STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

Petition of Plainfield Renewable Energy LLC for a Declaratory Ruling that No Certificate of Environmental Compatibility and Public Need Is Required for the Construction, Maintenance, and Operation of a 37.5 MW Wood Biomass Staged Gasification Generating Project in Plainfield, Connecticut	)	Petition 784MR
	)	September 15, 2008

PLAINFIELD RENEWABLE ENERGY LLC's POST-HEARING BRIEF RESPONDING TO THE FRIENDS OF THE QUINEBAUG RIVER'S MOTION TO REOPEN

Plainfield Renewable Energy LLC ("PRE") hereby submits this post-hearing brief addressing certain issues raised during the Connecticut Siting Council's ("Council") August 14, 2008 preliminary hearing on the Friends of the Quinebaug River's ("FQR") motion to reopen the Council's original June 7, 2007 declaratory ruling on Petition 784 that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance, and operation of a 37.5 megawatt wood biomass fueled gasification power plant (the "Project") in Plainfield, Connecticut.

This post-hearing brief (1) responds to FQR's allegations that there were "lapses in procedure" in PRE's petition and inadequate notice of the change in the location of the intake/outfall structure and pump house; (2) summarizes the procedural posture of the August 14, 2008 preliminary hearing, and the Council's definition of changed conditions that would require further proceedings on FQR's motion to reopen; (3) assesses the relevance and appropriate weight that the Council should give to the documents FQR entered into evidence; (4) demonstrates that FQR's five enumerated "changed conditions" do not meet the Council's definition of "changed conditions" that would require further proceedings on FQR's motion to reopen; and (5) briefly explains why the grant from the Connecticut Clean Energy Fund

("CCEF") Project 100 to PRE does not trigger the environmental assessment requirements of the Connecticut Environmental Policy Act, Conn. Gen. Stat. § 22a-1 *et seq.*, and its corresponding regulations, Conn. Agencies Regs. § 22a-1a-1 *et seq.*

I. PRE's RESPONSE TO FQR'S ALLEGATIONS OF "LAPSES IN PROCEDURE" AND INADEQUATE NOTICE OF THE CHANGE IN LOCATION OF THE INTAKE/OUTFALL STRUCTURE AND PUMP HOUSE

In its May 20, 2008 motion to reopen Petition 784, and at the August 14, 2008 public hearing, FQR generally alleged that there were "lapses in procedure" in the original November 16, 2006 public hearing and the Council's June 7, 2007 decision on PRE's petition. FQR specifically claimed that the public notice regarding the change in location of the water intake/outfall structure and pump house to the Man-Burch property was inadequate.

The alleged lack of notice regarding the change in the location of the water intake/outfall structure and pump house was extensively covered in PRE's Response to FQR's Motion to Reopen dated June 19, 2008, and in its Responses to Petition 784MR Interrogatories CSC-3, CSC-4 and FQR-5, which are incorporated here by reference.[1] In sum, and as explained at the public hearing on August 14, 2008, the then-First Selectman of the Town of Canterbury, Neil A. Dupont, was fully apprised of the change in location of the intake/outfall structure and pump house to its current location on the Man-Burch Property in early November 2006. Moreover, since November 3, 2006,[2] the Man-Burch Property has been the focus of all of the Council's proceedings – including the November 16, 2006 public hearing and site visit. As PRE made perfectly clear at the August 14, 2008 public hearing, there was nothing unusual about this change in location to the Man-Burch Property; it was a simple and necessary business decision,

[1] As explained in Parts II and IV of this post-hearing brief, and in PRE's General Objection dated August 14, 2008, allegations of inadequate public notice are not proper grounds for reopening a prior proceeding before the Council.
[2] On this date, PRE notified the Council of the change in location and provided new site maps in response to Council Interrogatory #5, dated October 16, 2006.

because the first property PRE considered was encumbered by tax liens which prevented PRE from consummating the transaction. *See* Tr. 8/14/08 at 124-125.

