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March 6, 2014

*Via Overnight Delivery*

Clerk of the Environmental Appeals Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1201 Constitution Avenue NW  
WJC East, Room 3334  
Washington, DC 20004

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U.S. EPA  
2014 MAR -7 AM 11:11  
ENVR. APPEALS BOARD

Re: In the Matter of: Footprint Power Salem Harbor Development LP  
Appeal No. PSD 14-02

Sir or Madam:

On behalf of permittee Footprint Power Salem Harbor Development LP (“Footprint”), enclosed for filing in the above-referenced matter please find an original and two copies of Footprint’s Opposition to Motion for Permission to File Amended Petition.

Respectfully submitted,

Lauren A. Liss

LAL/dm  
Enclosure

cc: Kenneth Kimmell, DEP Commissioner  
Wesley Kelman, Esq.  
Madelyn Morris, Esq.  
Mr. Cosmo Buttarro

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

\_\_\_\_\_) )  
IN RE: )  
FOOTPRINT POWER SALEM )  
HARBOR DEVELOPMENT, LP )  
\_\_\_\_\_) )

Appeal No. PSD 14-02  
Massachusetts DEP Application No. NE-12-022  
Massachusetts DEP Transmittal No. X254064

RECEIVED  
U.S. EPA.  
APR 11 2014  
ENVIR. APPEALS BOARD

OPPOSITION TO MOTION  
FOR PERMISSION TO FILE AMENDED PETITION

Footprint Harbor Salem Harbor Development LP (“Footprint”) hereby files its opposition to the motion filed by Jeff Brooks, Andrea Celestine, William Dearstyne and Linda Haley (collectively, the “Petitioners”) for permission to file an amended petition for review within two (2) weeks of the filing date of the Petition.

**Background**

Footprint proposes to revitalize an old, oil- and coal-fired electric generation facility located on a 65 +/- acre waterfront parcel of land at 24 Fort Avenue, Salem, Massachusetts. Specifically, Footprint proposes demolish the existing coal- and oil-fired Salem Harbor Power Station, and to construct and operate a nominal 630 MW natural gas-fired quick-start combined-cycle generating facility and related structures and infrastructure (the “Facility”). The proposed Facility will ensure a reliable supply of electricity in the New England grid as it provides needed new capacity in the Northeast Massachusetts (“NEMA”)/Boston load zone. Indeed, the Massachusetts Department of Public Utilities, ISO- New England, Inc. (“ISO-New England”) and the Federal Energy Regulatory Commission have all determined that the Facility is required to ensure that there is adequate electricity in the NEMA/Boston zone.

In order to meet ISO-New England's supply needs for NEMA/Boston, the proposed Facility must commence commercial operations in June 2016. As construction of the Facility is anticipated to last for a period of 23 months, construction must begin in June 2014 in order to meet the June 2016 deadline. Once operational, the proposed Facility will be one of the most efficient fossil-fueled electric generators in the NEMA/Boston zone.

On January 30, 2014, the Massachusetts Department of Environmental Protection issued to Footprint a Prevention of Significant Deterioration permit (the "PSD Permit") to construct the Facility. At approximately 11:59 p.m. EST on March 3, 2014, the Petitioners submitted to the Environmental Appeals Board, via electronic filing, a hybrid document entitled "Petition for Review and Motion for Permission to File Amended Petition" (the "Petition/Motion") regarding the PSD Permit. As conceded by the Petitioners in the Petition/Motion, the motion is essentially a motion for extension of time to file a petition. As discussed below, the Petitioners' request for an extension of time within which to prepare the Petition is clearly contrary to applicable federal regulations as well as the Board's established precedent, and the Petitioners have failed entirely to present adequate justification for such a request.

### **Argument**

As unequivocally stated in the regulations governing the Board's review of a PSD Permit, petitions for review of a PSD permit must be filed "[w]ithin 30 days" after the final permit decision is issued. 40 C.F.R. § 124.19. *See also, In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 329 (EAB 1999) ("It is a petitioner's responsibility to ensure that filing deadlines are met, and the board will generally dismiss petitions for review that are received after a filing deadline.") Moreover, the substantive requirements for the Petition are clearly spelled out in the regulations, *id.* at § 124.19(a)(4), in *The Environmental Appeals Board Practice Manual* dated August 2013

(the “EAB Practice Manual”), and in various Board decisions. *See e.g., In re City of Palmdale*, PSD Appeal 11-07 (EAB September 17, 2012)(Order Denying Review).

By their own admission, the Petitioners have failed to comply with the substantive requirements for a Petition. Instead, Petitioners have chosen to file a “summary petition” and to seek a 2-week extension in order to file a fully compliant Petition (*see* Petition/Motion at unnumbered page 3, footnote 1). The regulations simply do not allow this type of filing: *See In re: Sierra Pacific Industries*, PSD Appeal No. 13-01, at 2 (EAB March 26, 2013)(In Order Denying Extension of Time to File Brief, the Board states: “Section 124.19 does not provide for filing “notice” of an appeal, followed by a later-filed substantive brief.” Emphasis supplied). Accordingly, Petitioners’ motion should be denied.

Moreover, the Petitioners’ motion contradicts the Board’s clear policy directive to resolve NSR cases as quickly as possible. As expressly recognized by the Board, “NSR permits are time sensitive because new source construction cannot begin prior to receiving a final permit.” *Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits*, at 2 (EAB, March 27, 2013). Indeed, the critically time-sensitive nature of the Board’s action is particularly acute in this matter. Quite simply, the Massachusetts Department of Public Utilities, the Independent System Operator ISO-New England, and the Federal Energy Regulatory Commission have all determined that unless Footprint’s proposed electric generation facility is able to generate electricity by June 1, 2016, there will be a shortage of electric generation capacity in the Northeast Massachusetts/Boston capacity zone. That is, without the needed electric generation from the proposed Facility, the resulting emergency situation would require

rolling blackouts and other emergency measures in the NEMA/Boston area.<sup>1</sup> Further, Petitioners are wrong to suggest that Footprint will not be prejudiced “because this appeal is unlikely to be the final hurdle to construction.” *See* Petition/Motion, at unnumbered page 3). Even if an appeal to Footprint’s EFSB Certificate is filed, such an appeal does *not* automatically stay the effectiveness of the Certificate, and (unlike with an appeal of the PSD Permit) Footprint would be free to commence construction pending the outcome of such a Certificate appeal.

Moreover, the Petitioners have failed to show any good cause to justify the requested departure from the prescribed regulatory time periods or a departure from the Board’s stated policy on NSR review. The fact that Petitioners chose to wait until the very end of the PSD Permit appeal period to hire an attorney does not justify an extension to the filing deadline. *See In re: Massachusetts Correctional Institute – Norfolk Water Pollution Control Facility*, (EAB October 30, 2008)(Order Denying Motion for Extension of Time to File Petition for Review).

So too, the facts that the Conservation Law Foundation (“CLF”) – a co-commenter during the draft PSD Permit comment period – decided to settle other disputes with Footprint and decided not to appeal the PSD Permit do not justify the Petitioners delayed hiring of an attorney to represent them in a potential appeal of the PSD Permit. With respect to the PSD Permit, CLF acted only as the “authorized representative” – not as the attorney – of a Ten Residents Group (including the 4 individual Petitioners) in submitting comments on the draft PSD permit.<sup>2</sup> By letter dated February 18, 2014 (the “CLF Letter”), CLF wrote separately to

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<sup>1</sup> A fuller discussion of the declared electric generation shortfall, and the resulting public health/safety emergency situation, is set forth in Footprint’s “Motion for Expedited Review” and ISO – NE’s “Support for Footprint’s Motion”, which were both filed in *Conservation Law Foundation, Inc., v. Energy Facilities Siting Board*, Docket Number SJ-2013-450, and are included as Attachment 1 hereto. The Appellant in that case, Conservation Law Foundation, voluntarily moved to withdraw the appeal, on February 26, 2014 and the appeal was dismissed, with prejudice, on February 28, 2014.

