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

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

PETITIONERSô SUPPLEMENTAL BRIEF IN RESPONSE TO BOARDôS ORDER OF JULY 14

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Introduction

Petitioners submit this supplemental brief in response to the Boardôs July 14 order, and in response to the supplemental briefs filed by EPAôs Office of Air and Radiation (ñOARò) and the Massachusetts Department of Environmental Protection (ñMassDEPò).

Argument

I. The plain language of the PSD regulation requires application of BACT to ozone – and thus to *both* of its precursors.

In OARôs reading, the PSD regulation requires permit writers to apply BACT to individual ozone precursors separately, and to set a precursor-specific emissions limit only if the significance threshold is exceeded for the precursor in question. OAR Br. at 5-6. OAR emphasizes that section 52.21(j)(2) requires BACT to be applied to ñeach regulated NSR pollutantò that the facility would have the potential to emit in significant amounts, and notes that section 52.21(b)(50) defines *each* ozone precursor (VOCs and NOx) as a ñregulated NSR pollutant.ò On this basis, OAR argues that BACT can apply to one ozone precursor but not the other. But OAR misreads the regulation: its interpretation ignores that ozone *itself* (not just its precursors) is a ñregulated NSR pollutant,ò that ozone is clearly emitted by Footprint at a ñsignificantò level because of its NOx emissions alone, and that BACT therefore applies to ozone ï which in turn can only mean that permits issued to significant ozone sources should limit emissions of *both* of the precursors that must combine for ozone to be produced.

More specifically, a ñregulated NSR pollutantò is defined to include ñany pollutant for which a national ambient air quality standard has been promulgated.ò 40 C.F.R. 52.21(b)(50)(i). And, as OAR acknowledges, under this definition ozone is ña regulated NSR pollutant,ò because there is a NAAQS for ozone. This means that ozone itself, not just its precursors, is subject to BACT if there are potentially significant emissions. The regulation also states what ñsignificantò

means for ozone: ña rate of emissions that would equal or exceed *any* of the following rates: é Ozone: 40 tpy of volatile organic compounds or nitrogen oxides.ò 40 CFR 52.21(b)(23)(i) (emphasis added). OAR tries to parse what ñorò means in this part of the regulation, and in particular what it might mean if Footprintôs NOx and VOCs emissions levels were each below 40 tpy individually but above 40 tpy in aggregate (*e.g.*, if Footprint emitted 39 tpy of each of NOx and VOCs). But this inquiry misses the point: even if Footprintôs NOx and VOC emissions are *not* aggregated, Footprint is *still* responsible for significant potential emissions of ozone, because it has the potential to emit 144.8 tpy of NOx ï well above the 40 tpy threshold that is, even under OARôs argument, applicable to NOx *alone*.[1] Thus it follows that Footprintôs ozone emissions should have been subject to BACT. This much should be undisputed.

The only remaining question is what BACT might mean in the context of a pollutant like ozone, given that it is made up of two different precursors. But neither OAR nor MassDEP comes to grips with this question. While there could conceivably be cases where the potential emission of VOCs is so *de minimis* compared to the emission of NOx that ñthe maximum degree of reductionò for ozone can plausibly be achieved solely by limiting NOx, in this case there has been no such showing. Any argument of this nature would be hard to make in this context in any event, since VOC emissions are 28 tpy, or close to the 40 tpy threshold. The obvious truth is that it is impossible to say whether Footprint has undertaken the ñmaximum degree of reductionò possible for ozone without analyzing its emissions of *both* ozone precursors.

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[1] OAR makes other arguments directed at this aggregation question. For example, OAR relies on a statement in the Federal Register that precursors ñare not summed,ò OAR Br. at 9. OAR also relies on the PM2.5 significance levels set out in section 52.21(b)(23)(i), and notes that each of the PM2.5 precursors has separately listed significance levels ï which implies that a permit writer should not add up all the emissions of all the precursors to get over the numerical limit applicable to any one of them. OAR Br. at 8. But that is not the issue here, because with Footprint there is at least one individual precursor that is indisputably over the threshold that makes the regulated pollutant (*i.e.*, ozone) subject to BACT. The question presented by the Board was whether *all* precursors for ozone should be included in the BACT analysis where ozone is subject to BACT based on the emission of one but not all ozone precursors.

This understanding of the PSD regulation is not only consistent with its plain language, but with common sense. Ozone is produced when NOx and VOCs combine; both are necessary ingredients. Where it has been determined that a facilityôs ozone emissions are a significant problem, it would be willfully blind to try to solve the problem by limiting emissions of only one of these precursors. OARôs reading of the ozone significance threshold would require a facility like Footprintôs to strain every nerve to limit its NOx emissions (even though NOx is a criteria pollutant in its own right, subject to an identical 40 tpy significance threshold irrespective of its status as an ozone precursor) ï yet at the same time, OAR would require Footprint to make no attempt at all to limit equally potent ozone-causing emissions of VOCs. OARôs argument thus ignores reality and the language of the regulation. It should be rejected.