Contrary to FQR's unsupported assertions of "lapses in procedure," the Council and PRE followed a process in reaching its decision in this case that far exceeded the statutory and regulatory due process requirements for petitions for declaratory rulings.[3] As explained at the public hearing on August 14, 2008, there are no statutory or regulatory notice requirements for these types of petitions. *See* Tr. 8/14/08 at 29-30; 145-146. Nonetheless, in order to facilitate an open and transparent process, PRE fully complied with the notice requirements for a full application for a Certificate of Environmental Compatibility and Public Need set forth under the Public Utilities Environmental Standards Act, Conn. Gen. Stat. §§ 16-50g *et seq*. *See also* Cover Letter accompanying PRE's petition, dated August 14, 2006. PRE also believes it complied with the specific notice requirements in the Council's November 1, 2006 Memorandum outlining the format for the public hearing scheduled for November 16, 2006, and was never told otherwise by the Council. If the Council had asked PRE to provide notice to all property owners abutting the pipeline route and the intake/outfall structure and pump house in November 2006 or take other steps to notice the Council's hearing, it would have done so without hesitation, as PRE did for the August 14, 2008 public hearing. *See* PRE Exhibit 3 (Affidavit of Daniel Donovan Regarding Notice for August 14, 2008 hearing).[4]

As PRE explained in its closing statement in the August 14, 2008 public hearing, even though there were no mandatory rules for PRE to follow, PRE made an extensive effort to notify

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[3] PRE's Project was presented to the Council as a petition for a declaratory ruling rather than a Certificate of Environmental Compatibility and Public Need under Conn. Gen. Stat § 16-50k(a); therefore, the notice and public hearing requirements set forth in Conn. Gen. Stat. §§ 16-50*l* through 16-50p that apply to Certificate proceedings did not apply to this petition.

[4] PRE notes that despite its extensive efforts to provide notice of the August 14, 2008 public hearing to all abutting landowners near the power plant facility, along the pipeline route, and near the water intake/outfall structure and pump house, none of these landowners attended the August 14, 2008 public hearing, or even sent a letter to the Council or PRE expressing an opinion about the Project.

the surrounding community about the Project and the November 16, 2006 public hearing. *See* Tr. 8/14/08 at 145; *see also* Affidavit of Daniel Donovan Regarding Notice of Filing of Petition and Hearing, dated November 9, 2006; Council Findings of Fact on Petition No. 784, dated June 7, 2007 at ¶¶ 5-7. This public hearing was well-attended by members of the public and elected officials, who voiced their opinions for and against the Project. *See* Tr. 8/14/08 at 145. But, at no time before January 2008 did FQR or any of its members participate in the Council's proceedings on the Project, or even express an interest in doing so. This is particularly noteworthy because the testimony from the August 14, 2008 hearing suggests that some members of FQR – including its leaders, Robert Noiseux and Steven Orlomoski – may have actually seen the notice published in *The Norwich Bulletin* before the November 16, 2006 public hearing.[5] Even if they did not know about the November 16, 2006 hearing before it occurred, Noiseux admitted that he and other members of FQR knew about the public hearing and the Project "somewhere in that [November 2006] time period." Tr. 8/14/08 at 50. But neither FQR nor any its members attended the November 16, 2006 public hearing, raised any issues before the Council, or sought intervenor status in the eight months from November 2006 until the Council's June 7, 2007 decision on the Petition.

The Council's June 7, 2007 decision on PRE's Petition was based on a full and complete record that was developed during an eleven month long proceeding and through an extensive

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[5] In response to a question from Chairman Caruso on whether Mr. Noiseux was aware of the legal notice for the November 16, 2006 public hearing in Plainfield before the hearing, Mr. Noiseux testified:

> That I couldn't say. That I couldn't -- because your hearing in Plainfield -- correct me wrong -- if I'm wrong -- but that was at the end of '06. And we're now at the end of '08. So, I'll say somewhere in that time period. But whether it was just before or just after, I really don't know.

