Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection
One Winter Street Boston, MA 02108 • 617-292-5500

March 13, 2017

In the Matter of
Brockton Power Co., LLC

OADR Docket Nos. 2011-025 & 026
File No. W207973
Brockton, MA

INTERLOCUTORY DECISION:
(1) ADOPTING FINDINGS OF RECOMMENDED FINAL DECISION; AND
(2) REMANDING MATTER TO MassDEP FOR GWSA AND
UPDATED EJ POLICY REVIEW OF PROPOSED FACILITY

In this appeal, a group of residents of the City of Brockton and the adjacent Towns of East and West Bridgewater (collectively "the Petitioners") challenge the Massachusetts Department of Environmental Protection's ("the Department" or "MassDEP") July 2011 issuance of a Conditional Approval of the Major Comprehensive Plan Application ("the CPA") to Brockton Power Co., LLC ("the Applicant"). The CPA approved the Applicant's construction and operation in Brockton of a 350-megawatt combined cycle natural gas fired electric generating facility ("the proposed Power Plant").

The Petitioners contend that the Department issued the CPA in violation of:

(1) Title VI of the Federal Civil Rights Act of 1964 ("Title VI");

(2) the 2002 Environmental Justice Policy that the predecessor agency of the

Executive Office of Energy and Environmental Affairs ("EEA") issued to state agencies under its jurisdiction ("2002 EJ Policy"), including the Department;

(3) the federal air quality impact modeling requirements at 40 CFR 51, App. W, § 8.3;

(4) Appendix A(8)(b) of the Department's Air Pollution Control Regulations at 310 CMR 7.00; and

(5) the Department's Noise Pollution Regulations at 310 CMR 7.10 and the Department's Noise Policy.

Currently pending before me is the Chief Presiding Officer's 155 page Recommended Final Decision ("RFD") of July 29, 2016 recommending that I issue a Final Decision affirming the CPA, as modified by the Department in September 2015.[1] The Chief Presiding Officer made his recommendation after conducting a three day evidentiary Adjudicatory Hearing ("Hearing") in September 2015 and reviewing the voluminous testimonial and documentary evidence that the parties' respective expert witnesses presented at the Hearing. A total of 15 expert witnesses testified at the Hearing on behalf of the parties: (1) five for the Petitioners; (2) five for the Applicant; and (3) five for the Department. RFD, at pp. 5-7.

On September 28, 2016, I informed the parties that as a result of my review the RFD and pursuant to the provisions of 310 CMR 1.01(14)(a), I would treat the RFD as a Tentative Decision in the interests of justice because of the legal issues of first impression presented by the Petitioners' appeal of the CPA. Tentative Decision, at pp. 1-2. In accordance with 310 CMR 1.01(14)(a), I directed the parties to file memoranda by October 14, 2016 stating whether I should issue a Final Decision adopting, modifying, or rejecting the RFD. Id., at p. 2. By

[1] In September 2015, prior to the commencement of the evidentiary Adjudicatory Hearing that the Chief Presiding Officer conducted in this case, the Department filed a redlined version of the CPA setting forth "revisions to the [CPA] based upon updated information given by the parties in . . . . the pre-filed direct testimony of [their] witnesses [who testified at the Hearing]." RFD, at p. 2, n. 3. Accordingly, the term "CPA" in the RFD and in this Interlocutory Decision means the original July 2011 CPA, as modified by the Department in September 2015. Id.

agreement of the parties, the deadline for the parties to file their respective memoranda was extended to October 21, 2016. Chief Presiding Officer's Order, October 14, 2016.

On October 21, 2016, the parties filed memoranda in response to my Tentative Decision recognizing the Chief Presiding Officer's efforts in the case, but differing on whether I should adopt the RFD as my Final Decision. In their memoranda, the Applicant and the Department supported the RFD in all respects and recommended that I adopt the RFD as my Final Decision affirming the CPA because in their view the Chief Presiding Officer had correctly decided all of the issues in the case.[2] In their Memorandum, the Petitioners stated that the Chief Presiding Officer had "addressed the novel and difficult issues in the case with thoughtfulness and care," and that "substantial work . . . clearly went into the preparation of the RFD," but contended that he had erred in finding that the Department had properly issued the CPA, and, as such, requested that I remand the matter to him for a new Hearing.[3] The Petitioners, however, agreed with the Applicant and the Department that the Chief Presiding Officer had properly found that the proposed Power Plant complies with the Department's Noise Pollution Regulations at 310 CMR 7.10 and the Department's Noise Policy.[4] As a result of that concession by the Petitioners and for the reasons set forth in the RFD, at pp. 132-141, I adopt the Chief Presiding Officer's finding that the proposed Power Plant complies with the Department's Noise Pollution Regulations at

[2] Brockton Power Company, LLC's Memorandum Recommending Adoption of the Recommended Final Decision as the Final Decision, October 21, 2016 ("Applicant's Memorandum"), at p. 2; Department of Environmental Protection's Response to Tentative Decision, October 21, 2016 ("Department's Memorandum"), at p. 1.

