

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**December 6, 2017**

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In the Matter of  
Exelon West Medway, LLC and  
Exelon West Medway II, LLC

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OADR Docket No. 2017-001  
DEP File No.:  
Final Air Quality Plan Approval  
Transmittal No. X265409  
Air Plan/PSD Permit Application  
No. CE-15-016  
Medway, MA

**RECOMMENDED FINAL DECISION**

On January 11, 2017, the Conservation Law Foundation (“CLF” or “the Petitioner”) filed this appeal with the Office of Appeals and Dispute Resolution (“OADR”) challenging a Final Air Quality Plan Approval (“Air Permit”) that that the Central Regional Office of the the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to Exelon West Medway, LLC and Exelon West Medway II, LLC (collectively “Exelon” or “the Petitioner”) on December 19, 2016, pursuant to the Air Pollution Control Regulations, at 310 CMR 7.02. The Department issued the Air Permit to Exelon in connection with Exelon’s proposed construction of a 200 megawatt (“MW”) natural gas-fired electricity generation facility in Medway, Massachusetts (“the proposed Power Plant”). Exelon’s construction of the proposed

Power Plant had been previously approved on November 16, 2016 by the Commonwealth's Energy Facilities Siting Board ("EFSB").

The Adjudicatory Proceeding Rules at 310 CMR 1.01(5)(a)3, which govern adjudication of administrative appeals filed with OADR, authorizes a Presiding Officer of OADR to "stay [the proceedings in an] appeal where [a party's] failure to previously obtain a final decision required under another law would result in an unnecessary expenditure of the Department's administrative resources, or for other good cause." In accordance with 310 CMR 1.01(5)(a)3 and on my own initiative, on February 6, 2017, I issued an Order staying the proceedings in this appeal pending a further order of the Presiding Officer for the following reasons.

In response to CLF's appeal of the Air Permit, on January 12, 2017, Exelon filed with the EFSB an Initial Petition for a Certificate of Environmental Impact and Public Interest ("Certificate") pursuant to G.L. c. 164, § 69K½-69O½. January 30, 2017 Memorandum of Energy Facilities Siting Board to MassDEP ("EFSB's Memorandum"), at pp. 1-2. Under these statutory provisions, the proponent of an energy facility may seek a Certificate from the EFSB overriding a state or local permitting decision that purportedly will prevent or unduly delay construction of the facility. *Id.*, at p. 2. Exelon sought the Certificate from the EFSB contending that CLF's appeal of the Air Permit would prevent or significantly delay Exelon's construction of the proposed Power Plant. *Id.* If granted, the Certificate would override the Department's issuance of the Air Permit and would "be in the form of a composite of *all* individual permits, approvals or authorizations which would otherwise be necessary for the construction and operation of the [proposed Power Plant]." *Id.*, citing, G.L. c. 164, § 69K½ (emphasis supplied). Thus, if the EFSB approved Exelon's request for a Certificate, the EFSB would issue a Certificate granting Exelon: (1) the Air Permit initially issued by the Department, and (2) all

other state and municipal permits requested by Exelon from the EFSB that were necessary for construction and operation of the proposed Power Plant, provided that all of the permits satisfied any applicable statutory requirements. EFSB's Memorandum, at p. 2.