Tr. 8/14/08 at 50. *See also* Letter of Alton L. Orlomoski, FQR Exhibit 15 ("This whole proposal was kept from the taxpayers eyes and only surfaced when ***an alert citizen saw a legal notice in the 'Norwich Bulletin'*** hidden in the back pages.") (emphasis added); Testimony of Alton L. Orlomoski, Tr. 8/14/08 at 48 ("Well, I didn't say I saw [the legal notice in the Norwich Bulletin], but I know it was in there. And that was the only indication up until then that we even knew that there was -- that this plant was even being proposed. . . . I believe it was my son Steven [Orlomoski who told me about the legal notice.]").

discovery and hearing process. But, as PRE noted in the August 14, 2008 hearing, this was only the first step in a lengthy (and still ongoing) process before the Council. *See* Tr. 8/14/08 at 129, 143-144. PRE is following the standard procedure and orderly progression that all those who have previously come before the Council have followed: (1) seeking approval from the Council for the Project; (2) seeking Connecticut Department of Environmental Protection ("DEP") and other state and federal agency approval and permits for the Project (which does not usually begin in earnest until after the Council approves the Project); (3) returning to the Council with a Development and Management Plan ("D&M Plan") for the Project after receiving all necessary DEP permits and approvals; and (4) commencing construction of the Project, keeping the Council, DEP, and other agencies apprised, as appropriate, of any changes or issues that arise during construction.[6]

In fact, the Council's June 7, 2007 Opinion specifically recognized that the DEP was going to further investigate the water intake/outfall structure and pump house through its permitting process, and that the Council would continue to monitor and evaluate the environmental performance of the Project into the future:

> A more complete study of environmental effects [of using cooling water from the Quinebaug River], including habitat impacts and water quality analysis, is currently being conducted by the DEP as part of the state mandated water diversion permit process. . . .
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> * * *
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> If necessary, the Council will address any DEP recommendations regarding construction impacts to [a state species of special concern] during the [D&M] Plan approval process. . . .

[6] PRE is currently engaged in the comprehensive permit approval process with the DEP, which has been carefully scrutinizing the Project's water intake, water discharge, air emissions, and solid waste issues, and has already issued draft permits for these activities. The Council has taken judicial notice of these draft permits. *See* Tr. 8/14/08 at 75 (taking administrative notice of, *inter alia*, PRE's draft Permit to Construct and Operate (solid waste handling permit), New Source Review Permit (air emission permit), NPDES and State Permit (wastewater discharge permits), and Water Diversion Permit). FQR has been an active participant in these DEP proceedings, and has made their opinions and concerns about the Project known.

* * *

> Due to concern for potential detrimental environmental effects during construction activities, the Council will require periodic inspection of the site by an independent environmental inspector to ensure appropriate environmental safeguards are being adhered to.

Council Opinion on Petition No. 784, dated June 7, 2007 at 2-3. *See also* Council Decision and Order on Petition No. 784, dated June 7, 2007 at ¶ 5 ("The Petitioner shall retain an independent environmental consultant, subject to Council approval, to monitor and report on construction impacts to environmental resources during site development including site clearing and grading for plant construction and the installation of water intake structures and associated pipeline.").

Though PRE is near the end of its process with the DEP, FQR's motion to reopen the Petition seeks to send PRE all the way back to square one – casting doubt on all the time, energy, and thought the Council, the DEP, the Army Corps of Engineers and other state and federal agencies have invested in the Project. FQR's attempts to circumvent and undermine what has been an orderly, careful, thoughtful, well-established process based on speculative and unsubstantiated claims of changed conditions should not be tolerated. Otherwise, granting FQR's motion to reopen PRE's Petition under these circumstances would set a dangerous precedent, and thrust uncertainty into current and future dockets before the Council.

II. PROCEDURAL POSTURE AND THE COUNCIL'S DEFINITION OF CHANGED CONDITIONS THAT WOULD REQUIRE FURTHER PROCEEDINGS

PRE incorporates by reference its General Objection dated August 14, 2008, which summarized the procedural posture of the August 14, 2008 preliminary hearing, and argued that FQR's proffered evidence was irrelevant to changed conditions that would require further proceedings, as these terms have been defined by the Council and courts.

