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BEFORE THE ENVIRONMENTAL APPEALS BOARD

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U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

ENVIR. APPEALS BOARD

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ORDER SCHEDULING STATUS CONFERENCE

IN THE MATTER OF: :
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: :
FOOTPRINT POWER : PSD Appeal No.
SALEM HARBOR DEVELOPMENT, LP: 14-02
: :
Application No. NE-12-022 :
Transmittal No. X254064 :
: :

Tuesday,
April 1, 2014

Administrative Courtroom
Room 1152
EPA East Building
1201 Constitution Avenue, N.W.
Washington, D.C.

The above-entitled matter came on
for hearing, pursuant to notice, at 2:00 p.m.

BEFORE:

THE HONORABLE KATHIE A. STEIN
Environmental Appeals Judge

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ALSO PRESENT:

EURIKA DURR, Clerk of the Board
SUSAN GARDINIER, EAB Staff Attorney
SCOTT SILVERSTEIN, President & COO, Footprint
Power
PETER FURNISS, CEO, Footprint Power

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P-R-O-C-E-E-D-I-N-G-S

2:08 p.m.

MS. DURR: Environmental Appeals Board of the United States Environmental Protection Agency is now in session for a status conference in re Footprint Power Salem Harbor Development LP, Application Number NE-12-022, Transmittal Number X254064, PSD Appeal Number 14-02. The Honorable Judge Kathie Stein presiding.

Please be seated.

JUDGE STEIN: Thank you, everyone, for making yourselves available on short notice and my sincere apologies to those in Region 1 for the technical difficulties, but hopefully, you'll be able to hear. We can see you. You can't see us, but I think we ought to proceed at this time rather than trying to wait until you can magically appear by screen.

I'm Judge Kathie Stein and I really do appreciate everyone being here today.

1 With me on the bench is Ms. Susan
2 Gardinier who's a counsel to the Board. She
3 is the staff attorney assigned to work on this
4 matter and the Board also requested that a
5 representative of either the regional office
6 or the Office of General Counsel be present at
7 this conference.

8 I would like to begin by asking
9 each party to introduce themselves so I know
10 who we have here in the courtroom, in the
11 Region and why don't we start here in the
12 courtroom.

13 MS. LISS: Good afternoon, Your
14 Honor. My name is Lauren Liss from Rubin &
15 Rudman in Boston and I represent the permittee
16 Footprint Power Company.

17 JUDGE STEIN: Could you repeat
18 your name again? I didn't get --

19 MS. LISS: It's Lauren L-A-U-R-E-N
20 Liss L-I-S as in Susan S as in Susan.

21 MR. SILVERSTEIN: Good afternoon,
22 Your Honor. Scott Silverstein. I'm the

1 President and Chief Operating Officer of
2 Footprint Power.

3 JUDGE STEIN: Thank you for being
4 with us.

5 MR. FURNISS: Good afternoon, Your
6 Honor. Peter Furniss, Chief Executive Officer
7 of Footprint Power.

8 MR. DOSTER: Brian Doster from the
9 Office of General Counsel at EPA here on
10 behalf of the Region 1. Region 1 Office of
11 Regional Counsel was unavailable for this
12 hearing today.

13 JUDGE STEIN: Thank you. And can
14 we hear from the people in the Regional Office
15 now. I'm not hearing any sound.

16 STAFF: In the Regional Office, we
17 cannot hear you.

18 MR. KELMAN: Now?

19 JUDGE STEIN: Yes.

20 MR. KELMAN: You can hear us now.
21 Okay. I'm Wesley Kelman. I represent the
22 petitioners.

1 MS. KAPLAN: Nancy Kaplan, General
2 Counsel for the Massachusetts Development of
3 Environmental Protection.

4 MS. MORRIS: Madelyn Morris, Mass
5 DEP representing the permitting authority Mass
6 DEP.

7 MR. BRACZYK: Ed Braczyk, Mass
8 DEP, engineer.

9 MS. ARGENTO: Jeanne Argento,
10 Regional Attorney, DEP.

11 JUDGE STEIN: Thank you very much.

12 As everyone, I think, knows, PSD
13 permits are time sensitive and they receive
14 the highest priority on the Board's docket
15 relative to any other kind of case that the
16 Board hears particularly cases where
17 construction is not -- you don't need your
18 permit before you construct.