<sup>2</sup> Petitioners Linda Haley, William Dearstynne and Jeff Brooks also each submitted separate comments on their own behalves. In addition, on February 20, 2014 Petitioner Jeff Brooks filed with MassDEP a request for an adjudicatory hearing with respect to the state-only air permit which was issued concurrently with the PSD Permit.

each member of the Ten Residents Group to confirm their “discussion and correspondence last week” regarding CLF’s potential settlement agreement with Footprint. The letter specifically states that:

Based on our discussions last week, we understand that you may not be interested in joining in the proposed settlement agreement, and we are writing to ensure that you understand that although CLF is *withdrawing as the authorized representative* for the group, *our withdrawal has no bearing on your right to proceed with an appeal*. If you as an individual or as a member of the ten residents group wish to appeal the PSD Permit . . . issued by the Department on January 30, 2014, you may choose another member of the ten residents group to serve as you authorized representative *or may seek counsel* to represent you in filing an appeal in the manner set for in each of the permits.

See *CLF Letter* at pp. 1 – 2 (emphasis added), a copy of which is included in Attachment 2 hereto. Accordingly, Petitioners had no reasonable expectation that CLF would continue to serve as their “authorized representative” in an action CLF, itself, had decided not to pursue on its own behalf.

Moreover, by no later than February 10, 2014, CLF had specifically discussed with Petitioner William Dearstyne the potential for CLF’s settlement of its disputes with Footprint.<sup>3</sup> In fact, Mr. Dearstyne even assented to a joint motion filed on February 10, 2014 by CLF and Footprint (the “CLF/Footprint Motion”) which expressly sets forth the likelihood of CLF and Footprint resolving all outstanding issues including, *inter alia*, the PSD Permit:

CLF and Footprint Power have been engaged in discussions regarding the potential for settling the pending appeal of the Siting Board’s approval of the petition to construct pursuant to G.L. c. 164, § 96J ¼, as well as the outstanding c. 91 administrative appeal, and the issues remaining regarding the air permits that were issued by the Department of Environmental Protection on January 30, 2014.

A copy of the CLF Motion is included in Attachment 4 hereto.

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<sup>3</sup> In fact the groundbreaking settlement agreement between CLF and Footprint will result in unprecedented reduction of CO<sub>2</sub> emissions well beyond what is currently required by existing regulations. Copies of a press release from CLF describing the Settlement agreement and an article from the New York Times are included in Attachment 3 hereto. Footprint should not now be penalized by a delay that would undermine this important precedent.

Indeed, Petitioners offer no valid explanation whatsoever for their nearly 3-week delay in choosing an authorized representative or retaining counsel. The fact that Petitioners elected, for the first time, to retain attorneys “on Saturday, March 1, 2014, only two days before the date of this Petition” may have unfairly disadvantaged their *attorneys*, but the Petitioners’ tardy action is a circumstance of their own making and does not justify an extension of additional time to amend the Petition. <sup>4</sup>

The Board has stated that it will not depart from its strict construction of threshold procedural requirements unless special circumstances exist. *See In re: Russell City Energy Center, LLC*, (EAB May 3, 2010)(Order Dismissing Four Petitions for Review as Untimely).

Further:

The Board has found “special circumstances” to exist in cases where the delay stemmed “from causes not attributable to the petitioner, such as problems with the delivery service” or problems due to the U.S. Postal Service anthrax sterilization procedures. *Town of Marshfield*, at 5, *see, e.g., In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (delay caused by anthrax sterilization); *AES Puerto Rico*, 8 E.A.D. at 328-29 (delays due to hurricane and to aircraft problems experienced by overnight carrier); *see also In re Kawaihoe Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997) (delay attributable to permitting authority that mistakenly instructed petitioners to file appeals with EPA’s Headquarter’s Hearing Clerk).

*Id.* at pp. 7-8. As no such “special circumstances exist in this matter, Petitioners’ motion should be denied.

The Petitioners allegations are unlike the circumstances in *In re Desert Rock Energy Company LLC*, PSD Appeal 08-03 & 08-04 (EAB August 21, 2008)(Order Granting Desert

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<sup>4</sup> Taken in its larger context, Petitioners’ request is simply one in a number of delay tactics aimed at stopping construction of the proposed facility at all costs. For example, in the appeal of the grant of a local zoning permit for the Facility, Petitioner Dearstyne attempted to use the excuse of his tardy hiring ( i.e. on the day of the deadline for the filing) his *second* counsel in that matter to justify a delay in that proceeding. *See* “Plaintiffs’ Emergency Motion to Extend the Deadline for Filing an Opposition to Defendant’s Motion for Summary Judgment” included in Attachment 5 hereto. Mr. Dearstyne’s second counsel has now been replaced by a third counsel – who is also Petitioners’ current counsel in this matter.

Rock's Motion to Participate, Granting a 30-Day Extension of Time, and Denying a Stay of Briefing on Certain Issues) – the sole case cited by Petitioners in support of their motion. Contrary to Petitioner's assertions, the record in this matter is comparatively modest as the PSD Permit's accompanying Response to Comments document (which also includes comments regarding a state-only air permit) is only 42 pages plus a single exhibit – easily attached to Petitioners' Petition/Motion. Also contrary to Petitioners' assertion, all record materials were made readily available to Petitioners. The PSD Permit, PSD Fact Sheet and Response to Comments were all posted on MassDEP's website immediately upon issuance of the PSD Permit. Further the Response to Comments states that and copies of the PSD Permit and Response to Comments were sent to all commenters – including Petitioners Linda Haley, William Dearstyne, and Jeff Brooks. *See Response to Comments*, attached as Exhibit 4 to Petition/Motion. Finally, Petitioners do not assert that they have retained or intend to retain any technical experts to review the PSD Permit.

For all of the foregoing reasons, Footprint respectfully requests that the Board deny the Petitioners' motion.

Dated: March 6, 2014

Respectfully Submitted

A handwritten signature in cursive script, reading "Lauren A. Liss". The signature is written in black ink and is positioned above a horizontal line.

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Counsel for:

FOOTPRINT POWER SALEM HARBOR  
DEVELOPMENT LP

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of March, 2014, copies of the foregoing Opposition to Motion for Permission to File Amended Petition in the matter of Footprint Power Salem Harbor Development LLP, Appeal No. PSD 14-02 were served by First Class Mail to the following:

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DEVELOPMENT LP

# Attachment 1

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
NO. SJ-2013-450

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CONSERVATION LAW FOUNDATION, INC. )  
)  
)  
v. )  
)  
ENERGY FACILITIES SITING BOARD )

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**FOOTPRINT POWER SALEM HARBOR DEVELOPMENT'S  
MOTION FOR EXPEDITED REVIEW**

INTRODUCTORY STATEMENT

Intervenor Footprint Power Salem Harbor Development LP ("Footprint") hereby moves this Court for expedited review of the above appeal. As set forth below, if this appeal proceeds along the typical timeline for such appeals, even if the underlying Final Decision is upheld, the proposed electric generating facility will not be operational in time to fill the electric capacity shortage that is expected to occur on June 1, 2016. Accordingly, in order to avoid serious risks to the public, including brownouts and overall damage to the reliability of the electrical grid, Footprint respectfully requests an expedited process for this appeal.<sup>1</sup>

PROCEDURAL HISTORY

1. Footprint is proposing to demolish the existing, retired and ancient coal fired power plant currently known as Salem Harbor Power Station in Salem,

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<sup>1</sup>Because the scope of the Siting Board's review was limited to a determination of whether the Petition to Construct met the five requirements set forth in G.L. c. 164 §69, the issue of the exigent circumstances warranting expedited review was not in front of the Siting Board.

