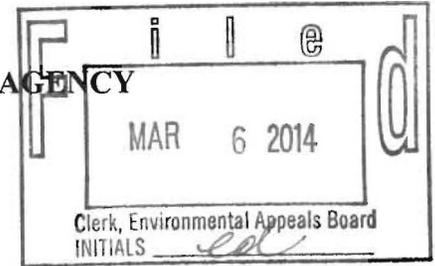


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
)

Footprint Power)
Salem Harbor Development, LP)
)

Application No. NE-12-022)
Transmittal No. X254064)
_____)

PSD Appeal No. 14-02

**ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE
PETITION FOR REVIEW**

On January 30, 2014, the Massachusetts Department of Environmental Protection (“DEP”) issued to Footprint Power Salem Harbor Development, LP (“Footprint”), a Clean Air Act (“CAA”) Prevention of Significant Deterioration (“PSD”) permit. The permit authorizes Footprint to construct a 692-megawatt combined cycle electric generating facility in Salem, Massachusetts. On March 3, 2014, four individuals (“Petitioners”) timely filed a joint petition for review of the PSD permit.¹ Petitioners simultaneously filed a motion requesting permission to file an amended petition for review no later than March 17, 2014. Petition for Review and Motion for Permission to File Amended Petition at 1 (Mar. 3, 2014) (“Petition”).

Petitioners aver that until very recently they were represented by the Conservation Law Foundation (“CLF”). *Id.* at 1-2. Petitioners state that CLF reached a settlement with Footprint, and on February 18, 2014, more than half way through the thirty-day appeal period, CLF notified

¹ The four individuals, represented by the same counsel, are Jeff Brooks, Andrea Celestine, William Dearstyn, and Linda Haley. Petitions for review of a PSD permit are due within thirty days after the permitting authority issues a final permit. 40 C.F.R. § 124.19(a)(3). Petitions for review in the above-captioned matter were due on March 2, 2014, which fell on a Sunday. Pursuant to 40 C.F.R. § 124.20(c), the 30-day time period to timely file was extended until Monday, March 3, 2014.

Petitioners that the terms of the settlement prevented CLF from providing Petitioners with any further legal assistance. *Id.* at 2. As a result, Petitioners aver that they were unable to retain counsel to replace CLF until March 1, 2014, two days prior to the deadline for filing a petition for review. *Id.* As a result, counsel for Petitioners had two days to obtain and review the relevant documents and prepare the petition for review. *Id.*

Petitioners acknowledge that under the Board's procedural rules, motions for extensions of time must be filed "sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time," and to provide the Board with a reasonable opportunity to prepare an order. 40 C.F.R. § 124.19(g), *cited in* Petition at 2.

Petitioners maintain that because counsel was not retained until two days prior to the filing deadline (on a Saturday), compliance with this rule was impossible, but that they nonetheless filed a "summary petition for review that represents their absolute best effort to properly raise issues for appeal." Petition at 2, n.1. Petitioners also state that they are willing to extend the deadline for responses from Footprint and DEP to ensure that neither of them is forced to respond without knowing whether the Board will allow the initial petition to be amended.² *Id.*

In support of their motion requesting an extension of time to file an amended petition for review, Petitioners aver that the circumstances underlying their request are extraordinary. In

² In addition to the motion for extension of time to file an amended petition, the petition for review raises several substantive challenges to the final permit. In particular, Petitioners argue that the carbon monoxide, sulfuric acid, and particulate matter emission limits changed substantially subsequent to the close of the public comment period. Petition at 3-6. Petitioners also challenge DEP's use of regional air monitoring data, the exclusion of de minimis sources from DEP's evaluation of potential national ambient air quality standard ("NAAQS") violations, and the failure to apply best available control technology ("BACT") to volatile organic compound ("VOC") emissions given that they are ozone precursors. *Id.* at 6-8.