19 And the Board's practice is to
20 begin review of a PSD permit as soon as a
21 petition comes in and in this particular case,
22 once we received the amended petition, the

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1 Board began its review of this particular
2 permit by looking at the petition and its
3 attachments.

4 And a preliminary review has
5 identified what we perceive to be a
6 significant procedural issue that we felt
7 obliged to call to your attention at this time
8 even recognizing that all of the briefs have
9 not been filed in this case.

10 And first and foremost, we are
11 concerned about the fact that the BACT
12 analysis appears not to have been subjected to
13 public comment and obviously, the briefs of
14 Mass DEP and the permittee have not been
15 received yet. They're due next week and what
16 I say, I say with an open mind, but I thought
17 it would be irresponsible not to brief this
18 issue to your attention at the earliest
19 possible time.

20 My understanding is that a summary
21 of the BACT analysis was made available for
22 public comment, but that in the final permit,

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1 a, I believe, 54-page BACT analysis was
2 appended to the final permit and that, in
3 fact, Region 1 commented during the public --
4 well, I don't know if it was during the public
5 comment process, but rose the concern about
6 the full BACT analysis not being made
7 available to public comment.

8 And I recognize that Massachusetts
9 is somewhat new to having their permits
10 reviewed by the Board as a delegated state and
11 I recognize that the permittee may not be
12 familiar with the Board and its precedence.

13 But, the public comment
14 deficiencies, if these are, in fact, the case,
15 are not issues that can be cured on appeal and
16 the purpose of the public comment process is
17 not only to allow the opportunity for the
18 public comment, but also to allow an
19 opportunity for the permitting authority with
20 its technical expertise to evaluate the
21 comments that come in and they need to be the
22 party that in the first instance responds to

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1 those comments.

2 It would not be consistent in my
3 view, and I've been on the Board a long time,
4 with Board precedent for us to proceed to the
5 merits of this case without subjecting the
6 BACT analysis and most likely the air quality
7 analysis to a full public comment process and
8 I say that recognizing how much time and
9 effort has already gone into this permit,
10 recognizing as I do the importance of
11 proceeding quickly and recognizing that
12 everybody here is proceeding in good faith to
13 try to move through this process.

14 But, as I sit here today, I see
15 essentially two paths for this permit. The
16 permittee -- excuse me. The permit issuer
17 Massachusetts DEP has a right under the
18 regulations to unilaterally take a voluntary
19 remand of this permit and begin the public
20 comment process that needs to occur. We often
21 encourage this if there appear to be obstacles
22 that we don't see ourselves in a position to

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1 overcome.

2 Now, that's not something that
3 Massachusetts DEP needs to do. Alternatively,
4 what will happen -- and I think you have up
5 until 30 days after the response is filed to
6 exercise that unilateral right. After that,
7 it's a discretionary matter for the Board to
8 decide.

9 The other thing that will happen
10 if Massachusetts doesn't take that route will
11 be for us to get your briefs next week, for us
12 to evaluate those briefs and it's very
13 likely, I can't promise you 100 percent, that
14 the Board will then remand the permit back to
15 Massachusetts DEP with instructions to take
16 public comments on the BACT analysis and
17 probably the air quality analysis.

18 So, I realize that neither of
19 those paths may be attractive to the company
20 or to Mass DEP, but this is where I see things
21 having taken a fairly close look with Susan's
22 able -- Ms. Gardinier's able assistance at the

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1 record that we have before us.

2 Now, I'm going to give the party's
3 a chance to respond, but PSD permits can be
4 appealed further to the First Circuit and some
5 of our PSD permits that have been issued have
6 gone up to the First Circuit and so, if there
7 is a record vulnerability or a legal
8 vulnerability or a procedural vulnerability,
9 the Board's inclination is not to let that
10 vulnerability sit there and ship it up to the
11 Board of Appeals is someone appeals and much
12 further down the road to fix that issue.

13 And so, I say this in all candor
14 that with the overall goal, everyone's goals
15 may be different, but certainly, I'm sure that
16 the company's goal is to get their permit as
17 quickly as possible and we're certainly
18 prepared to move quickly. But, we felt we
19 would be remiss in not calling this issue to
20 your attention.

21 At this point, I think what I
22 would like to do is to turn to the parties and

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1 see if they have any comments they would like
2 to make.