Massachusetts and construct a 674 megawatt, natural gas-fired electric generating facility on the site (“Facility”). The City of Salem and other critical stakeholders enthusiastically support the Facility’s development, as the Facility will provide numerous benefits to City residents.<sup>2</sup>

2. Footprint sought approval from the Massachusetts Energy Facilities Siting Board (“Siting Board”) to construct the Facility. See G.L. c. 164, § 69J¼ (no applicant can commence construction of a generating facility unless a petition for approval of that generating facility has been approved by the Siting Board), G.L. c. 164, § 69H (the Commonwealth relies on the Siting Board “to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost”). Footprint filed its Petition to Construct with the Siting Board on August 3, 2012. The Siting Board docketed the Petition to Construct as EFSB 12-2. In EFSB 12-2, the Siting Board held 10 days of evidentiary hearings during which 23 witnesses provided testimony; entered 775 exhibits into the evidentiary record; allowed Footprint and intervenors to the underlying action to submit initial and reply briefs; and reviewed an Issues Memorandum issued by EFSB Staff, as well as comments filed by parties in response to the Issues Memorandum.

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<sup>2</sup> The Facility will be smaller in size, more efficient in operation and provide for the environmentally remediation of the current site, including demolition of the existing stacks that have dominated the Salem skyline since 1950. The remediation will also free up the development of approximately 45 acres waterfront property on the site, thereby enhancing opportunities for public access along such waterfront allowing the City to make better use of the existing deep water port on the site. In addition, the Facility, will be a significant source of property tax revenues that will help fund important expenditures in the City’s public schools, public safety and public infrastructure systems.

3. In a final decision dated October 10, 2013 (“Final Decision”), the Siting Board approved 7-0 with one abstention Footprint’s Petition to Construct, thereby allowing Footprint to commence construction of the Facility.

4. On November 8, 2013, the Conservation Law Foundation (“CLF”) appealed the Final Decision pursuant to G.L. c. 25, § 5. On November 18, 2013, Footprint filed a Motion for Leave to intervene in this appeal, which was assented to by the Attorney General and unopposed by the CLF.

AN EXPEDITED APPEAL IS NECESSARY  
TO AVOID AN ELECTRICAL SHORTAGE

A. The Electrical Market in the Commonwealth of Massachusetts

5. The DPU has found that through restructuring the electric industry, the Commonwealth has made “a clear policy choice that electric generation resources are best developed in response to price signals from a competitive marketplace.” Ex. A, D.P.U. 12-77, at 30.<sup>3</sup> That competitive marketplace for Massachusetts (and the other New England States) is the Forward Capacity Market (“FCM”) administered by ISO-NE through its annual Forward Capacity Auctions (“FCAs”). Id. at 4-5.

6. The FCM is a market in which ISO-NE projects the needs of the power system three years in advance and then holds an annual auction to purchase power resources to satisfy the region’s future needs. ISO-NE explained the functioning of the FCM in a letter to the Massachusetts Department of Environmental Protection (“DEP”) dated August 9, 2013 (“ISO-NE Letter”):

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<sup>3</sup> Citations to Exhibits are referred to as “[ ], Ex. \_\_ at \_\_.”

The FCM is designed to ensure there is sufficient capacity by promoting economic investment in supply and demand resources where they are needed most. To purchase enough qualified resources to satisfy the region's future needs and to allow enough time to construct new capacity resources, FCAs are held each year for a delivery year approximately three years in advance. Capacity resources compete in the annual FCA to obtain a commitment to supply capacity in exchange for a market-priced capacity payment. If a new capacity resource clears in the FCA, it has approximately three years to build the infrastructure needed to fulfill its capacity obligation. "Clearing" in the FCA means that the resource was selected in the auction, and then must assume a supply obligation for the commitment period in which the FCA corresponds.

Ex. B, ISO- NE Letter, at 3.

7. Thus, for the FCM to function, developers must be able to build necessary power plants within three years from the date of the FCA. Id. In this case, Footprint participated in FCA #7, which ISO-NE conducted in February 2013. Id. The resulting obligation to supply electrical capacity begins on June 1, 2016. Id. In anticipation of a bid in FCA #7, Footprint began working on the Facility in April 2010 – six years before the capacity was needed.<sup>4</sup>

B. Both DPU and ISO-NE Conclude that An Electrical Capacity Shortage Is Likely to Occur if the Facility is Not Operational by June 1, 2016

8. On August 3, 2012, Governor Patrick signed into law Chapter 209 of the Acts of 2012, "An Act Relative to Competitively Priced Electricity in the Commonwealth" ("Act"). Section 40 of the Act required the Department of Public Utilities ("DPU") to open a docket to investigate the need for additional capacity in the NEMA/Boston region within the next 10 years. Section 40 provides the following guidance to the DPU in conducting its investigation:

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<sup>4</sup> As set forth above, Footprint filed its petition to construct the facility on August 3, 2012 – the same day it acquired the existing Salem Harbor facility and six months prior to FCA #7.

If there is a demonstration that the ISO-New England forward capacity auction immediately preceding March 15, 2013 concluded with total capacity, including excess generating capacity, in such load zone in an amount less than the capacity expected to be needed to reliably serve the load to such load zone during the next subsequent auction after taking into account any delist or retirement bids that were rejected for reliability reasons, the department shall determine whether there is a need for additional electric generating capacity in the NEMA region. Such a demonstration shall be conclusive proof of the need for additional electric generating capacity in the NEMA load zone.

Ex. B, ISO-NE Letter, at 3 (internal citation omitted).

9. In making its determination, the DPU must include consideration of “ISO-New England [Inc. (“ISO-NE”)] findings and of the anticipated function of the capacity market in New England.” *Id.* As part of its investigation, the DPU requested that ISO-NE provide: (a) information on the existing capacity resources in NEMA/Boston; (b) the ISO-NE load forecast for the next ten years; and (c) ISO-NE’s assessment of the likelihood of retirements of capacity resources and of the implementation of transmission upgrades over the next ten years. Ex. A, DPU 12-77, at 2-3. On October 26, 2012, ISO-NE responded to the Department’s request and provided a summary of information. *Id.* at 3.

10. The DPU then conducted a technical conference, at which Stephen J. Rourke, Vice President of System Planning for ISO-NE, presented the material ISO-NE submitted in October 2012. Mr. Rourke also discussed ISO-NE’s November 6, 2012 filing with the Federal Energy Regulatory Commission (“FERC”), entitled “FCA #7 Resource Qualification Determinations and Requirements”. *Id.* In that FERC filing, ISO-NE describes the current inventory of available resources in NEMA/Boston, including generation, transmission, energy efficiency and demand response, as well as ISO-NE’s forecasted peak loads for

NEMA/Boston through capacity year 2021/2022. The DPU then invited and received comments from numerous interested stakeholders. After conducting its review, the DPU determined that:

The results of FCA #7 show that, absent Footprint, there is a need in NEMA/Boston for additional capacity resources beginning in the 2016/17 capacity year.

Ex. A, D.P.U. 12-77, at 18.

