with certain conditions relating to the viability of the proposed generating facility, as well as changes in the Berkshire development team and design changes in the ABB GT-24 turbine. Berkshire Compliance Decision at 3-10.

In Section III.C, above, the Siting Board has reviewed issues related specifically to the environmental, public health and public safety implications of Berkshire's fuel oil tank, and has found that:

- Upon receipt of a Section 37 Permit from the State Fire Marshal, Berkshire will have established that the fuel oil storage tank has been designed and constructed in a manner that is compatible with considerations of environmental protection, public health, and public safety;
- The oil tank's location relative to gas supply and metering facilities is compatible with considerations of environmental protection, public health, and public safety;
- The oil tank's location relative to the L.V. Heliport is compatible with considerations of environmental protection, public health, and public safety;
- The Company's spill prevention and response strategy with respect to the oil storage tank and associated facilities is compatible with considerations of environmental protection, public health, and public safety;
- The 1999 Community Action Plan is compatible with considerations of environmental protection, public health, and public safety; and
- Subject to a condition restricting hours of fuel delivery, traffic impacts related to the operation of the oil storage tank are compatible with considerations of environmental protection, public health, and public safety.

Consequently, based on its findings in the Berkshire Decision, the Berkshire Compliance Decision, and Section III.C, above, the Siting Board finds that with the implementation of the conditions set forth in Sections III.C.1 and III.C.5, above, construction and operation of Berkshire's generating facility with an on-site fuel oil tank as described in this proceeding is compatible with considerations of environmental protection, public health and public safety.

### 3. Conformance with Existing State and Local Laws

G.L. c. 164, § 69O½ requires the Siting Board to include in its Final Decision a finding regarding "the extent to which construction and operation of the generating facility will fail to conform with existing state and local laws, ordinances, by-laws, rules, and regulations and [the] reasonableness of exemption thereunder, if any, consistent with the implementation of the energy policies contained in [G.L. c. 164]." G.L. c. 164, § 69O½(ii).

In Section III, above, the Siting Board has reviewed the record relative to non-conformance of the oil storage tank with existing state and local laws, ordinances by-laws, rules and regulations, and has found that, subject to a condition requiring the Company to obtain a Section 37 Permit from the State Fire Marshal, the record demonstrates no applicable area of non-conformance.

In its Application, Berkshire has requested "exemption" from one provision of an otherwise applicable State law. Specifically, Berkshire has requested that it be exempted from G.L. c. 148, § 13, to the extent that Section 13 requires the issuance of a "license to use the land" by a local licensing authority - in this case the Agawam City Council - prior to the storage of flammable or explosive materials on such land. G.L. c. 148, § 13, par. 1; G.L. c. 148, § 9. Berkshire has stated that, with the exception of this provision of G.L. c. 148, § 13, the Facility will conform with all applicable state and local laws (Exh. BPD-12, at 32).

The Siting Board acknowledges that the granting of Berkshire's Application in this proceeding would effectively exempt the Company from the need to obtain a Section 13 License from the relevant "local permitting authority", since it would allow the Company to store fuel oil on the Facility site notwithstanding the Council's denial of Berkshire's Section 13 License application. Thus, the Siting Board finds that, if Berkshire's Application is granted, the Company will be in non-conformance with G.L. c. 148, § 13. However, this result is consistent with, and is necessary to the full implementation of, the Siting Board's findings and decision in the Facility approval proceeding. In that proceeding, the Siting Board approved Berkshire's proposed fuel strategy for the Facility as a whole, and that strategy included both the use of and the on-site storage of fuel oil. Berkshire Decision, 4 DOMSB 221, at 237. The Siting Board found the Facility, with its proposed dual fuel strategy, would provide a reliable source of energy, and would minimize environmental impacts consistent with minimizing cost. Berkshire Decision, 4

DOMSB 221, at 440-441. In the absence of a Section 13 License, or a Certificate which serves as such a License, the Company cannot implement the fuel strategy as reviewed and approved by the Siting Board in the Berkshire Decision. The Siting Board therefore finds that granting the Company an exemption from G.L. c. 148, § 13 would be reasonable, and would be consistent with the Siting Board's implementation of the energy policies of G.L. c. 164 so as to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost.

Accordingly, based on its findings in the Berkshire Decision, the Berkshire Compliance Decision, and Section III.C, above, the Siting Board finds that construction and operation of Berkshire's generating facility with an on-site fuel oil tank as described in this proceeding, including implementation of the condition set forth in Section III.C.1, above, will fail to conform with G.L. c. 148, § 13, to the extent that G.L. c. 148, § 13 requires Berkshire to obtain a Section 13 License from a local licensing authority, but that exempting the generating facility from such conformance is reasonable and consistent with implementation of the energy policies of G.L. c. 164.

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#### 4. Public Interest or Convenience

Pursuant to G. L. c. 164, § 69O½, the Siting Board must address the public interest or convenience requiring construction and operation of the generating facility in its decision on an application for a Certificate.

