

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

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In the Matter of: )

FOOTPRINT POWER SALEM )

HARBOR DEVELOPMENT, LP )  
\_\_\_\_\_

Appeal No. PSD 14-02

Massachusetts DEP Application No. NE-12-022

Massachusetts DEP Transmittal No. X254064

**REPLY FROM FOOTPRINT POWER SALEM HARBOR DEVELOPMENT LP  
TO THE EPA OFFICE OF AIR AND RADIATION'S SUPPLEMENTAL BRIEF  
IN RESPONSE TO BOARD'S ORDER OF JULY 14, 2014**

Dated: August 1, 2014

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## INTRODUCTION AND BACKGROUND

Footprint Power Salem Harbor Development LP (“Footprint”) submits this reply (“Reply”) in response to the Order Directing Supplemental Briefing (“Order”) issued by the Environmental Appeals Board (“Board” or “EAB”) on July 14, 2014 in the above-captioned matter. In the Order, the Board sought U.S. Environmental Protection Agency’s (“EPA”) Office of Air and Radiation (“OAR”) and Office of General Counsel’s (“OGC”) direction on a limited issue regarding the application of best available control technology (“BACT”) to potential volatile organic compounds (“VOCs”) emissions from a new major stationary source.

Specifically, the Board posed to OAR and OGC the following question:

If a proposed new major stationary source has the potential to emit 40 tpy [tons per year] of either VOCs or nitrogen oxides but not both, what obligation does the permitting authority have, in applying BACT to ozone emissions, to apply BACT to the ozone precursor that does not exceed the 40 tpy standard?

Order at 3.

The Board noted that in the instant case, there was no dispute that the proposed Salem Facility has the potential to emit two ozone precursors – nitrogen oxide (144 tpy) and VOCs (28 tpy). The Petitioners claim the Massachusetts Department of Environmental Protection (“MassDEP”) erred in removing a proposed VOCs emissions limit from the PSD Permit. Both MassDEP and Footprint argued that there was no error in removing the VOCs limit from the PSD permit because Footprint’s proposed electric generation facility’s (“Facility”) potential VOCs emissions are below the PSD threshold of 40 tpy<sup>1</sup>. *See* MassDEP’s Response to the Amended Petition For Review (“MassDEP Resp.”) at 45-46; Response from Footprint Power

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<sup>1</sup> As discussed in more detail below, MassDEP did include a limit on VOCs in its separate Air Quality Plan Approval (“Air Plan Approval”) issued on January 30, 2014.

Salem Harbor Development LP to the Amended Petition for Review (“Footprint Resp.”) at 38-39.

On July 25, 2014, OAR and OGC filed a supplemental brief (“EPA Brief”) with the Board which fully supports the position advocated by MassDEP and Footprint that BACT was not required for VOCs because the VOCs emissions from the proposed Facility are below the 40 tpy threshold for PSD review. The EPA Brief also supports the argument advanced by MassDEP that VOCs should also not be addressed in the PSD permit because Massachusetts is classified as non-attainment for ozone – of which VOCs have been deemed a precursor – and therefore not subject to federal PSD review. Footprint fully endorses the EPA Brief and respectfully requests the Board to issue a Decision denying Petitioners’ claim, consistent with the arguments set forth therein. Specifically, Footprint respectfully requests that the Board both adopt the interpretation of the PSD regulations set forth in the EPA Brief regarding the 40 tpy standard as well reject Petitioners’ claim on jurisdictional grounds. Because the EPA Brief fully addresses the substantive issue regarding the application of BACT in instances where potential VOCs emissions fall below the 40 tpy threshold, we address only the jurisdictional argument below.

### **ARGUMENT**

#### **I. VOCs Are Not Subject To The Board’s Jurisdiction In The Instant Case.**

As the Board, itself, notes in the Environmental Appeals Board Practice Manual (“Manual”), 40 C.F.R. Section 124.19(a) authorizes appeals to the EAB from *federally*- issued PSD permit decisions. This includes PSD permits issued by states with delegated authority to issue a PSD permit, as is the case here with Massachusetts. (*See* Manual at 38). The Manual goes on to say that: “The EAB generally does not have authority to review state-issued permits pursuant to a state permitting program; such permits are reviewable only under the laws of the state that issued the permit.” (*Id.*) The Manual goes on to draw a contrast between PSD permits issued by states

that administer PSD programs under a delegation from EPA and those where the state issues a PSD permit pursuant to an EPA-approved state implementation plan (“SIP”). In the latter case, the EAB has no jurisdiction. *Id.* at 39. Indeed, if a state issues an air permit that combines federal PSD and non-federal PSD requirements, only the federal PSD part of the permit is reviewable by the EAB. (*Id.*)

In this case, VOCs are not subject to PSD regulation. As the Board notes in its Order, VOCs are a regulated New Source Review (“NSR”) pollutant. However, the provisions of the PSD program requirements (including a BACT determination) apply to such pollutants only if the proposed facility is located in an area that is designated as attainment or unclassifiable for that pollutant. *See* 40 C.F.R. 52.21(a)2(i); *see also* 40 C.F.R. 52.21(b)(50)(i)(b)(1). That is not the case here. Massachusetts is still classified as non-attainment for ozone. *See* MassDEP Reply at 46. In the EPA Brief, EPA concurs with the Commonwealth that Massachusetts is non-attainment for ozone. *See* EPA Brief, at 11. Therefore, the emission of VOCs as an ozone precursor is not regulated under the PSD program.<sup>2</sup> Non-attainment review is a separate regulatory regime with different standards from the PSD program. *See* 40 C.F.R. 51.165.<sup>3</sup>

In the instant case, MassDEP issued an Air Plan Approval pursuant to Massachusetts regulations 310 CMR 7.02 and 310 CMR 7.00: Appendix A Emissions Offsets and Nonattainment Review (“Appendix A”). As the Air Plan Approval itself notes, review of VOCs

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<sup>2</sup> Unlike for nitrous oxides (which is a criteria pollutant), there is no separate ambient air quality standard established for VOCs (which is not a criteria pollutant). VOCs come within the regulatory ambit of the Clean Air Act solely as an ozone precursor. Thus, the Board’s jurisdiction to review this PSD permit hinges on whether Massachusetts is in attainment for ozone (and subject to federal PSD review) or non-attainment (and not subject to federal PSD review). As set forth above, it is not in attainment for ozone and therefore is not subject to federal PSD review.