In sum, the Council's notice of this public hearing could not have been more clear that the hearing on August 14, 2008 was "held pursuant to Connecticut General Statutes § 4-181a(b) to ***hear evidence as to whether conditions have changed such that the Council should conduct further proceedings*** to examine whether its original decision should be reversed or modified." Notice of Public Hearing on Petition 784MR, dated July 14, 2008 (emphasis added). Thus, this was not a hearing on the merits of the Council's declaratory ruling on Petition 784; rather, this was a hearing to assist the Council in ascertaining "whether there [is] sufficient reason to entertain reconsideration of its prior decision." *Town of Fairfield v. Connecticut Siting Council*, 238 Conn. 361, 370 (1996). This is FQR's burden, and it is a heavy burden indeed, because it is well established that courts and agencies favor finality in judicial decisions. *See Sielman v. Connecticut Siting Council*, No. CV020517272S, 2004 WL 203046 at *5 (Conn. Super. Ct. Jan. 15, 2004); *see also Meinket v. Levinson*, 193 Conn. 110, 113 (1984).

According to the Council's prior decisions in the dockets underlying *Town of Fairfield* and *Sielman, supra*,[7] evidence of "changed conditions" that might justify reconsideration of a prior decision must be new information or facts that (1) ***were not available*** at the time of the original hearing and decision on Petition 784; (2) ***do not concern issues of public notice***; (3) ***do not relate to an issue already covered*** in the underlying decision on Petition 784; and (4) are so ***material*** that it would ***compel*** reopening the original case. Analogous – and similarly stringent – standards are found in the context of reopening Workers' Compensation settlements, and in the context of reopening judgments issued by courts. *See, e.g., Tutsky v. YMCA of Greenwich*, 28 Conn. App. 536, 541-43 (1992) (describing standards for reopening Workers' Compensation settlements); *Chapman Lumber, Inc. v. Tager*, 288 Conn. 69, 106-07 (2008) (describing

[7] Copies of the decisions on the motions to reopen Council dockets No. 141 (*Town of Fairfield*) and No. 198 (*Sielman*) were attached as Exhibits A and B to PRE's General Objection dated August 14, 2008.

standards for reopening judgments to present new evidence). In all of these contexts, reopening is a disfavored, drastic remedy. As will be discussed below, none of FQR's alleged changed conditions meets the Council's stringent standard to justify reconsideration of the Council's prior decision in Petition 784.

III. FQR'S EVIDENCE IS IRRELEVANT TO CHANGED CONDITIONS AND DESERVES LITTLE OR NO WEIGHT

At the outset of its case, FQR presented Exhibits 1 through 31 for admission into evidence. *See* Tr. 8/14/08 at 24. PRE objected to these Exhibits on two primary grounds: (1) authentication or foundation (i.e., what is the document offered, and for what purpose is it offered); and (2) relevance to changed conditions. *See* Tr. 8/14/08 at 24, 31, 33. *See also* PRE's General Objection dated August 14, 2008.[8] For the reasons stated below, the vast majority of the evidence proffered by PRE is irrelevant to the sole issue before the Council – whether there are changed conditions that would justify reopening the Council's earlier decision on the Petition – and thus this evidence deserves little, if any, weight.

FQR's evidence (photos, maps, land records, correspondence, e-mails, and letters from members of FQR which the Council has deemed pre-filed testimony), can be grouped into nine general categories:

(1) evidence of historic uses of properties in the general vicinity of the Man-Burch property for waste disposal (FQR Exhibits 16-26, 28);

(2) evidence of recreational uses of the Quinebaug River (FQR Exhibits 12, 15-16, 19, 28-31);

(3) evidence of public attitudes toward the project (FQR Exhibits 11, 13-14, 16);

[8] After going through each FQR exhibit to address its authentication or foundation problems, *see* Tr. 8/14/08 at 34-42, PRE reiterated its standing objection to FQR's evidence because of its irrelevance to changed conditions that would necessitate reopening the Council's decision. *See* Tr. 8/14/08 at 42-43. The Council nonetheless admitted all of FQR's exhibits into evidence subject to PRE's objections, and with the caveat that the Council would ascribe more or less weight to FQR's evidence depending on its relevance.