3 I'm not expecting to have an
4 immediate answer necessarily and I want to
5 assure you that the Board will evaluate with
6 an open mind anything that comes in next week.
7 So, we're not trying to prejudge this case,
8 but I'm trying to let you know that we see a
9 problem.

10 Why don't we start with the permit
11 issuer, Mass DEP, to see if you have any
12 questions or comments.

13 MS. MORRIS: Thank you.

14 I just wanted to give you a little
15 background. That the application and the BACT
16 analysis that came with the initial
17 application was made available for public
18 review and, in fact, these petitioners took
19 advantage of that opportunity prior to the
20 issuance of the final permit during the public
21 comment period and had an opportunity to
22 examine that BACT analysis and they used that

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1 BACT analysis and criticized it in their
2 comments.

3 So, they did have and we, DEP, had
4 the benefit of their comments on the BACT
5 analysis. In fact, several of the changes
6 that were made between the draft permit and
7 the final permit were directly in response to
8 comments made by these petitioners.

9 They wanted, for example, the
10 addition of an oxidation catalyst to the
11 auxiliary boiler. That happened.

12 They thought that certain limits
13 in the permit were not stringent enough and in
14 response to those comments, aware of those
15 comments, the Applicant convinced its vendor
16 to give them more stringent guarantees with
17 regard to the emissions of various pollutants
18 including CO and also PM and as a result, we
19 were able to issue a final permit with much
20 more stringent limits with regard to PM and
21 the limits for CO went down so much that CO
22 was no longer subject to PSD permitting.

1 The only addition aside from
2 reflecting those new stringent emission limits
3 which were a direct response to comments
4 including comments made by these very
5 petitioners was to provide additional
6 justification for the limits that were in the
7 permit.

8 In the initial BACT analysis,
9 Massachusetts DEP mainly compared the limits
10 that were in the draft permit to limits that
11 were issued for permits to Massachusetts
12 sources. For example, the Pioneer Valley
13 permit, the Brockton Power Plant permit and
14 the Mystic Station permit to name a few.

15 The big addition to the BACT
16 analysis that occurred between the draft
17 permit and the final permit was additional
18 information pertaining to permits that were
19 issued in other jurisdictions throughout the
20 country and that additional information
21 provided additional support for the limits.
22 That was the major difference.

1 This was not a case where there
2 was any question about the kind of technology
3 or approach that should be used for emission
4 control. This is a combined cycle plant
5 that's state of the art. This is natural gas
6 only. The only question that could have been
7 raised would have been whether to do air
8 cooling versus water cooling and that issue
9 had been totally sorted out prior to the
10 application coming into DEP through other
11 processes that proceeded this. An
12 environmental review process and a siting
13 board process.

14 JUDGE STEIN: Can I ask a
15 clarifying question?

16 Because I think that the reason
17 that we are here today is because the
18 allegation was made in the petition and based
19 on the review of the attachments that we had,
20 we were under the impression that what was
21 available for public comment was only a
22 summary of the BACT analysis and that the

1 Region -- there was a letter in the file in
2 which the Region expressed the view that the
3 full BACT analysis had to be subjected to
4 public comment and so, that is the factual
5 premise on which we are asking our questions.

6 You know, if, in fact, that is not
7 correct, that would be a significant important
8 fact to be clarified.

9 Because our concern really is
10 whether the full -- there may be a couple of
11 levels of concern, but as a preliminary
12 matter, if the full BACT analysis was not
13 subjected to public comments, then I think we
14 have a significant issue.

15 If the facts are otherwise, then
16 we may not.

17 There are circumstances in which
18 changes in the BACT analysis will require
19 further public comment, but that is a much
20 more case specific matter that we certainly
21 wouldn't be calling the status conference
22 unless we concerned that there was an issue

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1 about whether or not the full BACT analysis
2 went out to public comment.

3 MS. MORRIS: The full BACT
4 analysis was available for public comment at
5 the regional offices. It was not placed on
6 our website. Only the draft fact sheet and
7 the draft permit. But, anyone who wanted to
8 was given an opportunity to see it to come to
9 our regional offices.

10 These petitioners took advantage
11 of that opportunity. They did see the BACT
12 analysis. They had an opportunity to comment
13 on that BACT analysis.

14 And again, it was a -- there was a
15 lot of detail in that original BACT analysis.
16 There was an evaluation of two different
17 turbines, the GE turbine and a Siemens turbine
18 and comparing its efficiency with regard to
19 greenhouse gases and with regard to the nox
20 emissions during shutdown and start-up
21 conditions. It was very, very highly detailed
22 and that was made available to anyone who

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1 wanted to see it at the regional offices, the
2 BACT analysis.

