

**COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD**

In the Matter of the Initial Petition and)
Application of Footprint Power Salem Harbor) EFSB 13-1
Development LP for a Certificate of)
Environmental Impact and Public Interest)
)

FINAL DECISION

M. Kathryn Sedor
Presiding Officer

February 25, 2014

On the Decision:
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The Massachusetts Energy Facilities Siting Board (“Siting Board” or “Board”) hereby GRANTS: (1) the Initial Petition; and (2) the Application of Footprint Power Salem Harbor Development LP (“Footprint” or “Company”) for a Certificate of Environmental Impact and Public Interest (“Certificate”) for the construction of a 630 megawatt (“MW”) natural gas-fired, quick-start, combined-cycle electric generating facility at the present location of the Salem Harbor Station in Salem, Massachusetts.

I. INTRODUCTION

Pursuant to G.L. c. 164, §§ 69K½ - 69O½ (“Certificate statute”), Footprint filed with the Siting Board an Initial Petition and Application for a Certificate to construct a 630 MW natural gas-fired, quick-start, combined-cycle electric generating facility in the City of Salem (“project” or “facility”). Footprint indicated that the filing of the Initial Petition and Application was necessitated by the appeal (“Zoning Appeal”) by two Salem residents of a decision issued by the City of Salem Zoning Board of Appeals (“ZBA”) granting a Special Permit for an Essential Service Use pursuant to Section 3.0 of the City of Salem’s Zoning Ordinance Use Regulations, and Variances from the City’s Dimensional Requirements pursuant to Section 4.0 of the Zoning Ordinance. The Certificate, appended to this Decision as Exhibit A, has the effect of granting seven final state and local permits for the project.

A. Summary of the Proceeding

1. Project Description

Footprint proposes to construct a generating facility consisting of two quick-start natural gas turbine generators, two heat recovery steam generators, two steam turbine generators, and a block of air-cooled condensers (Exh. FP-1, at 4-5). The facility would be capable of generating 630 MW without duct firing; with duct firing under summer conditions, it would produce an additional 62 MW, for a total of 692 MW (*id.* at 4). The facility would be constructed on a 65-acre parcel that is presently occupied by four separate electric generating units (*id.* at 6). Two of the four units have ceased operation; the remaining two units are scheduled to cease operation on June 1, 2014 (Exh. FP-2, at 15). Demolition of the existing units would begin in early 2014; construction of the proposed facility would begin in June 2014, with completion by the end of May 2016 (Exh. FP-1, at 1). The facility is scheduled to commence commercial operation in June 2016.

The Siting Board approved the project on October 10, 2013. Footprint Power Salem Harbor Development LP, EFSB 12-2 (October 10, 2013) (“Footprint 12-2 Decision”).

2. Relief Requested

On June 28, 2013, the ZBA issued a decision approving Footprint’s petition for a Special Permit for an Essential Service Use pursuant to Section 3.0 of the City of Salem’s Zoning Ordinance Use Regulations, as well as Variances from the City’s Dimensional Requirements pursuant to Section 4.0 of the Zoning Ordinance (“Salem ZBA Approval”) (Exh. FP-1, at 2). On July 17, 2013, two residents of Salem, Michael Furlong and William Dearstyne, appealed the Salem ZBA Approval (*id.*).¹ Footprint subsequently filed with the Siting Board an Initial Petition followed by an Application, pursuant to the Certificate statute.²

In its Initial Petition and Application, Footprint originally asked the Siting Board to grant a Certificate containing the equivalent of the Salem ZBA Approval and twelve additional state and local permits identified by the Company as necessary for project construction (Exh. FP-2, at 26, 27).³ Since the filing of the Initial Petition and Application, the Company has withdrawn its request for four of those 13 permits because these have subsequently been granted and the appeal periods have expired (Exhs. EFSB-FP-1; EFSB-FP-5; EFSB-FP-6; Company Brief at 45).⁴ A fifth

¹ Mr. Furlong and Mr. Dearstyne also subsequently appealed the decision issued by the Salem Planning Board on August 27, 2013, granting additional zoning approvals for the project.

