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

	)	
IN THE MATTER OF:	)	
FOOTPRINT POWER SALEM	)	Appeal No. PSD 14-_____
HARBOR DEVELOPMENT, LP	)	Massachusetts DEP Application No. NE-12-022
	)	Massachusetts DEP Transmittal No. X254064

PETITION FOR REVIEW AND MOTION FOR PERMISSION TO FILE AMENDED PETITION

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Introduction

Pursuant to 40 C.F.R. § 14.19(a) , the undersigned residents of Salem and other nearby towns petition for review of the Prevention of Significant Deterioration permit issued by the Massachusetts Department of Environmental Protection ("DEP") to Footprint Salem Harbor Development LP ("Footprint") to construct a 692-megawatt combined cycle electric generating facility. The permit decision was issued by DEP on January 30, 2014. A copy of the permit is attached as Exhibit 1. The petitioners also move for permission to file an amended petition two weeks from today's date.

Threshold Procedural Requirements

Petitioners satisfy the threshold requirements for filing a petition for review. Petitioners have standing because they participated in the public comment period on the draft permit. 40 C.F.R. 124.19(a)(2). A comment submitted on their behalf is attached as Exhibit 2. As described more below, the issues raised in this petition were raised by petitioners with DEP during the public comment period, were raised by other commenters, or are directly related to DEP's responses to other comments (*i.e.*, the issues were not reasonably ascertainable during the comment period). The Board has jurisdiction to hear Mr. Brooks' timely request for review.

Argument

I. The Petitioners' Motion for Permission to File an Amended Petition Should Be Granted.

II.

Petitioners move for permission to file an amended petition two weeks from today's date. The reason for the motion is that the petitioners' counsel have had only one business day to prepare this petition – and this through no fault of the petitioners themselves. Until very recently, petitioners were represented by a prominent Boston non-profit organization known as

the Conservation Law Foundation. On February 18, 2014 – more than halfway through the 30-day period for prosecuting an appeal – CLF informed petitioners that it had settled with Footprint, and that by the terms of the settlement CLF was unable to provide any further assistance to petitioners. Petitioners retained their current attorneys on Saturday, March 1, 2014, only two days before the date of this petition. In this short period, petitioners' lawyers have had to obtain the relevant documents to the extent possible, read them, and prepare this petition. At 2:10 p.m. on today's date, petitioners asked representatives of Footprint and DEP to consent to this motion; Footprint declined to consent and DEP (as of 8 p.m.) did not respond.

This motion should be granted. Petitioners are aware that this motion is analogous to a motion for an extension of time, and that these motions are not favored. *See* 40 C.F.R. § 124.19(g).[1] But the circumstances here are extraordinary. First, through no fault of their own, petitioners (who are ordinary homeowners with day jobs) were left without legal assistance less than two weeks before this appeal was due. In fact, it is worse than that: the loss of their prior representative was procured by Footprint on the eve of the appeal deadline, because a condition of Footprint's mid-February agreement to settle with CLF was that CLF would give no further assistance to the petitioners. Second, there is no prejudice to Footprint, because this appeal is unlikely to be the final hurdle to construction. An appeal of Footprint's composite permit from the Massachusetts Energy Facilities Siting Board is likely to be initiated in state court later this month, and litigation in other venues is possible as well. Third, the public interest in a reasoned

[1] Subsection (g) says that parties should file motions for extensions of time "sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond." Here counsel was not retained until two days ago (Saturday), and it was impossible to comply with this part of the rule. In recognition of this, counsel have in fact complied with the deadline for a petition for review, by filing a summary petition that represents their absolute best effort to properly raise issues for appeal. Petitioners are also willing to extend the deadline for the response to this petition so as to ensure that DEP and Footprint are not forced to respond without knowing whether the Board will allow the initial petition to be amended.

appellate decision supports granting this motion. This is a significant project that has generated a complicated record – a record that DEP changed significantly at the last minute, as described below. Yet it has been practically impossible for petitioners to submit anything like the appeal papers that a project of this scope cries out for, because of lack of time and because they simply have been unable to obtain all the necessary parts of the record on short notice.

The Board has discretion to relax its filing deadlines, and in circumstances even less compelling than these it has done so.[2] The petitioners' motion should be granted, so that this appeal can be adjudicated based on a brief that reflects the time and attention the subject demands.