11. As described in the ISO-NE Letter, Footprint's bid in the FCA to supply capacity was "cleared" (*i.e.*, accepted as needed) by ISO-NE for the NEMA load zone for the 2016/17 delivery year. Ex. B, ISO-NE Letter, at 3. After the FCA, ISO-NE filed materials at FERC seeking FERC's approval of the FCA 7 auction results. *Id.* at 9. In testimony before the Federal Energy Regulatory Commission, Mr. Rourke explained:

The capacity from Footprint is needed to meet NEMA/Boston's Local Sourcing Requirement... without the capacity from Footprint, the zone would not have sufficient capacity to meet its Local Sourcing Requirement.

Ex. C, Prefiled testimony of Stephen J. Rourke, ISO New England Docket No. ER 13-992, Feb. 26, 2013, at 8:15-8:20.

12. FERC accepted the ISO-NE filing on June 11, 2013. Ex. B, ISO-NE Letter, at 4. Thus, the DPU, ISO-NE and FERC have all determined that unless the Facility is able to generate electricity on June 1, 2016, there will be a shortage of capacity for the 2016-2017 commitment period, and therefore the NEMA/Boston capacity zone will not meet reliability standards. Specifically, ISO-NE stated:

The FCM is the primary means of ensuring that the region and local areas have resources to meet reliability standards. The auction is designed to send the appropriate price signals so that

capacity is built where it is needed most. The process worked as intended by attracting a significant new resource in NEMA/Boston, an area that needed new resources to meet the reliability needs in the area. Without the capacity from Footprint, NEMA/Boston will be below the zone's Local Sourcing Requirement for the 2016 to 2017 commitment period. As such, Footprint is both the only choice and the best choice at this time.

Ex. B, ISO-NE Letter, at 4.

C. A Possible Electrical Capacity Shortage Triggers Significant Public Health Concerns

13. The Massachusetts legislature has declared that an adequate supply of electricity is essential to public health and safety and economic development. Section 1(a) of the Restructuring Act of 1997 expressly provides that "electricity service is essential to the health and well-being of all residents of commonwealth, to public safety, and to orderly and sustainable economic development." 1997 Mass. Acts. ch. 164 §1(a). Having established that there will be a capacity shortage in the Boston/NEMA region if the Facility is not online by June 1, 2016, the next question in the analysis is to determine the effect of such shortage. As more particularly described below, that question has been answered – such shortage will create an emergency situation that triggers significant public health and safety concerns.

14. ISO-NE is tasked with the responsibility of insuring a reliable supply of electricity in New England. Ex. A, D.P.U. 12-77, at 33. ISO NE concluded that there is a significant possibility of a service interruption (with its threat to public health and safety) if the Facility is not on line by June 2016. In the ISO-NE Letter, after explaining why Footprint's Facility is needed to meet the NEMA/Boston capacity deficiency, ISO-NE specifically states that the expected capacity shortage

would be an “emergency” requiring the use of “operational tools” that could still result in interruptions of electric service to customers. Ex. B, ISO-NE Letter, at 5.

15. The ISO-NE Letter also makes clear that no such “emergency” would occur if the Facility is online by June 1, 2016. Ex. B, ISO-NE Letter, at 5 (“Many of these tools would only be used in emergency situations in real-time operations, which is why the ISO first looks to the market to resolve reliability issues.”) Such tools are “backstop actions . . . if the FCM does not produce sufficient resources.”<sup>5</sup> In fact, the only thing that ISO-NE is positive about is that no capacity shortfall will occur (and therefore no emergency or threat to public health and public safety will occur) if the Facility is online by June 2106. “Footprint is both the only choice and the best choice at this time.” *Id.*

D. Footprint Requires Financing to Commence Pre-Construction Activities

16. In order for Footprint to meet its obligation to supply electrical capacity on June 1, 2016, it must commence its pre-construction activities no later than January 31, 2014. Ex. D, Affidavit of Peter Furniss at ¶3. The pre-construction tasks include substantial engineering, field work and procurement. *Id.* at ¶4. The estimated cost for these pre-construction activities is \$150 million, which includes procurement deposits that must be made months in advance in order to insure the availability of equipment to support a June 2016 in-service date. *Id.* at ¶5.

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<sup>5</sup> Clearly, these back-up actions could not include any kind of generating facility given permitting requirements and timelines.

17. Footprint requires financing to begin the pre-construction activities. However, financing simply cannot proceed during the pendency of this appeal. No lender will advance hundreds of millions of dollars when permits needed for construction are challenged on appeal. Thus, if this appeal is not complete by January 31, 2014, financing will not be achieved and pre-construction activities will not commence. Consequently, Footprint will be unable to meet a June 2016 in-service date.

CLF is NOT LIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL

18. Finally, we note that CLF's appeal appears to be deficient on its face. The gravamen of CLF's appeal is that the Siting Board erred in approving the Facility because the Facility is inconsistent with the Global Warming Solutions Act ("GWSA"), G.L. c. 21N. However, Section nine (9) of the GWSA provides that nothing in the statute "shall preclude, prohibit or restrict construction of a new facility" if it is in conformance with any regulations issued pursuant to the statute. G.L. c. 21N, §9. The record will show that there are no such regulations.<sup>6</sup> Thus, the relief requested by CLF is not permitted by the explicit language of the very statute on which its argument rests.

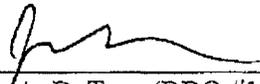
WHEREFORE, based on the exigent circumstances described herein, Footprint Power Salem Harbor Development LP respectfully requests that the Supreme Judicial Court for Suffolk County issue an expedited scheduling order for

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<sup>6</sup> The Secretary of Energy and the Environment did issue the Massachusetts Clean Energy and Climate Plan for 2020 ("Plan") in response to the mandate of the GWSA. The Siting Board found that the proposed Facility was consistent with the Plan. Ex. E, Final Decision of Siting Board, at 104.

this appeal and that any hearing or argument in this matter be scheduled before January 31, 2014, or the earliest practicable date after January 31, 2014 that is convenient to this Court.<sup>7</sup>

Respectfully submitted,  
Footprint Power Salem Harbor Development  
LP  
By their Attorneys,



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Dated: November 25, 2013

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<sup>7</sup> While the January 31, 2014 date is critical to ensuring that financial close is completed in time to ensure construction prior to June 1, 2014, we understand that the Court is scheduled to hear oral argument on other matters on February 3, 2014 (the Monday following Friday, January 31, 2014). To conform to the Court's docket, we would respectfully request that we be included on the argument list for that date.

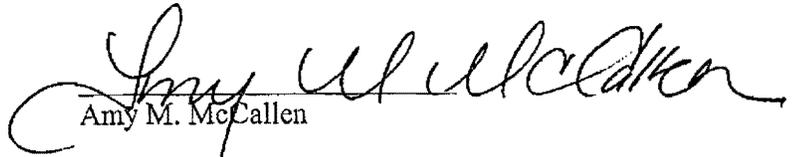
CERTIFICATE OF SERVICE

I, Amy M. McCallen, hereby certify that on this 25th day of November, I served by first class mail a true copy of Footprint's Motion to Leave to Intervene and Exhibits thereto upon:

Robert J. Shea, Presiding Officer  
Energy Facilities Sitting Board  
One South Station  
Boston, MA 02110

Pierce O. Cray  
Assistant Attorney General  
One Ashburton Place – 18<sup>th</sup> Floor  
Boston, MA 02108

Shanna Cleveland, Esq.  
Conservation Law Foundation  
62 Summer Street  
Boston, MA 02110

  
Amy M. McCallen

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
NO. SJ-2013-450

\_\_\_\_\_  
CONSERVATION LAW FOUNDATION, INC. )

v. )