<sup>3</sup> *See* footnote 4, *infra*.

emissions pursuant to these state regulations is "not part of the PSD Process".<sup>4</sup> Nonetheless, this Air Plan Approval includes an emissions limit on VOCs, consistent with the more stringent state regulations.

In summary, because Massachusetts is classified as non-attainment for ozone, VOCs are not subject to federal PSD review and therefore not subject to EAB review. Moreover, even though emissions limits for VOCs are not required under either the federal PSD review (or the state's non-attainment NSR), MassDEP did include in the Air Plan Approval a VOCs emissions limit under the requirements of the more stringent state regulations at 310 CMR 7.00. As the Board itself has acknowledged, it does not have jurisdiction to review such state permits. *See e.g., Hess Newark Energy Center*, PSD Appeal No. 12-02 (EAB November 20, 2012). The Air Plan Approval permit is subject only to review under the laws of the Commonwealth of Massachusetts. Accordingly, the Board should reject Petitioners' VOCs-related appeal both on this independent jurisdictional ground as well as consistent with the interpretation of the 40 tpy standard set forth in the EPA Brief.<sup>5</sup>

Finally, in recognition of the crucially time-sensitive nature of PSD permitting decisions, the Board provided a limited period for supplemental briefing of this issue, giving EPA 11 days to file its Supplemental Brief and ordering that other parties file reply briefs within 7 days of the

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<sup>4</sup> So too, even though the Facility is located in a non-attainment area for ozone, the VOCs emissions are not subject to non-attainment NSR (including LAER) because the VOCs emissions will be below the threshold for review under the non-attainment NSR program: "Since VOC emissions from the Facility are below the new major source threshold of fifty (50) or more tons per year, the Permittee is not subject to regulation under Appendix A for LAER and emission offsets pertaining to VOC emissions. However, the VOC emissions from the Facility are subject to, and must comply with, Best Available Control Technology (BACT) pursuant to [the more stringent state regulations at] 310 CMR 7.02." *See* Air Plan Approval, at 6; *see also* 40 C.F.R. 51.165

<sup>5</sup> This jurisdictional argument was timely raised in the MassDEP Resp because Petitioners raised the VOCs issue at hand for the first time in the Amended Petition. In any event, Federal Rule 12(h)(3) provides that a court must dismiss the action at any time that it determines that it lacks subject-matter jurisdiction. "The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). The Board has stated that it looks to the Federal rules of Civil Procedure for guidance in interpreting the Consolidated Rules of Practice ("CROP"). Manual at 21.

filing of the EPA Brief – by August 1, 2014. The Board further stated: “Given the need for expeditious disposition of PSD permit appeals, the Board will grant no extensions of time to these deadlines absent a showing of extraordinary circumstances.”<sup>6</sup> Not only are there no extraordinary circumstances which would warrant any extension of time, but rather there are extraordinary circumstances which mitigate in favor of an expeditious resolution of this appeal to permit the Facility to begin construction which will limit the amount of time that the Greater Boston, Massachusetts area could be subject to a significant shortfall in electric generating capacity. To facilitate the Board’s understanding of these extraordinary circumstances, Footprint refers the Board to Attachment 1 to Footprint’s previously filed Opposition to Motion for Permission to File Amended Petition, which is a pleading filed in an earlier proceeding before the Massachusetts Supreme Judicial Court (“SJC”) by ISO New England, Inc. (“ISO-NE”) the regional transmission organization responsible for New England’s bulk electric generation and transmission grid.<sup>7</sup> In that pleading, ISO-NE explains in detail the importance of this project to the regional electric grid and specifically the impact that the failure to expeditiously construct this project will have on electric reliability in the Greater Boston area. The fact that the ISO-NE’s pleading was filed with the SJC almost 8 months ago serves only to further highlight the need to resolve this appeal so that the project can move forward. All other state and local permits are final and non-appealable. This proceeding represents the sole remaining permitting issue preventing construction of the Facility. Footprint respectfully requests that the Board expedite its resolution of this appeal.

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<sup>6</sup> Order at 3 (citation omitted).

<sup>7</sup> In response to Footprint’s Motion to Expedite that proceeding and ISO-NE’s supporting pleading, the SJC did order expedited briefing and oral argument in that proceeding. Prior to such oral argument, the parties settled the case and it was dismissed voluntarily by the appellant.

**Conclusion**

For all of the foregoing reasons, Footprint respectfully requests that the Board deny the Amended Petition for Review.

Respectfully Submitted

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Dated: August 1, 2014

**STATEMENT OF COMPLIANCE WITH WORD LIMITATION**

Pursuant to 40 C.F.R. § 124.19(d)(iv), this Reply complies with the word limits set by the Board. According to the word count function in Microsoft Word, this Reply contains 2,206 words.

/s/ Lauren A. Liss  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 1st day of August, 2014, copies of the foregoing Reply in the matter of Footprint Power Salem Harbor Development LP, Appeal No. PSD 14-02 were served by First Class Mail to the following:

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