particular, Petitioners cite the unanticipated loss of counsel less than two weeks before the deadline to file a petition for review. *Id.* at 2. In addition, Petitioners note that “[t]his is a significant project that has generated a complicated record,” such that the truncated period for preparation of an appeal has diminished Petitioners’ ability to cite to the administrative record to support their allegations that the final permit has changed substantially. *Id.* at 2-3. Petitioners state that they requested representatives of Footprint and DEP to consent to their motion for an extension of time to file an amended petition. *Id.* at 2; *see* 40 C.F.R. § 124.19(f)(2). Footprint opposes Petitioners’ motion, whereas Petitioners did not receive a response from DEP before they had to file their petition to ensure it was timely. Petition at 2.

The Board hereby grants Petitioners’ request for an additional fourteen days to file an amended petition for review that sets forth in full detail all of their arguments. As Petitioners point out, the Board has discretion to relax or modify its procedural rules.³ 40 C.F.R. § 124.19(n); *see also Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (“[I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.”); *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 139 & n.36 (EAB 2006) (explaining the Board’s decision to grant petitioners’ motion to amend their petition for review of

³ The Board strictly construes threshold procedural requirements, including the timely filing of a petition. *See* 124.19(a)(3); *see also In re Sierra Pacific Industries*, PSD Appeal No. 13-01, at 2-3 (EAB Mar. 21, 2013) (Order Denying Extension of Time to File Appeal Brief). In this instance, Petitioners’ timely filed their petition for review, and thus they have already invoked the Board’s jurisdiction under 40 C.F.R. § 124.19. *See In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 & 08-04, at 5 n.2 (EAB Aug. 21, 2008) (Order Granting Desert Rock’s Motion to Participate, Granting a 30-Day Extension of Time, and Denying a Stay of Briefing on Certain Issues) (“Desert Rock Order”).

a PSD permit because it caused no discernible prejudice to permittee, the amended petition was filed before any responsive pleadings, and the issue raised involved important policy considerations).

As the Board's procedural regulations make clear, in addition to identifying contested permit condition(s) or other specific challenge(s) to the permit, Petitioners must clearly set forth, with legal and factual support, why the petition should be reviewed, and demonstrate that each challenge to the permit is based on a clearly erroneous finding of fact or conclusion of law, or an important policy consideration. 40 C.F.R. § 124.19(a)(4) (noting that a petitioner must make specific reference to the administrative record to demonstrate participation in proceedings below and to support any contention that the permit issuer's response to comments was clearly erroneous). Among other things, the Board finds significant the fact that Petitioners must digest and address the relevant portions of a complex administrative record, including a 100-page response to comments and likely several additional attachments. *See, e.g.,* Desert Rock Order at 4 (allowing extension of time to file petition for review based on complexity and length of administrative record); *In re City & County of Honolulu*, NPDES Appeal No. 09-01, at 1,3 (EAB Feb. 2, 2009) (Order Granting Alternative Motion for Extension of Time to File Petitions for Review) (same). In addition, the Board is cognizant that the Petitioners were without counsel at a crucial time during the 30-day time period within which they could appeal this PSD permit.

As the Board has explained before, PSD matters are time-sensitive. Nonetheless, the Board concludes that its decisionmaking process will benefit from affording Petitioners the additional time provided in this order to fully present their arguments. The Board believes that, on balance, this will lead to a more efficient briefing process that will increase the Board's

efficacy and potentially expedite its analysis of the issues Petitioners raise.

Petitioners are required to file their amended petition for review with the Board no later than Monday, March 17, 2014. DEP's response, as well as a certified index of the administrative record and relevant portions of the administrative record, must be filed with the Board no later than Monday, April 7, 2014. Footprint's response must also be filed no later than Monday, April 7, 2014.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Date: March 6, 2014

By: 

Randolph L. Hill
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting Motion for Extension of Time to File Petition for Review in the matter of Footprint Power Salem Harbor Development, LP, PSD Appeal No. 14-02, were sent to the following persons in the manner indicated:

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Dated: MAR - 6 2014



Annette Duncan
Secretary