ENERGY FACILITIES SITING BOARD )  
\_\_\_\_\_

**ISO- NEW ENGLAND INC.'S SUPPORT FOR  
FOOTPRINT POWER SALEM HARBOR DEVELOPMENT'S  
MOTION FOR EXPEDITED REVIEW**

**INTRODUCTORY STATEMENT**

Proposed intervenor, ISO New England (the "ISO")<sup>1</sup>, hereby supports the motion of Footprint Power Salem Harbor Development LP ("Footprint") to this Court for expedited review of the appeal ("Footprint's Motion for Expedited Review") filed by the Conservation Law Foundation ("CLF") in the above-referenced docket. The ISO takes no position on the merits of CLF's appeal. Rather, the ISO is concerned that if this appeal proceeds along the typical timeline, even if the underlying Final Decision is upheld, Footprint's proposed 674 megawatt, natural gas-fired electric generating facility ("Footprint Generating Station") will not be

<sup>1</sup> Simultaneously with this Motion, the ISO has filed a Motion to Intervene in this docket.

operational in time to fill the FERC-approved<sup>2</sup> electric capacity shortage that will exist in the NEMA<sup>3</sup>/Boston Capacity Zone beginning in June 2016, as described in greater detail below. Accordingly, in order to meet federal reliability criteria and to avoid risks to the public, which could include controlled blackouts to ensure the reliability of the larger power system in the absence of the Footprint Generating Station, the ISO supports Footprint's Motion for Expedited Review. As such, the ISO requests that the Court review and issue a determination on CLF's appeal as soon as practicable.

### **PROCEDURAL HISTORY**

1. Footprint sought approval from the Massachusetts Energy Facilities Siting Board ("Siting Board") to construct the Footprint Generating Station, a 674 megawatt,<sup>4</sup> natural gas-fired electric generating facility on the site of the existing Salem Harbor generating station pursuant to G.L. c. 164, §69J1/4 and G.L. c. 164, §69H. Footprint filed its Petition to construct with the Siting Board on August 3, 2012. The Siting Board docketed the Petition to Construct as EFSB 12-2. In EFSB 12-2, the Siting Board held 10 days of evidentiary hearings during which 23 witnesses provided testimony; entered 775 exhibits into the evidentiary record; allowed Footprint and intervenors to the underlying action to submit initial and reply briefs; and reviewed an Issues Memorandum issued by EFSB Staff, as well as comments filed by parties in response to the Issues Memorandum.

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<sup>2</sup> Letter Order issued on June 11, 2013 in Docket No. ER13-992-000 available at: [http://www.iso-ne.com/regulatory/ferc/orders/2013/jun/er13-992-000\\_6-11-13\\_ltr\\_ord\\_accept\\_7th\\_fca\\_results.pdf](http://www.iso-ne.com/regulatory/ferc/orders/2013/jun/er13-992-000_6-11-13_ltr_ord_accept_7th_fca_results.pdf)

<sup>3</sup> "NEMA" is short for "Northeastern Massachusetts". The NEMA/Boston Zone approximately defined geographically as being bounded by the New Hampshire/Massachusetts border to the north, Interstate 495 to the east, and the southern suburbs of Boston to the south.

<sup>4</sup> A single megawatt or "MW" is enough electric energy to serve approximately 1,000 homes.

2. In a final decision dated October 10, 2013 (“Final Decision”), the Siting Board approved 7-0 with one abstention, Footprint’s Petition to Construct, thereby allowing Footprint to commence construction of the Footprint Generating Station.

3. On November 8, 2013, CLF appealed the Final Decision pursuant to G.L. c. 25, §5. On November 25, 2013, Footprint filed a Motion for Expedited Review of this appeal. On December 6, 2013, CLF filed its “Opposition to Footprint Power Salem Harbor Development LP’s Motion for Expedited Review” (CLF’s Opposition To Expedited Review”). Among other things, CLF incorrectly claims that no electrical shortage is likely to occur if the Footprint Generating Station is not available by June 1, 2016.<sup>5</sup> As discussed below, if the Footprint facility is not available by June 1, 2016, the NEMA/Boston area is expected to face an electric capacity shortage, will not meet federal reliability criteria, and could face controlled blackouts.

**AN EXPEDITED APPEAL IS NECESSARY  
TO AVOID AN ELECTRIC CAPACITY SHORTAGE**

**A. The New England Wholesale Electricity Market**

4. The ISO is the independent, private, non-profit entity that serves as the regional transmission organization (“RTO”) for New England. The ISO is regulated by the Federal Energy Regulatory Commission (“FERC” or the “Commission”). The ISO has no shareholders and its employees are barred from being employed by or owning shares in companies that participate in the ISO’s markets. The ISO plans and operates the New England bulk power system and administers New England’s organized wholesale electricity market. In its capacity as an RTO, the ISO has the responsibility to protect the reliability of the New England Control Area and to plan and operate the system according to reliability standards established by the Northeast

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<sup>5</sup> CLF Opposition To Expedited Review at 5.

Power Coordinating Council (“NPCC”) and the North American Electric Reliability Corporation (“NERC”).<sup>6</sup>

5. The primary means by which ISO ensures sufficient resources to reliably serve demand is through the Forward Capacity Market (“FCM”). The FCM is a three-year forward market for capacity to procure and retain the necessary resources to reliably serve demand both locally and system-wide in New England. The ISO purchases capacity system-wide, and in addition, the FCM is also designed to address electric capacity needs in subregions of the New England system. As pertinent to this proceeding, the NEMA/Boston Capacity Zone has been determined to lack adequate internal resources and transmission import-capability to meet reliability standards (the “Local Sourcing Requirement”) as described below. The NEMA/Boston Capacity Zone includes the Greater Boston and North Shore regions of Massachusetts.

6. The FCM is designed to ensure that there is sufficient capacity by promoting economic investment in supply and demand resources where they are needed most. To purchase enough qualified resources to satisfy the region’s future needs and to allow enough time to construct new capacity resources, Forward Capacity Auctions (“FCAs”) are held each year for a delivery year approximately three years in advance. Capacity resources compete in each annual FCA to obtain a commitment to supply capacity in exchange for a market-priced capacity payment. If a new capacity resource clears in the FCA, it has approximately three years to build the infrastructure needed to fulfill its capacity obligation. “Clearing” in the FCA means that the

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<sup>6</sup> FERC has designated NERC as the “Electric Reliability Organization” for the United States. NERC develops and FERC approves mandatory reliability standards pursuant to Section 215 of the Federal Power Act. These standards are enforceable with penalties of up to 1 million dollars per day per violation.

resource was selected in the auction, and then must assume a supply obligation for the commitment period for which the FCA corresponds.

**B. A Capacity Shortage Exists If Footprint Is Not Available By June 1, 2016**

7. Last February, the seventh FCA was held for the June 1, 2016 through May 31, 2017 Capacity Commitment Period. The Local Sourcing Requirement for the NEMA/Boston Capacity Zone for FCA 7 was 3,209 MW. In other words, a minimum of 3,209 MW of capacity resources in the auction needed to be located within the NEMA/Boston capacity zone to meet the reliability standards. Prior to the auction only 3,080 MW of Existing Resources were located in this zone, meaning that at least 129 MW of new resources were needed to provide capacity within the zone. At the beginning of the auction, the NEMA zone had only 3,754 MW of capacity, including Footprint's 674 MW, which meant that the capacity from Footprint was needed to meet the Local Sourcing Requirement. No other significant resources sought to meet the need and, because power plants cannot be built just to the specific size needed to meet the reliability need, the Footprint plant cleared in the FCA and the ISO determined that without capacity from Footprint, there would be insufficient capacity in NEMA/Boston to meet the zone's Local Sourcing Requirement. Specifically, in a filing with the FERC, the ISO reported that without the capacity from Footprint, the [NEMA/Boston] zone would not have sufficient capacity to meet its Local Sourcing Requirement. The Commission accepted the ISO filing in an order issued June 11, 2013.<sup>7</sup> Therefore, the Court should disregard CLF's claim that the ISO has not "concluded that an electric capacity shortage is likely to occur" without Footprint.<sup>8</sup>

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<sup>7</sup> Letter Order issued on June 11, 2013 in Docket No. ER13-992-000

<sup>8</sup> CLF Opposition to Expedited Review at 5.