(4) evidence of impairment of the Quinebaug River for *e-coli* bacteria (FQR Exhibits 27 and 29);

(5) evidence of the zoning classification of the Man-Burch property (FQR Exhibits 2-3);

(6) evidence regarding the construction of the water pipeline (FQR Exhibits 4-7, 15);

(7) evidence of John A. Tetreault's (the Chairman of the Town of Canterbury Inland Wetlands & Watercourses Commission) support of reopening the Petition (FQR Exhibits 8-10);

(8) evidence related to the use of air cooling instead of water cooling at the power plant (FQR Exhibits 12, 15-16); and

(9) evidence related to the emissions and releases from the power plant (FQR Exhibits 16, 19).[9]

In response to a direct question from Vice-Chairman Tait, FQR specifically limited its allegations of changed conditions to four events and/or issues: (1) the historic contamination of the Yaworski properties in the general vicinity of the Man-Burch property; (2) improved recreational uses of the Quinebaug River; (3) a "deteriorated relationship between the developer and the community"; and (4) the DEP's designation of the section of the Quinebaug River near the Man-Burch Property as impaired. *See* Tr. 8/14/08 at 52-53. (In its closing, FQR added a fifth issue: the allegedly inadequate notice of the change in the location of the water intake/outfall structure and pump house. *See* Tr. 8/14/08 at 140.) Therefore, by FQR's own testimony and admission, only categories (1) through (4) in the proceeding list are potentially relevant to the question of changed conditions. Categories (5) through (9) are superfluous, and should be given no weight at all.[10]

[9] PRE has no objection to FQR Exhibit 1 (maps showing the location of the intake/outfall structure and pipeline route).

[10] Even if FQR had not essentially conceded that categories (5) through (9) above were irrelevant to changed conditions, this evidence would still deserve little weight. Specifically (and by category): (5) The zoning of the Man-Burch property (FQR Exhibits 2-3) has not changed at any point during these proceedings, and the Council has exclusive jurisdiction over the location and type of facilities such as the Project and is empowered to decide that local concerns, such as zoning regulations, must give way. *See* Conn. Gen. Stat. §§ 16-50x(a) & (d); *see also Preston v. Connecticut Siting Council*, 20 Conn. App. 474, 485-86 (1990), *cert. denied*, 215 Conn. 805 (1990).

The first four categories of evidence – the only evidence potentially relevant to changed conditions by FQR's own concession at the August 14, 2008 public hearing – are also not relevant and deserve little weight because they do not fit the Council's definition of changed conditions, as discussed in Part IV, below.

IV. FQR'S FIVE PURPORTED CHANGED CONDITIONS DO NOT MEET THE COUNCIL'S DEFINITION OF CHANGED CONDITIONS THAT WOULD REQUIRE FURTHER PROCEEDINGS

As stated above, FQR claims there are five changed conditions since the Council's June 7, 2007 decision on Petition 784 that would justify further proceedings on its motion to reopen: (1) historic pollution in the vicinity of the Man-Burch property; (2) the draft designation of the Quinebaug River as impaired for *e-coli* bacteria; (3) increased recreational use of the Quinebaug River; (4) deteriorating relationships between the Project and the community; and (5) inadequate notice of the change of location of the intake/outfall structure and pump house to the Man-Burch property. In support of their claimed changed conditions, FQR offers:

- A collection of letters from its members with anecdotes about, *inter alia*, dropping off waste at the nearby Yaworski landfill sites, recreational use of the Quinebaug River, and personal opinions of the Project (FQR Exhibits 12-20, 25, 28-30);
- Photographs to show "that there are things in the library" and that families use the Quinebaug River, Tr. 8/14/08 at 40; 42 (FQR Exhibits 24 and 31);
- Unintelligible Town of Canterbury land records from the 1950s and 1960s which may or may not concern some of the properties in the vicinity of the Man-Burch property (FQR Exhibit 26);