III. Petition for Review

A. The permit changed substantially after the public comment period.

CO limits were eliminated. In the draft PSD permit, DEP contended that Footprint had carbon monoxide (CO) emissions of 106.4 tons per year (tpy). *See* Exhibit 3 (Draft Permit) at 9. In their comment, petitioners contended that Footprint had not used the best available control technology to reduce these emissions. Exhibit 2, at 3-4. In the final permit, DEP responded by altogether eliminating the BACT analysis for CO, on the entirely new ground that Footprint's potential to emit CO was in fact only 88 tpy. *See* Exhibit 4 (Response to Comments), at 8. This in turn meant that no BACT analysis was required for CO, because under 40 CFR 52.21(b)(23)(i), a source is required to undertake a BACT analysis for CO emissions only if these emissions are at or above 100 tpy. This reduction to 88 tpy was attributed primarily to

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[2] *See In re Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03 & 08-04 (authorizing 30-day extension of time to file briefs in support of petitions for review where the appeal was complex: "Given the voluminous record … the Board recognizes that the petitioners might need the extended time period to identify and articulate with sufficient specificity the precise issues for which review is being sought. The Board believes that, on balance, this will lead to a more efficient briefing process and potentially expedite the Board's analysis.").

"new performance data" submitted by the turbine vendor, to the addition of an oxidation catalyst on an auxiliary boiler (more on that later), and to a correction Footprint's prior assumption that the restarting the plant every Monday morning would qualify as a "cold start" rather than the "warm starts" associated with lower emissions. As DEP explained in its RTC (Exhibit 4), at 4-5:

> The turbine vendor has also supplied new performance data that show that CO will be controlled to less than 2.0 parts per million by volume, dry basis, corrected to 15% O_2 (ppmvdc) at the minimum emission compliance load and that with greater loads the CO emissions will not exceed 8.0 lbs/hr with and without duct firing. This emission cap is achievable because the turbines are able to operate more efficiently under higher load conditions. The Applicant also corrected an error in its calculation of CO emissions during start up and shut down. The Applicant incorrectly assumed that if the plant were shut down on Friday night and restarted on Monday morning this would result in a cold start (a startup after a shutdown of more than 72 hours) rather than a warm start (a start up after a shutdown of approximately 60 hours). Since warm starts result in lower CO emissions than cold starts, this correction reduced the plant's annual CO emissions. In addition, in response to public comments, MassDEP required the Applicant to include an oxidation catalyst on its proposed auxiliary boiler (EU3), further reducing facility wide CO emissions. Taken together, these actions have resulted in the reduction of facility-wide CO emissions, to 88 tons per year (tpy), a level that is below the PSD significance level of 100 tpy. This 88 ton per year limit on CO emissions is set forth in the CPA Approval issued concurrently with the PSD Permit and is a federally enforceable limit. As a result, CO emissions are no longer subject to PSD review and the PSD Permit no longer contains limits for CO emissions.

However, it is not clear that the "the new performance data" and evidence of the supposedly sharp distinction between shutdowns of 60 hours versus 72 hours have ever been provided to the public, and there certainly has been no opportunity for comment on any of this information. Section 165(e)(3)(B) and (C) of the Clean Air Act, 42 U.S.C. § 7475(e), require that the analysis of air quality impacts be done and that the results be "available *at the time of the public hearing* on the application." The regulations provide that where additions to the record are "substantial," the permitting authority must reopen the record. 40 C.F.R. § 124.14(b). The

data purporting to show that CO could be dropped from the permit entirely was obviously a substantial addition to the record, yet petitioners have never seen this data, and certainly were never given a chance to comment on it. Under these circumstances, the permit should be remanded to DEP so that it may re-open the record.[3]

Sulfuric acid limits for the auxiliary boiler were increased by 900%. The same thing happened with sulfuric acid. In between the draft and final permits, DEP increased permissible sulfuric acid emissions from the auxiliary boiler by 900%, from 0.0001 lb per MMBtu to 0.0009 lb per MMBtu. RTC at 5 (Exhibit 4). This was a "collateral" impact of the addition of an oxidation catalyst on the auxiliary boiler, to reduce CO emissions (to below the significance limit, as discussed above). *Id.* Adding the oxidation catalyst was an unusual tradeoff: the BACT analysis revealed that every other comparable facility did not have an oxidation catalyst on the auxiliary boiler, which resulted in almost every case in significantly lower emissions of sulfuric acid. The decision to increase sulfuric acid emissions so as to reduce CO emissions (to just below the threshold of BACT significance) should also have been submitted to the public.

PM emissions limits were allegedly increased for start up and shut down of the turbines. In its response to comments, DEP stated that that PM emissions for start up and shut down of the Footprint turbines "have been increased per event. However, at no time will these emissions exceed [PM] BACT governing steady state combustion turbine operations." RTC, at 6 (Exhibit 4). However, a comparison of the draft permit and final permit show that start up and shut down (SUSD) PM emissions were *decreased* between the draft permit and the final permit. Compare

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[3] *See In re Eldeck-Elwood*, 13 E.A.D. 126, 146-48 (2006) (permit condition allowing a different boiler size was "a significant addition to the permit and at a minimum the public should have been afforded the opportunity to comment"); *id.* at 161 n.72 (reliance by permitting authority on EPA materials not in record "will not save IEPA from the public notice and comment problem referenced below, as these materials have not yet been subjected to public scrutiny under the PSD permitting process."); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 102 (1998) (remanding where public was not given an opportunity to comment on air quality analysis data).