Contrary to this assertion, the ISO, supported by a final order of the Federal Energy Regulatory Commission, has concluded that Footprint is needed to prevent a capacity shortage.<sup>9</sup>

8. Since FCA 7, there have been significant changes in the New England system that increase the need for capacity from Footprint. Specifically, for the upcoming eighth Forward Capacity Auction, the ISO has received Non Price Retirement requests (“NPR”) representing over 3,000 MW from generation and Demand Response resources in New England, which is more than triple the amount of capacity that sought to retire from the previous capacity auctions combined. An NPR is a binding request to retire capacity from a resource. New England is a closely connected power pool and the capacity from Footprint is being counted on by the ISO to address both local reliability concerns in the NEMA/Boston Capacity Zone and potential system-wide reliability concerns resulting from the large number of potential retirements.

**C. CLF’s assertions That the Footprint Power Plant is Not Needed Because of Other Alternatives Is Wrong**

9. In its opposition to Footprint’s Motion, CLF asserts that “ISO-NE has the obligation and the ability to ensure system reliability with or without Footprint Power.” While there is some merit in this statement, it does not represent the realities of the situation in the NEMA/Boston zone. As explained above, FERC and the ISO have found a need for new resources in this zone and Footprint was awarded the right and obligation to meet this need through a competitive, market-based auction. CLF is correct in asserting that, if the Footprint plant is not constructed, the ISO will take all possible steps to protect reliability. What CLF fails to explain is what these

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<sup>9</sup> CLF’s footnote 14 states that the ISO and CLF may differ on the interpretation of the ISO’s Tariff. The FERC order cited by CLF is irrelevant to this proceeding.

steps could include. Further, CLF is wrong that the ISO will “ensure” reliability if the plant is not built.

With respect to the ISO’s options if the plant is not built, CLF states: “ISO-NE has multiple tools to ensure that other resources will be in place if necessary. These include reconfiguration auctions, the Locational Forward Reserve market, a gap request for proposals (“RFP”), as well as operational tools.” The first three of these options are short-term in nature and relatively unlikely to meet the reliability needs in the region. Because of the fact that the need is now only two and one half years away and a resource would only receive very limited and short-term compensation, it is virtually impossible that a new power plant could replace Footprint. What is more likely through any of these vehicles is the use of trailer-mounted diesel generators which, would likely face strong opposition and might not be installable.<sup>10</sup>

This means that the only option left to the ISO to protect reliability will be the “operational tools” to which CLF refers. From the perspective of the operator of the bulk power system, protecting reliability means avoiding uncontrolled or cascading outages to the entire region’s power system. Without sufficient resources in a local area (such as NEMA/Boston), the ISO will heavily rely upon existing demand response resources and other emergency load relief actions. On a hot summer or cold winter day or if other resources fail, the ISO will use controlled power outages, or “rolling blackouts”, in the NEMA/Boston zone to assure that reliability in the larger region is not threatened. While such rolling blackouts help ensure reliability of the larger power system, they do result in disruption of service to electric customers in the affected areas, here

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<sup>10</sup> While some might argue that demand response and conservation could meet the need, the ISO does not believe that enough of these resources could meet the relatively large need in the NEMA/Boston zone. Similarly, there are no transmission projects that have even begun the siting process and, as a result, transmission is also not a viable option to meet the need.

NEMA/Boston. CLF's assertion that the ISO will "ensure" reliability is incorrect because the ISO cannot maintain firm electric service to customers under federal rules if that continued service would threaten the reliability of the overall power system. In the absence of sufficient generation to serve electric load pursuant to the federal standards, the ISO will reduce the load that needs to be served. The ISO simply cannot make megawatts of generation materialize that are not on the system.

The ISO supports expediting this appeal to provide it with the maximum time to plan, if necessary, for the unavailability of Footprint if this Court reverses the Siting Board's decision.

**D. The ISO Requests That The Court Act On Footprint's Motion For Expedited Review As Soon As Practicable**

10. Because Footprint received a Capacity Supply Obligation for FCA 7, the ISO is counting on Footprint's capacity to be available no later than June 1, 2016. In its Motion For Expedited Review, Footprint states that in order for Footprint to meet this obligation, it must commence pre-construction activities no later than January 31, 2014 and that Footprint requires financing in order to start the pre-construction activities.<sup>11</sup> Footprint also states that it cannot obtain financing during the pendency of the appeal. Therefore, if the appeal is not concluded prior to January 31, 2014, Footprint will not be available to provide capacity by June 1, 2016.<sup>12</sup> As such, the ISO requests that the Court act on the appeal as soon as practicable under the Court's rules.

WHEREFORE, based on the exigent circumstances described herein, ISO-New England, Inc. supports the Footprint Motion for Expedited Review.

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<sup>11</sup> Footprint Motion at ¶¶ 16-17.

<sup>12</sup> Footprint Motion at ¶ 17.

Respectfully submitted,

ISO New England Inc.

By:

Ray Hepper (by *EHK*)

Ray Hepper BBO # 000207

ISO New England Inc.

One Sullivan Road

Holyoke, MA 01040-2841

(413) 540-4592 (Telephone)

(413) 535-4379 (Fax)

Email: [Rhepper@iso-ne.com](mailto:Rhepper@iso-ne.com)

Date: December 11, 2013

CERTIFICATE OF SERVICE

I, , hereby certify that on this 11<sup>th</sup> day of December, I served by first class mail a true copy of the ISO's Support for Footprint's Motion to Leave to Intervene upon:

Robert J. Shea, Presiding Officer  
Energy Facilities Siting Board  
One South Station  
Boston, MA 02110

Shanna Cleveland, Esq. Conservation  
Law Foundation  
62 Summer Street  
Boston, MA 02110

Pierce O. Cray  
Assistant Attorney General  
One Ashburton Place- 18<sup>th</sup> Floor  
Boston, MA 02108

John A. DeTore, Esq.  
Rubin and Rudman, LLP  
50 Rowes Wharf, 3d Floor  
Boston, MA 02110  
(counsel for Footprint Power)

A handwritten signature in cursive script, appearing to read "Eric Kentland", is written over a horizontal line. The signature is enclosed in a large, hand-drawn oval.

# Attachment 2



For a thriving New England

CLF Massachusetts 62 Summer Street  
Boston MA 02110  
P: 617.350.0990  
F: 617.350.4030  
www.clf.org

*By electronic mail and first-class mail*

February 18, 2014

Dear Member of Ten Residents Group:

Further to our discussion and correspondence of last week, Conservation Law Foundation (“CLF”) has just today reached a settlement agreement with Footprint Power Salem Harbor Development LP (“Footprint Power”) regarding its proposal to construct and operate a natural gas fired electric generating facility in Salem, Massachusetts. CLF and Footprint Power will be filing the proposed settlement agreement with the Massachusetts Energy Facilities Siting Board (“Siting Board”) today, February 18, 2014.