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(6) The ongoing negotiations and disputes between PRE and the Town of Canterbury over the construction of the water pipeline (FQR Exhibits 4-7, 15) eventually will be resolved, and are irrelevant to changed conditions regarding the potential environmental impacts of the Project. (7) Mr. Tetreault's opinions on FQR's motion to reopen (FQR Exhibits 8-10) are not binding on the Council, and are contrary to the Council's own precedent on what constitutes evidence of changed conditions that would justify reopening a prior decision of the Council. (8) PRE's decision to use water cooling instead of air cooling for the power plant (FQR Exhibits 12, 15-16) was discussed as part of the proceedings on the original Petition, and the technical and business reasons for this choice have not changed since the Council's original decision. (9) Emissions and releases from the power plant in Plainfield (FQR Exhibits 16, 19) were thoroughly discussed as part of the proceedings on the original Petition, are currently being evaluated by the DEP, and these issues have not changed since the Council's original decision.

- A Canterbury Planning and Zoning document from 1977 indicating that Yaworski, Inc. operated waste disposal and mining operations on properties in the Town of Canterbury other than the Man-Burch property (FQR Exhibit 21);
- Excerpts from an April 2007 survey of the residents of the Town of Canterbury regarding, *inter alia*, their attitudes on issues facing the Town (FQR Exhibit 11); and
- A memorandum of understanding signed between Aspinook, LLC and Man-Burch LLC (but not PRE) regarding the heavy truck traffic and historic contamination in the vicinity of the Man-Burch property, entered into as part of the sale of the property to Man-Burch LLC (FQR Exhibit 23).

PRE respectfully submits that much of this evidence is unsubstantiated, uncorroborated, unreliable, and unverifiable, and deserves little weight. But, even if the proffered evidence were of a type and quality worthy of some weight, FQR's claimed five changed conditions do not meet the Council's stringent definition of changed conditions that would justify further proceedings, as summarized below:

(1) Historic Pollution. Historic pollution in the general vicinity of – but not the actual location of – the intake/outfall structure and pump house on the Man-Burch property cannot constitute a changed condition since the Council's June 7, 2007 decision, because, by definition, this ***historic*** pollution pre-existed the Council's deliberations, and thus was known or knowable at the time through due diligence. In fact, PRE, its environmental consultants, the Towns of Canterbury and Plainfield, the DEP, and the Council were all generally aware of the historic contamination from the Yaworski Landfill, Yaworski Lagoon, and other Superfund sites throughout the Project area, in the vicinity of the power plant and the water intake/outfall and pump house, and along the route of the pipeline.[11] *See* Responses to Petition 784MR Interrogatories CSC-7, FQR-1, FQR-2, FQR-4, FQR-6, FQR-12, FQR-17 and FQR-18. Furthermore, a changed condition must be so material that it would have likely changed the

[11] In fact, normally PRE's efforts to put a Brownfield site back into productive use would be applauded and encouraged by the Council. *See* Tr. 8/14/08 at 147.

outcome of the original proceeding. This historic pollution is in the general vicinity of the Man-Burch property (located 0.5 to 1.25 miles upstream along the course of the river), but there is no evidence whatsoever that the Man-Burch property is itself contaminated, is a Superfund site, or was ever used by industry. *See* Responses to Petition 784MR Interrogatories CSC-7, FQR-1, FQR-2, FQR-4, FQR-12, FQR-16, FQR-17 and FQR-18. Most importantly, the DEP Remediation Division has investigated the Project and its water diversion plan and concluded that the historic pollution from the Yaworski Landfill and Yaworski Lagoon are of no concern. *See* Responses to Petition 784MR Interrogatories CSC-7 and FQR-2.

(2) Impairment for *e-coli*. Putting aside the fact that the DEP's designation of the relevant portion of the Quinebaug River as impaired for *e-coli* bacteria is not yet final, *see* Tr. 8/14/08 at 54-55, the DEP's concerns about *e-coli* bacteria in the Quinebaug River could hardly be considered a changed condition so material that it would have likely changed the outcome of the original proceeding. Despite FQR's attempt to have the impaired designation alone justify reopening without further inquiry into the reasons for the DEP's actions, the Council should recognize that power plants do not generate *e-coli* bacteria. *See* Tr. 8/14/08 at 63-64. The Council should also recognize that the DEP is aware of the potential *e-coli* problems in the Quinebaug River resulting from "unidentified" excess nutrients, such as waterfowl feces. Through the wastewater permitting process, PRE has agreed not to use certain phosphorous-based additives to the cooling water.[12] In addition, standard water processing for power plant cooling operations includes treating the incoming water with chlorine before discharge back to the river.[13] *See* Tr. 8/14/08 at 114-115; 120. Thus, the fact that the Quinebaug River has a draft designation as impaired for *e-coli* bacteria is largely irrelevant to the Council, and certainly does