II. Footprint is required to adhere to the ozone PSD rules, because Massachusetts is in attainment for ozone.

In a codicil to its brief, OAR argues that the failure to apply BACT to both ozone precursors can be sustained because ñthe area where the Footprint facility is located is designated nonattainment for the 1997 ozone NAAQS.ò OAR Br. at 11. This allegation is significant, says OAR, because under section 52.21(i)(2), BACT requirements ñshall not apply to a major stationary source é if the owner or operator demonstrates that, as to that pollutant, the source é is located in an area designated as nonattainment under section 107 of the Act.ò OAR Br. at 11. MassDEP devotes most of its brief to a similar argument based on section 52.21(b)(50)(i)(B)(1), which states that VOCs are treated as precursors to ozone ñin all attainment and unclassifiable areas.ò These arguments by OAR and MassDEP go beyond responding to the Boardôs question, which was about the significance thresholds for ozone precursors; OAR and MassDEP instead take another shot at sustaining the permit based on reasons that could have been, but were not,

included in the lengthy merits briefs previously submitted by Footprint and MassDEP.

But the factual premise is misleading. Although Essex County, Massachusetts was designated as nonattainment under the 1997 8-hour ozone NAAQS, *see* 40 C.F.R. 81.322, current data show that it is in attainment not only for the 1997 NAAQS but for the more protective 2008 8-hour NAAQS. *Cf. Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards*, 77 Fed. Reg. 30088, 30089 (May 21, 2012) (2008 NAAQS is more protective). MassDEPôs own 2012 Air Quality Report states this clearly: ñMassachusetts *was* designated as nonattainment with the 1997 8-hour ozone standard of 0.08 parts per million (ppm). *However, all monitors now show that Massachusetts meets the 1997 ozone standard statewide. EPA updated the 8-hour ozone standard to 0.075 ppm in 2008, and designated Massachusetts as [in] attainment statewide except for Dukes County in 2011*.ò MassDEP Exh. 13, at 9 (emphasis added).[2] This is not merely a case where an area is in attainment for the pollutant using one averaging period but in nonattainment under a different averaging period, as in the particulate matter Federal Register notice cited by OAR (Oar Br.12): Except for one county (*i.e.*, not where Footprint is located), the record shows that Massachusetts is currently in attainment of all ozone NAAQS under *any* measure, and thus properly subject to PSD regulation for ozone. Moreover, until now neither Footprint (*i.e.*, the ñowner or operatorò required under section 52.21(i)(2) to undertake the demonstration of nonattainment) nor MassDEP has ever suggested, as far as petitioners are aware, that ozone nonattainment was a basis for refusing to

[2] MassDEPôs supplemental brief also states: ñ*Because Massachusetts is designated as being in nonattainment with the 1997 8-hour ozone standard*, MassDEP also subjected the SHR Projectôs potential NOx emissions to nonattainment new source review and included a limit based on LAER in the [state-law permit].ò MassDEP Br. at 4 n.5 (emphasis added). But, as far as petitioners can tell, the sources cited in support of this statement suggest that MassDEP applied LAER in the stateôs ñplan approvalò because Footprint is a major source of NOx, and *not* because the state was in nonattainment for NOx ï let alone for ozone. *See* MassDEP Exh. 23, at 7 (ñIn accordance with 310 CMR 7.00: Appendix A(6)(b), for a new major stationary source of NOx located in an area that is *not* a nonattainment areaé .ò) (emphasis added).

regulate VOCs in the PSD permit.[3] OARôs and MassDEPôs arguments should be rejected.

Conclusion

The petitioners respectfully submit that the answer to the Boardôs question is that, where any ozone precursor is emitted in a significant amount, ozone is subject to BACT, and requires evaluation of limits on all ozone precursors.

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Respectfully submitted,

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[3] *See, e.g.*, Response to Comments at 8 (PetitionersôExh. 3) (responding to comments questioning whether VOC emissions were low enough: ñIn addition, volatile organic compounds (VOC) have been removed from the PSD Fact Sheet and PSD Permit since [VOCs] will [not] be emitted at or above its applicable PSD significance level,ò no allegation of ozone nonattainment).

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Pursuant to 40 C.F.R. § 124.19(d)(iv), this supplemental brief complies with the word limit set by the Board. According to the word count function in Microsoft Word, this brief contains 1,896 words.

/s/ Wesley Kelman
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CERTIFICATE OF SERVICE

I certify that on August 1, 2014 I have sent a copy of this supplemental brief by email to the counsel listed below, with hard copies to follow on August 4, 2014 by first-class mail.

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