You are receiving this letter because you are a member of a ten residents group that was formed pursuant to G.L. c. 30A, § 10A, to file comments on the draft PSD Permit and Proposed Comprehensive Plan Approval issued by the Massachusetts Department of Environmental Protection to Footprint Power on September 9, 2013. CLF as one of the members of the ten residents groups agreed to serve as the authorized representative for the ten residents group and in that capacity filed with the Massachusetts Department of Environmental Protection a Motion for Mandatory Intervention in the adjudicatory proceeding regarding these permits on behalf of itself and the ten residents group on November 8, 2013. In addition, CLF, serving as the authorized representative for the ten residents group, filed on behalf of itself and the ten residents group a complaint for a declaratory judgment in Massachusetts Superior Court on January 14, 2014 alleging that the Massachusetts Department of Environmental Protection does not have the authority to issue PSD permits. That complaint was docketed as SUCV2014-00161-H, Conservation Law Foundation et al v. Massachusetts Department of Environmental Protection.

As a result of its proposed settlement agreement with Footprint Power, CLF has agreed to voluntarily dismiss its Motion for Mandatory Intervention and withdraw as the authorized representative for the ten residents group if the Siting Board incorporates our Settlement Agreement as an enforceable condition on any final approval of a Certificate for the proposed Footprint Power facility. In addition, CLF has agreed to voluntarily dismiss the complaint for a declaratory judgment and withdraw as the authorized representative for the ten residents group. Based on our discussions last week, we understand that you may not be interested in joining in the proposed settlement agreement, and we are writing to ensure that you understand that although CLF is withdrawing as the authorized representative for the group, our withdrawal has no bearing on your right to proceed with an appeal. If you as an individual or as a member of the



ten residents group wish to appeal the PSD Permit and the Comprehensive Plan Approval that were issued by the Department on January 30, 2014, you may choose another member of the ten residents group to serve as your authorized representative or may seek counsel to represent you in filing an appeal in the manner set forth in each of the permits. In addition, because we are dismissing the complaint for declaratory judgment without prejudice, you may choose another member of the ten residents group to serve as your authorized representative or may seek counsel to file your own declaratory judgment action.

Finally, with respect to the Comprehensive Plan Approval, Footprint Power has asked the Siting Board to incorporate the Comprehensive Plan Approval into the Certificate of Environmental Impact and Public Interest that it seeks pursuant to G.L. c. 164, §§ 69K½- 69O½ which has been docketed as EFSB 13-1. The Siting Board issued a Tentative Decision on February 4, 2014 indicating that it intends to grant Footprint Power's request to incorporate the CPA into the Certificate. The Siting Board will be holding a public meeting to deliberate on the Tentative Decision on February 20, 2014 at 10 a.m. at One South Station, 5th Floor, Hearing Room A, Boston, MA. It is our understanding that the public may offer comments on the Tentative Decision at that time.

CLF is also notifying the Department of Environmental Protection and the Siting Board of our withdrawal as the group's authorized representative. We have provided each of these agencies with the names and addresses for each member of the ten residents group so that you will receive notice regarding any further action by the agencies; however, you may also want to contact the agencies directly to notify them that you wish to receive any future communications regarding these dockets.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Shanna Cleveland  
Senior Attorney  
Conservation Law Foundation  
62 Summer Street  
Boston, MA 02110  
(Phone) 617-350-0990, x1716  
(E-mail) [scleveland@clf.org](mailto:scleveland@clf.org)



conservation law foundation

cc: Andrea Maubourquette  
Dorian Williams  
Douglas Haley  
Linda Haley  
Jane Bright  
Jeffrey Brooks  
Marlene Faust  
Martha Dansdill  
Lynn Nadeau  
Sue Kirby  
William Dearstyne  
Clean Water Action  
HealthLink  
350ma.org  
Better Future Project

# Attachment 3

## Conservation Law Foundation Announces Settlement with Footprint Power Plant on Salem Natural Gas Facility

CONTACT:  
Emily Dahl, CLF  
978-394-3506  
[edahl@clf.org](mailto:edahl@clf.org)

### **In groundbreaking settlement, plant developers agree to emissions limits and future shutdown date to comply with Mass. climate mandates**

BOSTON, MA February 18, 2014 – Conservation Law Foundation (CLF) today announced that the organization has reached a groundbreaking settlement ensuring that for the first time, a proposed natural gas-fired power plant must comply with conditions aimed at reducing greenhouse gas emissions and overreliance on fossil fuels, including enforceable annually declining emissions limits and a date certain for future plant retirement. The agreement between CLF and the developers of the natural gas-fired Footprint Power Plant proposed at the site of a retiring coal-fired plant in Salem, Mass., has been filed for final review and approval with Massachusetts state authorities.

“At a time when many across the nation and the world see unrestricted growth of natural gas as a climate solution, this is the first settlement providing a pathway for new natural gas infrastructure to help enable rather than undermine a clean energy future,” said CLF President John Kassel. “By recognizing the need to limit greenhouse gas emissions from natural gas-fired plants, this agreement reaffirms that natural gas and other fossil fuel projects must comply with state climate mandates, and has important implications for similar projects in the region and nationally.”

Since summer 2012, the proposed Footprint plant has been at the center of legal battles over concerns raised by CLF and residents of Salem and surrounding communities, on the grounds that neither the plant’s developers nor the Commonwealth of Massachusetts had demonstrated how the proposed facility could be consistent with the deep emissions reductions established by the Massachusetts Global Warming Solutions Act signed into law by Governor Deval Patrick in 2008, requiring emissions to be cut at least 25% below 1990 levels by 2020 and at least 80% below 1990 levels by 2050.

Under the settlement announced today, the developers of the Footprint plant agreed to the first ever set of binding conditions for a natural gas plant that establish decreasing annual emissions limits and a retirement date of no later than January 1, 2050. These conditions will help to ensure that the new plant will not hinder Massachusetts’ progress toward reducing emissions. In addition, in connection with the settlement, the Patrick Administration has committed to provide support to municipalities with active or retired coal plants with up to \$2 million in funding to build renewable energy facilities and transition to clean energy rather than relying on new fossil fuel plants.

“This agreement shows how natural gas can be a tool for reducing greenhouse emissions if it is appropriately conditioned and constrained in a manner that is consistent with the need to decarbonize our energy system,” said Shanna Cleveland, attorney for CLF. “Natural gas is often viewed as a bridge to the clean energy future; this settlement ensures that there is an end to that bridge. CLF will continue to advocate for sound legal frameworks around energy projects for the benefit of the citizens, communities, economy, and environment of Massachusetts and the entire region.”

The settlement will only take effect if the Siting Board incorporates the entirety of the agreement into the Final Decision as a condition of the approval that the Siting Board is proposing to issue for Footprint Power’s plant. A public meeting will be held at the Siting Board at 10 a.m. at One South Station, Fifth Floor, Hearing Room A in Boston, Massachusetts on Thursday, February 20.

Conservation Law Foundation (CLF) protects New England's environment for the benefit of all people. Using the law, science and the market, CLF creates solutions that conserve our natural resources, build healthy communities, and sustain a vibrant economy region-wide. Founded in 1966, CLF is a nonprofit, member-supported organization with offices in Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

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62 Summer Street, Boston MA 02110 | 617.350.0990 | [e-info@clf.org](mailto:e-info@clf.org)

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**The New York Times** <http://nyti.ms/1d6ip22>

ENERGY & ENVIRONMENT

## Massachusetts Regulators Approve a Gas-Fired Power Plant With an Expiration Date

By MATTHEW L. WALD FEB. 20, 2014

For years, proponents of natural gas, including President Obama, have promoted it as a “bridge fuel,” cleaner than coal but not clean enough to solve the climate problem. On Thursday, regulators in Massachusetts, in an unusual vote, put that theory into practice when it approved a new gas-fired power plant with only a limited life span.