[12] Phosphorus is a nutrient that might encourage *e-coli* growth. *See* Tr. 8/14/08 at 119.
[13] Treatment with chlorine typically eliminates *e-coli*. *See* Tr. 8/14/08 at 115.

not constitute a changed condition that would justify further proceedings on the FQR motion to reopen.[14] *See also* Responses to Petition 784MR Interrogatories FQR-13 and FQR-14.

(3) Recreational use of the river. FQR claims that there has been an increase in recreational use of the river, based on evidence of a "newly constructed public boat launch" downstream from the intake/outfall structure and pump house, *see* FQR Motion to Reopen dated May, 20, 2008, at ¶ 6(d), and anecdotal statements by members of FQR that they have seen more people fishing on the Quinebaug River. But recreational use of the Quinebaug River is not a new phenomenon, and any minor incremental difference in recreational use could hardly be considered a changed condition so material that it would have likely changed the outcome of the original proceeding. The characterization of the boat launch as "new" is factually incorrect; this pre-existing boat launch merely has been upgraded by the addition of gravel. *See* Tr. 8/14/08 at 56; 106. FQR also admitted that recreational use of the river existed – and in fact was increasing – before the original November 16, 2006 public hearing was held. *See* Tr. 8/14/08 at 55-56. Of course, the recreational uses of the Quinebaug River were also considered by the Council as part of its deliberations on the original Petition. *See, e.g.*, Council Findings of Fact on Petition No. 784, dated June 7, 2007 at ¶ 73 ("Permanent navigational markers would identify the location [of the water intake/outfall structure] to safeguard boaters and swimmers."). Moreover, there is no evidence whatsoever that a boat launch three-quarters of a mile downstream, or the alleged general increase in boat traffic on the river, would be impacted by the intake/outfall structure which will be located at the bottom of the river, covered by ten feet of water, and clearly marked by navigational buoys floating on the surface. *See* Tr. 8/14/08 at 69-6; 69-70; 106. *See also* Responses to Petition 784MR Interrogatories FQR-11. Thus, the fact that the Quinebaug River

[14] The Project's use of water from the Quinebaug River is minimal, comprising roughly one tenth of one percent (0.1%) of the average annual flow of the River. *See* Tr. 8/14/08 at 101.

is used for recreation does not constitute a changed condition that would justify further proceedings on the FQR motion to reopen.

(4) Deteriorated relationship with the community. Based on documents reflecting changes in the political administration of the Town of Canterbury, *see* Tr. 8/14/08 at 37, and anecdotal evidence from FQR's members, FQR claims that there is now a deteriorated relationship with the local community, and because of this alleged change its motion to reopen should be granted. Putting aside the very serious questions as to whether FQR's purported evidence of deteriorated relationships with the community is in any way reliable, verifiable, and/or representative of the community as a whole, it is difficult to comprehend how the Council could consider a change in political leadership of a local government or the status of a petitioner's ongoing public outreach program relevant to changed conditions that would justify the reopening of the Petition. *See* Tr. 8/14/08 at 52-53; 140-141. To the contrary, the Council was created to rise above local politics and the not-in-my-back-yard ("NIMBY") mentality of many local communities, and serve as an impartial arbiter to ensure that crucial energy infrastructure projects can be built in this State in accordance with sound environmental management principles. *See* Tr. 8/14/08 at 146. *See generally* Conn. Gen. Stat. §§ 16-50g & 16-50x.