3 The only thing that didn't happen
4 was it wasn't placed on the DEP website, but
5 it was made available to anyone including
6 these petitioners who wanted to see it and
7 they did.

8 JUDGE STEIN: And at the time that
9 went out for public comment, were petitioners
10 apprised that they could review the BACT
11 analysis at the regional office?

12 I mean if that's a question they
13 don't the answer to, that's something --

14 MS. MORRIS: I think -- they must
15 have known that because they did, in fact, do
16 so.

17 JUDGE STEIN: Okay.

18 MS. MORRIS: And they had -- the
19 petitioners at the time were part of a
20 citizen's group represented by the
21 Conservation Law Foundation who was part --
22 who was following this permit and was heavily

1 involved in the prior proceedings of this
2 project.

3 They did a Freedom of Information
4 request and immediately without -- we didn't
5 have any delays, you know, like sometimes can
6 occur with public records' requests. We
7 immediately made the documents available to
8 them in October during the public comment
9 period and they actually spent time in the
10 regional offices going through the documents
11 themselves.

12 JUDGE STEIN: Okay. Well, if that
13 is the case, then I think what would be
14 important is for that kind of information to
15 be made clearly available in filing your
16 response next week.

17 Any other questions or comments
18 from Mass DEP?

19 MS. MORRIS: Yes, and another
20 thing you should be aware of is that DEP
21 actually extended the public comment period so
22 that they could have a full opportunity to

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1 look at the application and see the documents
2 that they wanted to see so that they could
3 have a full opportunity to comment and again,
4 we did pay attention to their comments and
5 made changes directly in response to those
6 comments.

7 JUDGE STEIN: Okay. Well, that
8 would be very helpful. We often encourage our
9 regional offices to put the administrative
10 record either up on their website or available
11 to us as soon as possible.

12 We have had the attachments
13 available and the attachments raised some
14 significant questions in our mind which is why
15 we're here. But, we obviously look forward to
16 both your briefs and the filing of the
17 administrative record so we can see for
18 ourselves what the situation is.

19 MR. KELMAN: This is Wes Kelman.
20 Let me just sort of weigh in with what I
21 understand to be the situation and I should
22 say, first of all, you know, I didn't

1 represent these folks until, you know, a few
2 days before the original petition for review
3 was filed. So, I can't speak from first-hand
4 knowledge.

5 But, if you look at the comment
6 letter that was submitted with our amended
7 petition for review, I think that's Exhibit 6
8 to our amended petition, you know, it does
9 seem like Conservation Law Foundation, which
10 at the time was the authorized representative
11 for the folks that I represent, had looked at
12 the BACT analysis.

13 I didn't have the document myself
14 when I filed the original petition for review.
15 I asked DEP for it. Maybe I -- I may have
16 gotten it also from another source. I did not
17 get it from my clients.

18 I guess I just wanted to clarify
19 the situation. I did not intend to suggest
20 one way or another whether my clients had the
21 document and if you look at the comment
22 letter, certainly, Conservation Law

1 Foundation, which was their authorized
2 representative, seems to have reviewed it.

3 So, to that extent I just wanted
4 to --

5 JUDGE STEIN: Okay.

6 MR. KELMAN: -- you know, make it
7 clear that that -- at least some of what
8 Madelyn is saying is correct.

9 JUDGE STEIN: Okay. Any --

10 MR. KELMAN: That it was not
11 attached -- it was not attached to the, you
12 know, the PSD fact sheet or the draft permit.
13 The draft PSD fact sheet.

14 JUDGE STEIN: Okay. Anything
15 else?

16 MR. KELMAN: And then it also
17 talked at some length about how substantially
18 it changed. It went from being essentially a
19 13 or 14-page document that was attached to
20 their original permit application, Footprint's
21 original permit application. It was
22 supplemented, I believe, in April and June.

1 These were not extensive supplements and then
2 it grew from that into this 54-page document
3 that was attached to the final PSD fact sheets
4 in response to comments.

5 In so doing, I don't think DEP was
6 particularly clear that this was a new
7 analysis, but in my estimation, I tried to
8 show in the amended petition why we thought it
9 was. There was substantial change.