[3] Petitioner Residents' Memorandum Requesting Partial Rejection of the Recommended Final Decision, A Remand of the Case With Instructions For Further Determinations, and Other Relief, October 21, 2016 ("Petitioners' Memorandum"), at pp. 1-7, 34-37.

[4] Petitioners' Memorandum, at p. 2.

310 CMR 7.10 and the Department's Noise Policy.

With respect to remaining issues in the case, after reviewing the parties' respective Memoranda in response to my Tentative Decision, I also adopt all of the Chief Presiding Officer's remaining findings in the RFD. Specifically, I adopt the Chief Presiding Officer's findings that the CPA complies with: (1) Title VI;[5] (2) the federal air quality impact modeling requirements at 40 CFR 51, App. W, § 8.3;[6]and (3) Appendix A(8)(b) of the Department's Air Pollution Control Regulations at 310 CMR 7.00.[7] Currently, anyone aggrieved by the Department's permit decisions or enforcement orders, based on purported Title VI violations may assert such claims in an administrative appeal with the Department's Office of Appeals and Dispute Resolution ("OADR"), as the Petitioners did in this case with respect to the CPA. As was also done in this case, the claims are adjudicated by an OADR Presiding Officer based on the evidentiary record in the case, who will forward a Recommended Final Decision to the Department's Commissioner.[8]

I also adopt the Chief Presiding Officer's findings with regard to compliance with the EEA 2002 Environmental Justice Policy, but in light of the remand needed to address issues raised by the decision in Kain v. Department of Environmental Protection, 474 Mass. 278 (2016) ("Kain") discussed below, I am also remanding this decision to ensure compliance with the

[5] RFD, at pp. 11-83.

[6] RFD, at pp. 29-58.

[7] RFD, at pp. 101-152.

[8] I note that MassDEP is in the process of developing a formal Title VI Complaint Policy for the Department and expects to issue this Policy, following public comment, in 2017.

updated Environmental Justice Policy. In January 2017, the Executive Office of Energy and Environmental Affairs ("EEA"), which oversees the Department, published the update.[9]

I am remanding the matter to the Department's Southeast Regional Office and Bureau of Air and Waste ("BAW") to conduct a further review of the proposed Power Plant to ensure that the Plant will assist the Commonwealth in achieving: (1) the 2020 mandate to reduce Greenhouse Gas Emissions ("GHG emissions") by 25% from 1990 emission levels and (2) the 2050 mandate for an 80% reduction from the 1990 emissions levels as required by the Massachusetts Global Warming Solutions Act of 2008 ("GWSA"), G.L. c. 21N, consistent with a ruling by the Supreme Judicial Court's ("SJC") recent decision in Kain.

The GWSA was enacted by the Massachusetts Legislature in August 2008[10] "against the backdrop of an emerging consensus shared by a majority of the scientific community that climate change is attributable to increased emissions, as well as perceptions in the Commonwealth that national and international efforts to reduce those emissions are inadequate." Kain, 474 Mass. at 281. "The act established a comprehensive framework to address the effects of climate change in the Commonwealth by reducing emissions to levels that scientific evidence had suggested were needed to avoid the most damaging impacts of climate change." Id., at 281-82. "In accordance with these findings, the [statute, as discussed above,] requires that, by 2050, greenhouse gas emissions be reduced by at least eighty per cent below 1990 levels." Id., at 282.

In Kain, the SJC ruled that Section 3(d) of the GWSA, G.L. c. 21N, § 3 ("Section 3(d)") "requires the [D]epartment to promulgate regulations that address multiple sources or categories of greenhouse gas emissions sources, impose a limit on emissions that may be released, limit the

[9] http://www.mass.gov/eea/docs/eea/ej/2017-environmental-justice-policy.pdf

[10] St. 2008, c. 298. The statute was enacted on August 7, 2008(St. 2008, c. 298), several months after the Applicant applied for the CPA on April 25, 2008.

aggregate emissions released from each group of regulated sources or categories of sources, set emission limits for each year, and set limits that decline on an annual basis." 474 Mass. at 300. The SJC ruled that the GWSA required the Department to "issu[e] [the Section 3(d) regulations] by January 1, 2012, to take effect on January 1, 2013, and to expire on December 31, 2020," and that the Department had not issued the regulations. 474 Mass. at 279.

On September 16, 2016, Governor Baker issued Executive Order No. 569 ("EO 569") entitled "Establishing An Integrated Climate Change Strategy for the Commonwealth," which, among other things requires the Department to promulgate the Section 3(d) regulations by August 11, 2017 that "consider limits on emissions from, among other sources or categories of sources," including "***new***, expanded, or renewed emissions permits or approvals." EO 569, § 2, ¶ c (emphasis supplied). The need to ensure that the proposed Power Plant emissions are appropriately accounted for and permitted is necessary in light of the Kain decision. Requiring the Department to conduct a review of the proposed Power Plant emissions is also consistent with permitting that the Department recently conducted in issuing on December 19, 2016 a Final Air Quality Plan Approval ("Permit") to Exelon West Medway, LLC and Exelon West Medway II, LLC (collectively "Exelon") authorizing its installation and operation of two simple-cycle combustion turbine driven electric generators and ancillary equipment at Exelon's electricity generating facility in Medway, Massachusetts.[11]

The timetable for the Department to conduct its review and permitting of the proposed Power Plant emissions, and to ensure consistency with the updated Environmental Justice Policy, is as follows:

[11] See http://www.mass.gov/eea/agencies/massdep/air/approvals/air-permits-and-approvals-issued-to-facilities.html; http://www.mass.gov/eea/docs/dep/air/approvals/final2016/exelonwm-faqpa.pdf.