(5) Notice of changed location. In its closing statement, FQR added the allegedly inadequate notice of the change in location of the intake/outfall structure and pump house as a changed condition that would justify further proceedings. As explained in Part II, *supra*, and in PRE's General Objection dated August 14, 2008, according to the Council's prior decisions on motions to reopen, issues of public notice cannot constitute changed conditions that would justify further proceedings. *See* Decision on Motion to Reopen Docket No. 141, dated July 30, 1993, at

6, attached as Exhibit A to PRE's General Objection dated August 14, 2008 ("[A] claim[] that the [prior] proceeding was inadequately noticed . . . is not a changed condition that would justify reopening of the proceeding.") (emphasis added).

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In sum, none of FQR's five purported changed conditions meet the Council's established definition of changed conditions that would justify further proceedings. Thus, FQR's evidence in support of its five purported changed conditions should be given little, if any, weight.

V. PRE'S LIMITED FUNDING FROM CCEF PROJECT 100 DOES NOT TRIGGER THE CONNECTICUT ENVIRONMENTAL POLICY ACT

In response to Vice Chairman Tait's inquiry during the August 14, 2008 public hearing, *see* Tr. 8/14/08 at 116-118, PRE states that CCEF Project 100 funds come from the ratepayers of the electric distribution companies (The Connecticut Light and Power Company and The United Illuminating Company),[15] through a surcharge on their bills of not less than one mill ($0.001) per kilowatt hour, as authorized by the Department of Public Utility Control. *See* Conn. Gen. Stat. § 16-245n(b). Because CCEF Project 100 funds come from ratepayers and not state funds, grants under this program do not trigger the environmental assessment provisions of the Connecticut Environmental Policy Act. *See* Conn. Gen. Stat. § 22a-1c (the term "actions which may significantly affect the environment" under the Connecticut Environmental Policy Act means, *inter alia*, activities "funded in whole or in part ***by the state,*** which could have a major impact on the state's land, water, air, historic structures and landmarks . . . , existing housing, or other environmental resources, or could serve short term to the disadvantage of long term

[15] CCEF's Project 100 was an initiative aimed at increasing clean energy supply by at least 100 megawatts of installed capacity. *See generally* Conn. Gen. Stat. § 16-244c(j)(2). CCEF is currently promoting Project 150, which seeks to increase clean energy supply in Connecticut by at least 150 megawatts of installed capacity.

environmental goals.") (emphasis added); Conn. Agencies Regs. § 22a-1a-1(2) ("Action means an individual activity . . . funded in whole or in part ***by the state***.") (emphasis added).[16]

VI. CONCLUSION

For all the reasons articulated in PRE's Response to FQR's Motion to Reopen dated June 19, 2008, its Responses to Petition 784MR Interrogatories, its General Objection dated August 14, 2008, its testimony at the August 14, 2008 preliminary hearing, and set forth herein, PRE opposes FQR's motion to reopen Petition 784, and respectfully requests that it be denied with prejudice.

Respectfully submitted,

PLAINFIELD RENEWABLE ENERGY LLC

By: _____

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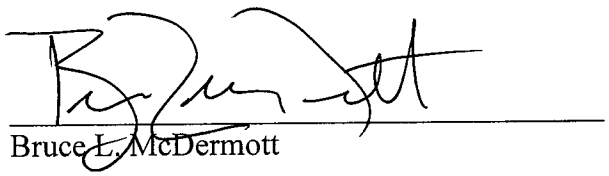
[16] PRE notes that it knows of no CCEF Project 100 grant recipient that has been subject to the environmental impact assessment provisions of the Connecticut Environmental Policy Act. *See, e.g.*, Petition 834 of Tamarack Energy, Inc. / Watertown Renewable Power, LLC (approved by the Council on April 24, 2008).

CERTIFICATION

This is to certify that on this 15th day of September, 2008, an original and twelve (12) copies of the foregoing were delivered by hand to The Connecticut Siting Council, 10 Franklin Square, New Britain, Connecticut 06051, one copy was served on all other known parties and intervenors by depositing the same in the United States mail, first class postage prepaid on this 15th day of September, 2008, and an electronic copy was provided to the Connecticut Siting Council and all other known parties and intervenors.



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