10 JUDGE STEIN: I think at this
11 point let me turn to the counsel for Footprint
12 and let me give them an opportunity to respond
13 as well.

14 MS. LISS: Thank you, Your Honor.

15 We certainly reiterate and support
16 the comments that have been made by the
17 Department of Environmental Protection.

18 We greatly appreciate the
19 opportunity to come in this afternoon and
20 speak with you so that we can know what the
21 Board's concerns are and have a chance to
22 respond to those. We are very excited to

1 respond to all of these issues in our response
2 and look forward to supporting what is clearly
3 the case that there was a lot of information.
4 There's voluminous information in the
5 application all over the public record that
6 the comments that petitioner -- the issues
7 that petitioner raises in the petition are
8 largely the same issues that were raised in
9 their comment letter.

10 We think that this case is much
11 closer to the facts of the Netcam case and
12 that there certainly were not any substantial
13 new issues or questions that were raised.

14 Significant changes from the draft
15 PSD permit to the final PSD permit were that
16 there are significant reductions in emissions'
17 limits in several pollutants and again, we
18 look forward to submitting our response.

19 JUDGE STEIN: Mr. Doster, do you
20 have anything you want to offer?

21 MR. DOSTER: Yes. Yes, I would
22 like to help clarify on behalf of Region 1 its

1 intent behind the comment that I think has
2 partially motivated holding this status
3 conference.

4 The Region's comment was not a
5 comment that it had concluded that the record
6 as a whole was deficient as to apprising the
7 public of the BACT analysis or the basis for
8 the BACT analysis. I think the Region's
9 intent was to comment in the nature of
10 recommending best practices in making the BACT
11 analysis more transparent and accessible to
12 public commenters and the Region.

13 I think Ms. Morris' explanation as
14 to the way the record was composed here helps
15 explain to a certain extent the Region's
16 comment in that apparently the fact sheet was
17 available on the Internet, but some of the
18 supporting documents were not and I think if
19 you read the Region's comment, it really is
20 recommending that that information be included
21 in the fact sheet or that a link to that
22 information be a part of the fact sheet and

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1 it's not necessarily that the Region was
2 concluding that the record as a whole did not
3 have sufficient information to apprise the
4 public of the nature and reasoning of the BACT
5 analysis.

6 The Region's letter does not
7 specify that an additional public comment
8 opportunity should be provided and my
9 understanding is the Region's intent was
10 really just in terms of better practices to
11 make this information more accessible to the
12 public and to EPA.

13 JUDGE STEIN: Yes, we were struck
14 by, I think, one of the last sentences in the
15 Region's comment letter that says "This
16 analysis should be available for public
17 comment and for EPA to review."

18 So, at the concluding part of the
19 Region's letter in the absence of a complete
20 administrative record, that is definitely what
21 caught our attention and we will be happy to
22 go and wait for your briefs and take a closer

1 look.

2 I would still encourage all of the
3 parties to take a look at a recent precedence.
4 Take a look at any areas where you have
5 perceived vulnerabilities.

6 From the Board's perspective,
7 there is -- we're just interested in getting
8 these cases decided as quickly as possible as
9 you are.

10 We tend to get them late in the
11 game. A lot of effort has gone into them on
12 the part of the citizens, on the part of the
13 company, on the part of Massachusetts and to
14 the extent that after an evaluation of what's
15 at play here you think there are issues that
16 need work, I would encourage you to think
17 about that.

18 I'm not commenting on the merits
19 in any way. We've had a couple of cases
20 recently where we've had to remand. They
21 aren't your cases, but sometimes we had to
22 remand for procedural issues late in the game

1 and we don't like it any more than anybody
2 else does.

3 So, I apologize. Well, I don't
4 like taking your time unnecessarily and I
5 appreciate everybody coming in, but at the
6 same time, I think it's only fair for you to
7 know where the Board is coming from so that at
8 least we can get these particular questions
9 resolved.

10 Does anyone else have any further
11 questions or comments before we adjourn the
12 status conference?

13 MR. KELMAN: I don't. Thank you
14 very much.

15 JUDGE STEIN: Well, again, I
16 really appreciate everybody making themselves
17 available on short notice. This has been very
18 informative and we will look forward to the
19 next piece.

20 MS. DURR: All rise.

21 (Whereupon, at 2:36 p.m., the
22 status conference was adjourned.)

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Development LP

Before: EPA

Date: 04-01-2014

Place: Washington, D.C.

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