Draft Permit at 7 (7.3 lbs per start up and 5.8 lbs per shut down) *with* Final Permit at 6 (6.60 lbs and 3.96 lbs). Petitioners are not aware of any explanation or evidence supporting the new emissions limits, or indeed whether the limits as listed in the final permit are even the limits that DEP intended.

B. The use of regional air monitoring data is not supported by record evidence.

Over the petitioners' objection, see Exhibit 2, at 8, and over the objection of others who requested preconstruction monitoring, Exhibit 4, at 17, DEP relied on existing monitoring data from Lynn, which is located 5.9 miles to the southwest of the proposed site. This was contrary to EPA guidance.

Under the Clean Air Act, an applicant must "agree[] to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source." 42 U.S.C. § 7475(a)(7). More specifically, at a minimum the preconstruction PSD review must "be preceded by analysis … by the State … or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in the areas which may be affected," typically to be gathered over one calendar year preceding the application. 42 U.S.C. § 7475(e)(1); *see also* 40 C.F.R. § 52.21(m)(f). The *NSR Manual* states that "existing ambient data" may be used instead, if it is "representative of the air quality" at the facility site. *NSR Manual* at C.18-19. In determining the "representativeness" of existing data, the permitting agency must consider the monitor location, the quality of the data, and currentness of the data, as described further in the *Ambient Monitoring Guidelines for PSD. Id; see also In re Hibbing Taconite Co.*, 2 E.A.D. 838, 850 (Adm'r 1989) (requiring adherence to this guidance); *In re Northern Michigan University Ripley Heating Plant*, PSD 08-02, Slip Op. at 62-63 (EAB Feb.

18, 2009) (same, remanding for determination of compliance with guidance). In turn, section 2.4.1 of the *Ambient Monitoring Guidelines* authorizes use of existing monitoring data if those data are representative of each three areas:

(a) The location of the maximum concentration increase from the proposed facility;

(b) The location of the maximum air pollutant concentration from existing sources; and

(c) The location of the maximum combined impact area (existing sources plus proposed facility).

Where the monitors are not located within the area modeled for the permit decision, regional data can be used only in certain limited situations, also described in the guidance – *e.g.*, where the source is in a remote area, or is in an area of "basically flat terrain." *Id.*

DEP contended that the Lynn monitoring station, though located 5.9 miles from the site and situated in a nature preserve, was appropriate because it was closer to Boston than Salem and located south-southwest of large industrial sources. However, even if these contentions were correct, there appears to have been no attempt to show that the decision not to require preconstruction monitoring met the quite detailed criteria for use of regional data described above.

C. DEP appears to have improperly excluded "de minimis" sources from its evaluation of potential NAAQS violations.

In response to comments questioning the conservatism of the air dispersion analysis, on page 23 of its Response to Comments (Exhibit 4), DEP states that "only the total impacts from the SHR Project plus interactive sources that contain a contribution of 7.5 ug/m^3 need to be considered when evaluating whether the SHR project will cause or contribute to a NAAQS violation." However, the Clean Air Act and implementing regulations prohibit issuing a permit to a source that would contribute to any violation of NAAQS at any receptor location – and it

does not have an exemption for violations where the source's contribution is less than "significant impact level" that is nowhere found in the regulation.

D. DEP improperly failed to limit VOC emissions.

Apparently in response to comments on whether volatile organic compound (VOC) emissions limits reflected BACT, the final permit abruptly eliminated VOC emission limits altogether, on the ground that these emissions are below the significance level for emissions subject to BACT. But this was incorrect: sources are required to apply BACT to all ozone precursors (including VOCs) where, as here, the sum total of these precursors exceeds 40 tpy.

Specifically, 40 C.F.R. § 52.21(j)(2) provides: "A new major stationary source shall apply best available control technology for each regulated NSR pollutant that it would have the potential to emit in significant amounts." And 40 CFR 52.21(b)(23)(i) states that "[s]ignificant means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates: … Ozone: 40 tpy of volatile organic compounds or nitrogen oxides." Here VOC emissions are above 28 tpy, and nitrogen oxide emissions are 144 tpy. *See* Exhibit 1, at 7 (NOX); Exhibit 2, at 9 (VOCs). The plain language regulation requires control of ozone precursors of *whatever* type, provided these precursor emissions exceed 40 tpy, which is the case here. The failure to require application of BACT to VOCs was clear error.

Conclusion

The petitioners's motion for leave to file an amended petition should be granted. The permit should be remanded to DEP.

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Pursuant to 40 C.F.R. § 124.19(d)(iv), this Petition and Motion for Permission to File Amended Petition ("Petition and Motion") complies with the word limit set by the Board. According to the word count function in Microsoft Word, this Petition and Motion contains 3,036 words.

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CERTIFICATE OF SERVICE

I certify that on March 3, 2013 I have sent a copy of this petition for review and motion for extension of time, together with all attachments, by email and first-class mail to:

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