1. Within thirty (30) days of the date of this Interlocutory Decision, the Department shall conduct and complete its review of the proposed Power Plant and issue an amended CPA containing conditions and requirements designed to ensure that the Plant will assist the Commonwealth in achieving: (1) the 2020 mandate to reduce GHG emissions by 25% from 1990 emission levels and (2) the 2050 mandate for an 80% reduction from the 1990 emissions levels as required by the GWSA. As discussed above, Governor Baker's EO 569 requires the Department to finalize Section 3(d) regulations by August 11, 2017 imposing annual declining GHG emission limits on multiple sectors in the Commonwealth, including electricity generation facilities. Recently, on December 16, 2016, the Department issued for public comment, draft regulations designed to further reduce GHG emissions from various sources, including electricity generation facilities.[12] Public comments on these proposed regulations were due by February 24, 2017.[13] Now that the public comment period has concluded, the Department intends to finalize Section 3(d) regulations that, along with other measures the Department has already adopted or proposes to adopt, will ensure that statewide GHG emissions will meet the 2020 goals of the GWSA and the Kain decision. Accordingly, the amended CPA shall include a provision providing that the CPA will incorporate the relevant applicable conditions included in any final Section 3(d) regulation.

2. The Department shall file a copy of the amended CPA with OADR at the same time it issues the amended CPA to the Applicant and the Petitioners. The Department's filing with OADR shall include sworn Pre-filed Testimony ("PFT") of the Department staff who performed and/or oversaw the review resulting in the amended CPA's issuance.

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[12] See http://www.mass.gov/eea/agencies/massdep/air/climate/section3d-comments.html; proposed 310 CMR 7.74 (Reducing Greenhouse Gas Emissions from Electricity Generating Facilities).

[13] Id; http://www.mass.gov/eea/agencies/massdep/news/comment/reducing-ghg-emissions.html.

3. The Department shall also review the updated EEA Environmental Justice Policy to ensure compliance with that document and similarly provide PFT by staff who conducted or oversaw the review.

4. Within thirty (30) days after the Department files the amended CPA and PFT supporting the amended CPA and its Environmental Policy Justice review, the Petitioners and the Applicant shall each file with OADR, written comments indicating whether they agree or disagree in whole or in part with the amended findings, conditions, and requirements. The Petitioners' and the Applicant's comments shall be supported by the sworn PFT of the individual or individuals who reviewed the amended findings, conditions, and requirements on behalf of the Petitioners and the Applicant.

4. If the Petitioners and/or the Applicant file comments supported by PFT disagreeing in whole or in part with the amended findings, conditions, and requirements, the Department shall file with OADR within thirty (30) days after the filing, sworn Supplemental PFT responding to the comments. The Supplemental PFT shall be from the Department staff who reviewed and/or oversaw the Department's review of the comments. Within thirty (30) days after the Department files its Supplemental PFT, the Chief Presiding Officer shall conduct an evidentiary Adjudicatory Hearing to determine whether the amended findings, conditions, and requirements are valid. All individuals who have filed sworn PFT or Supplemental PFT with respect to the amended findings, conditions, and requirements shall appear at the Hearing for cross-examination in accordance with the Adjudicatory Proceeding Rules at 310 CMR 1.01. Within fourteen (14) days after the Hearing, the parties shall file Closing Briefs with OADR setting forth their respective positions on the validity of the amended findings, conditions, and requirements based on the evidence presented at the Hearing. Within thirty (30) days after the

Closing Briefs are filed, the Chief Presiding Officer shall issue a Recommended Final Decision on the validity of the amended findings, conditions, and requirements. I will issue my Final Decision within fourteen (14) days thereafter on all of the issues adjudicated in the appeal.

All submittals in this case shall be filed with Bridget Munster, Case Administrator of the Office of Appeals and Dispute Resolution, at One Winter Street, 2nd Floor, Boston, MA 02108 and served on the other parties in the case (identified on the attached service list) pursuant to 310 CMR 1.01(4)(f). Electronic mail filings may be made with Ms. Munster at the following electronic mail address: Caseadmin.oadr@state.ma.us.

This Interlocutory Decision is not appealable to Court pursuant to G.L. c. 30A. See Town of East Longmeadow v. State Advisory Commission, 17 Mass. App. Ct. 939, 940 (1983) ("[a]n administrative order requiring a subordinate administrative body to reconsider its order is neither final nor appealable" pursuant to G.L. c. 30A).

Martin J. Suuberg
Commissioner

SERVICE LIST

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Docket No. 2011-025 2011-026	File No. W207973 Brockton
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