In a hearing in Boston, a state siting board voted 5 to 0 to accept a proposal by a major New England environmental group and a company that wants to build the plant that would allow the plant to open, but require it to emit less and less carbon dioxide until it closed by 2050.

The Conservation Law Foundation and Footprint Power reached an agreement over a proposed \$800 million plant to be built in Salem Harbor, at the site of a coal plant that will shut this year. The new plant would generate 630 megawatts — although in later years, it would either have to limit its hours of operation, install carbon capture or make investments in renewable energy to stay under the declining emissions cap.

The agreement for progressively lower output and a definite retirement date is a first, according to Jonathan Peress, a vice president of the Conservation Law Foundation. Gas cuts carbon dioxide emissions by about half compared to coal, but it is still far too high in carbon to meet the ultimate climate emissions requirements, he said.

“We want gas to continue to displace coal,” he said. “We just don’t want to worry that we’re going from heroin to methadone.”

The agreement was submitted to the Massachusetts Energy Facilities Siting Board this week.

The plant is scheduled to open in 2016 and would operate normally until 2026, when progressively stricter limits would be imposed. In 2049, its last year of operation, its limit would be about one-quarter what it was in 2016.

Joining in the agreement was a state agency, the Executive Office of Energy and Environmental Affairs, which promised that if the deal was approved, it would be written into the state-issued operating permit for the plant. The state would embark on a program to reduce leaks of unburned natural gas. Methane, the main ingredient of natural gas, is a potent global warming gas.

A version of this article appears in print on February 21, 2014, on page B2 of the New York edition with the headline: Massachusetts Regulators Approve a Gas-Fired Power Plant With an Expiration Date.

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# Attachment 4



able to reach a settlement that could be presented to the Siting Board for incorporation into the Final Decision and the Composite Certificate. In the interest of ensuring due process, CLF and Footprint are requesting an extension of seven (7) days to provide an opportunity to finalize a proposed settlement agreement that can be presented to the Siting Board for consideration at the same time that the Tentative Decision is reviewed. CLF and Footprint Power believe that this additional time is necessary to ensure that the Siting Board and the other parties and participants have sufficient time to review the terms of any proposed settlement agreement and provide comment on such terms. Under the proposed schedule, CLF and Footprint Power would submit a proposed settlement agreement no later than February 18, 2014 and the Siting Board would hold its public meeting on February 20, 2014.

CLF and Footprint Power submit that resolution of the issues through a settlement agreement will result in administrative and judicial economy by reducing the likelihood of appeal and addressing the substantive and procedural issues raised by CLF. The additional time will not prejudice any other party since its effect will serve only to extend the time for them to comment on the Tentative Decision and proposed settlement agreement. CLF and Footprint Power have contacted all other parties and limited participants and represent that the Department of Environmental Protection, National Grid, the City of Salem, William Dearstyne, and Michael Furlong have no objection to this motion.

WHEREFORE, CLF and Footprint Power hereby respectfully request that the Siting Board extend the procedural schedule in this proceeding.

Respectfully submitted,

CONSERVATION LAW FOUNDATION

By its attorney,

/s/ Shanna Cleveland  
Shanna Cleveland  
Conservation Law Foundation  
62 Summer Street  
Boston, MA 02110  
Tel: (617) 850-1716  
Email: [scleveland@clf.org](mailto:scleveland@clf.org)

FOOTPRINT POWER SALEM HARBOR DEVELOPMENT LP

By its attorney,

/s/ John DeTore  
John DeTore  
Rubin and Rudman LLP  
50 Rowes Wharf  
Boston, MA 02110  
Tel: (617) 330-7550  
Email: [JDeTore@rubinrudman.com](mailto:JDeTore@rubinrudman.com)

Date: February 10, 2014

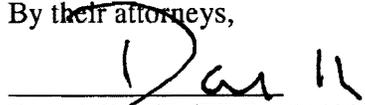
# Attachment 5



apparently not initiated any discovery prior to his withdrawal. Further, the prejudice to the defendants in this matter is minimal, given that discovery in this case should still be open under Land Court Standing Order 1-04 ("F" Track), and in any event a minor delay should be weighed against the plaintiffs' rights to effective counsel and their right to seek meaningful judicial review under G.L. c. 40A, § 17 and Article XI of the Declaration of Rights.

PLAINTIFFS,

By their attorneys,



Daniel C. Hill (BBO #644885)

Blair G. Edwards (BBO #682625)

Peter J. Cura (BBO #564195),

*Of Counsel*

HILL LAW

43 Thorndike St.

Cambridge, MA 02141

617-494-8300

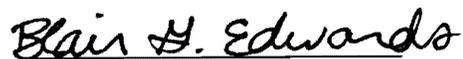
dhill@danhilllaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that I have served of a copy of the foregoing on the counsel of record listed below by mailing a copy, first class mail, postage prepaid this 19th day of February, 2014.

Amy E. Kwesell, Esq.  
Rubin and Rudman LLP  
50 Rowes Wharf  
Boston, MA 02110

Robin Stein, Esq.  
Assistant City Solicitor  
93 Washington Street  
Salem, MA 01970

  
Blair G. Edwards

COMMONWEALTH OF MASSACHUSETTS

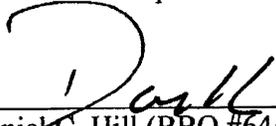
Essex, ss.

Land Court Department  
No. 13 PS 480212 KFS

MICHAEL FURLONG and WILLIAM	)
DEARSTYNE,	)
Plaintiffs	)
	)
v.	)
	)
FOOTPRINT POWER SALEM HARBOR	)
DEVELOPMENT LP and REBECCA	)
CURRAN, RICHARD DIONNE, MIKE	)
DUFFY, ANNIE HARRIS, THOMAS	)
WATKINS, DAVID EPPLEY and JAMES	)
TSITSINOS in their capacity as Members of	)
the SALEM BOARD OF APPEALS,	)
Defendants	)
	)

**NOTICE OF APPEARANCE**

Please enter our appearance for the plaintiffs in the above-captioned matter.

  
 Daniel C. Hill (BBO #644885)  
 Blair G. Edwards (BBO #682625)  
 Peter J. Cura (BBO #564195), *Of Counsel*  
 HILL LAW  
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 617-494-8300

**CERTIFICATE OF SERVICE**

I hereby certify that I have served of a copy of the foregoing on the counsel of record listed below by mailing a copy, first class mail, postage prepaid this 19th day of February, 2014.

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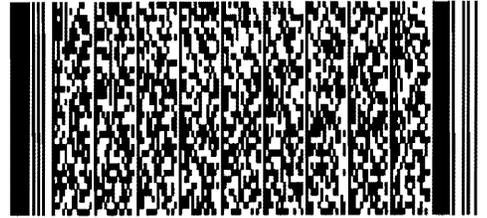
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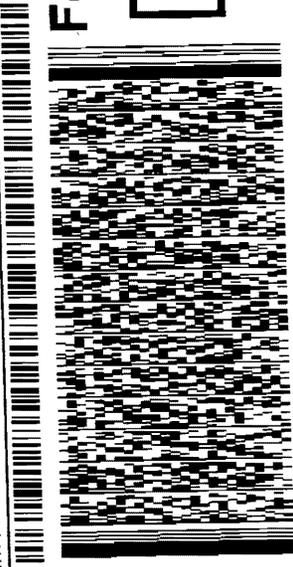
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