The need for the Berkshire Facility was clearly established in the Berkshire Decision. In that decision, the Siting Board found that the record in its proceeding demonstrated “a showing of a need for 252 MW or more of additional energy resources for the Commonwealth for reliability purposes beginning in 1999 and beyond, and a likely need for 252 MW or more of additional energy resources in the region beginning in 1999 and beyond.” Berkshire Decision, 4 DOMSB 221, at 304. Accordingly, the Siting Board found that Berkshire’s “proposed project is needed to provide a necessary energy supply for the Commonwealth beginning in 1999 and beyond.” Id. In addition, after conducting an extensive review of alternative generating technologies, alternative sites, and the environmental impacts of the Facility, the Siting Board

found that, upon compliance with specific conditions set forth in its decision, the construction and operation of the Facility would be consistent with providing a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost, in keeping with the Siting Board's statutory obligations under G.L. c. 164, § 69H. Id. at 446.

In this proceeding, intervenors have raised a number of concerns relating specifically to the oil storage tank needed to contain back-up fuel for the Berkshire Facility. These issues include the design and construction of the oil tank, the tank's location, adequacy of evacuation plans, and the traffic and public safety implications of oil deliveries. In Section III.C, above, the Siting Board has reviewed each of these concerns, and has imposed conditions, where necessary, to protect public safety, public health, and the environment. In Section III.B.2, above, the Siting Board has found that construction and operation of Berkshire's nominal net 252 MW natural gas-fired, combined-cycle power plant with an on-site fuel oil storage tank as described in this proceeding is compatible with considerations of environmental protection, public health and public safety.

Accordingly, after reviewing the need for the generating facility and its compatibility with considerations of environmental protection, public health and public safety, the Siting Board finds that the public interest requires the construction and operation of Berkshire's generating facility with an on-site fuel oil tank as described in this proceeding.

#### IV. DECISION

Pursuant to the Siting Board's enabling statute, the Siting Board shall issue a Certificate of Environmental Impact and Public Interest with respect to a generating facility only if the Board determines that the issues raised by the state or local agencies whose actions are the subject of the petitioner's Application have been comprehensively addressed, either in the Siting Board's approval of the facility under G.L. c. 164, § 69J, or in the Siting Board's review of the facility under G.L. c. 164, § 69K½. G.L. c. 164, § 69O½. In addition, the Siting Board's decision to issue a Certificate must include findings with respect to: (1) the compatibility of the generating facility with considerations of environmental protection, public health, and public safety; (2) the extent to which the generating facility will not conform to existing state and local

laws, and the reasonableness of exempting it from conformance, consistent with implementation of the energy policies of G.L. c. 164; and (3) the public interest or convenience requiring construction and operation of the generating facility. G.L. c. 164, § 69O½.

In Section III.D.1, above, the Siting Board has found that the issues raised by the agency whose actions are at issue in this proceeding have been addressed in a comprehensive manner by the Siting Board, either in its prior approval of Berkshire's generating facility or in this Certificate proceeding.

In Section III.D.2, above, the Siting Board has found that with implementation of the conditions set forth in Section III.C, above, and III.C.5, above, construction and operation of Berkshire's generating facility with an on-site fuel oil tank as described in this proceeding is compatible with considerations of environmental protection, public health and public safety.

In Section III.D.3, above, the Siting Board has found that with implementation of the condition set forth in Section III.C.1, above, construction and operation of Berkshire's generating facility with an on-site fuel oil tank as described in this proceeding will fail to conform only with the requirement of G.L. c. 148, § 13 that the Company obtain a fuel oil storage license from the local permitting authority, rather than from the Siting Board, and that exempting the generating facility from such conformance is reasonable and consistent with implementation of the energy policies of G.L. c. 164.

In Section III.D.4, above, the Siting Board has found that the public interest requires the construction and operation of Berkshire's generating facility with an on-site fuel oil storage tank as described in this proceeding.

Accordingly, subject to Conditions A and B, set forth below, the Siting Board APPROVES the Company's Application for a Certificate of Environmental Impact and Public Necessity with respect to the issuance of a License pursuant to G.L. c. 148, § 13 for the on-site storage of fuel oil at the Company's electric generating facility in Agawam, Massachusetts. Accordingly, the Siting Board also ISSUES a Certificate of Environmental Impact and Public Interest and G.L. c. 148, § 13 License, a copy of which is attached hereto as Attachment A and is part of the Siting Board's Final decision in this proceeding.



Condition A: In order to establish that the Facility, including its fuel oil storage tank, is compatible with considerations of public safety, the Siting Board directs Berkshire to obtain a Permit from the Office of the State Fire Marshal in accordance with G.L. c. 148, § 37.

Condition B: In order to establish that the Facility, including its fuel oil storage tank, is compatible with considerations of public safety, the Siting Board directs Berkshire to limit oil tanker deliveries to the Facility as follows: (1) deliveries shall be limited to the hours of 9:00 a.m. to 2:00 p.m. Monday through Friday and 8:30 a.m. to 4:30 p.m. on Saturday, with no deliveries on Sundays or holidays; and (2) upon arrival at the Facility, tankers delivering fuel oil or waiting to unload shall remain in a staging area located entirely within the Facility property.

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M. Kathryn Sedor  
Hearing Officer

Dated this 3rd day of September, 1999