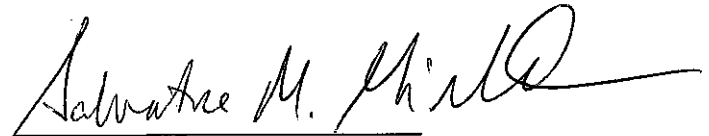
After a three-day evidentiary hearing, on August 4, 2017, the EFSB issued a written decision granting Exelon's request for a Certificate pursuant to G.L. c. 164, § 69K½-69O½. Exelon's Motion to Dismiss CLF's Appeal before OADR As Moot ("Exelon's Motion to Dismiss"), October 18, 2017, at p. 2; Attachment A to Exelon's Motion to Dismiss. Pursuant to G.L. c. 164, § 69K½, the Certificate that the EFSB issued to Exelon incorporated all of the requirements in the Air Permit issued by the Department, and supersedes the Permit. Additionally, on August 11, 2017, the Massachusetts Executive Office of Energy and Environmental Affairs ("EEA") and the Department promulgated Final CO<sub>2</sub> Limit Regulations at 310 CMR 7.74 governing the reduction of CO<sub>2</sub> emissions from electricity generating facilities, which replaced the CO<sub>2</sub> Emission Limits and compliance requirements in special conditions set forth in the Air Permit issued by the Department. Exelon's Motion to Dismiss, at p. 2. For these reasons, Exelon has moved to this appeal brought by CLF of the Air Permit as moot. The Department assents to Exelon's Motion to Dismiss.

Under 310 CMR 1.01(5)(a)2, "[t]he Presiding Officer may, on the Presiding Officer's own initiative or on a party's motion where appropriate . . . dismiss appeals for . . . mootness . . . ." Exelon filed its Motion to Dismiss to dismiss CLF's appeal as moot on October 18, 2017. Under 310 CMR 1.01(11)(a)1, CLF's response to Exelon's Motion to Dismiss was due within seven business days after the Motion's filing: by Friday, October 27, 2017. As of this

date, more than 30 days after expiration of the October 27<sup>th</sup> deadline, CLF has not filed a response to Exelon's Motion to Dismiss.

Accordingly, based on: (1) the Certificate that the EFSB issued to Exelon pursuant to G.L. c. 164, § 69K½-69O½, (2) the provisions of 310 CMR 1.01(5)(a)2 authorizing the dismissal of moot appeals pending before OADR, and (3) CLF's lack of a response to Exelon's Motion to Dismiss, I recommend that the Department's Commissioner issue a Final Decision dismissing this appeal as moot.

Date: 12/06/17

  
Salvatore M. Giorlandino  
Chief Presiding Officer

## **SERVICE LIST**

**Petitioner:** Conservation Law Foundation  
62 Summer Street  
Boston, MA 02110;

**Legal representatives:** David Ismay, Senior Attorney  
Conservation Law Foundation  
62 Summer Street  
Boston, MA 02110  
**e-mail:** dismay@clf.org;  
jblock@clf.org;

**The Applicant:** Exelon West Medway, LLC and  
Exelon West Medway II, LLC

**Legal representatives:** John A. DeTore, Esq.  
Keren Schlomy, Esq.  
Rubin and Rudman LLP  
53 State Street  
Boston, MA 02109  
**e-mail:** jdetore@rubinrudman.com  
kschlomy@rubinrudman.com;

**The Department:** John Beling, Deputy Regional Director  
MassDEP/Central Regional Office  
Bureau of Air and Waste  
8 New Bond Street  
Worcester, MA 01606  
**e-mail:** John.Beling@state.ma.us;

Roseanna Stanley, Permit Chief  
MassDEP, Central Regional Office  
8 New Bond Street  
Worcester, MA 01606  
**e-mail:** roseanna.stanley@state.ma.us;

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William Lamkin, Environmental Engineer  
Bureau of Waste Prevention  
One Winter Street  
Boston, MA 02108  
**e-mail:** william.lamkin@state.ma.us

**Legal Representatives:** Michael Dingle, Deputy General Counsel  
for Litigation  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, MA 02108  
**e-mail:** Mike.Dingle@state.ma.us;

Marilyn Levenson, Senior Counsel  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, MA 02108  
**e-mail:** Marilyn.Levenson@state.ma.us;

**cc:** Anne Berlin Blackman, Chief Regional Counsel  
MassDEP/Central Regional Office  
8 New Bond Street  
Worcester, MA 01606  
**e-mail:** Anne.Blackman@state.ma.us;

Leslie DeFilippis, Paralegal  
MassDEP/Office of General Counsel  
One Winter Street  
Boston, MA 02108.