² Both the Company’s Initial Petition and its Application are under review in this proceeding. See Sections II and III, below.

³ Footprint in its Application designated two Massachusetts Department of Environmental Protection air permits as one permit. The Siting Board views them as two separate permits and discusses them below (See Section III.B.3). Thus, while Footprint attached to its Application a list of twelve permits, we review in this Decision the Company’s requests for 13 permits.

⁴ These four permits are: a MassDEP Industrial Sewer Use Permit; a Massachusetts Department of Transportation consent to build on lands formerly used as a railroad right-of-way; a City of Salem Approval to connect to the Salem water system; and a City of Salem Approval to connect to the Salem public sewer and discharge industrial wastewater.

permit was similarly granted and is now past the date of any potential appeal.⁵ Accordingly, the Siting Board in this proceeding reviews the Company's request for a Certificate incorporating each of the following eight permits:

1. A Special Permit for an Essential Service Use pursuant to Section 3.0 of the City of Salem's Zoning Ordinance Use Regulations, ordinarily issued by the Salem Zoning Board of Appeals; and Variances from the City's Dimensional Requirements pursuant to Section 4.0 of the Zoning Ordinance, ordinarily issued by the Salem Zoning Board of Appeals;
2. Site Plan Approval; a Planned Unit Development ("PUD") Special Permit; and a Special Permit for a Flood Hazard Overlay District, pursuant to G.L. c. 40A, and Sections 7.3, 8.1, and 9.5, respectively, of the Salem Zoning Ordinance. These permits are ordinarily issued by the Salem Planning Board;
3. A Phase II Demolition Permit, pursuant to Chapter 12 of the Salem Code of Ordinances, ordinarily issued by the Salem Inspectional Services Department;
4. A Building Permit for new construction, pursuant to Chapter 12 of the Salem Code of Ordinances, ordinarily issued by the Salem Inspectional Services Department;
5. A Chapter 91 Variance and License, pursuant to G.L. c. 91 and 310 CMR 9.00, ordinarily issued by the Massachusetts Department of Environmental Protection ("MassDEP");
6. A Comprehensive Plan Application ("CPA") Approval, pursuant to G.L. c. 111 §142A – 142N and 310 CMR 7.00, an air permit ordinarily issued by MassDEP;
7. A Prevention of Significant Deterioration ("PSD") Permit, pursuant to the federal Clean Air Act and 40 CFR 52.21, an air permit ordinarily issued by MassDEP; and
8. A State Fire Marshal Above Ground Storage Tank Construction Permit and Use Permit, pursuant to G.L. c. 148, § 37, ordinarily issued by the Massachusetts Department of Public Safety, Office of the State Fire Marshal.⁶

⁵ The fifth permit is a Wastewater Discharge Permit pursuant to Chapter 46 of the Salem Code of Ordinances, ordinarily issued by the South Essex Sewerage District ("SESD"). The SESD issued a final Wastewater Discharge Permit on December 6, 2013 (Exh. SESD-1). The SESD stated that this permit cannot be appealed by a party other than the petitioner (RR-SESD-4). Further, the 30-day appeal period has expired (*id.*). Therefore, the Siting Board does not include the SESD Wastewater Discharge Permit in the Certificate issued in this proceeding.

⁶ As discussed in Section III.B.4, below, the State Fire Marshal ordinarily issues the construction permit and use permit separately. In this Decision, we address and issue these together as a single permit.

B. Jurisdiction

Footprint filed its Initial Petition and Application for a Certificate under G.L. c. 164, §§ 69K½ - 69O½. Pursuant to these provisions of the Certificate Statute, any applicant that proposes to construct or operate a generating facility in Massachusetts may seek a Certificate from the Siting Board if the applicant is prevented or delayed from building the facility because of an adverse state or local agency permitting decision, undue agency delay, or the appeal by a third party of a state or local agency permitting decision. The Certificate, if granted, has the legal effect of granting the permit in question, and may grant additional project permits as well. The Siting Board makes a decision on a Certificate Application for a generating facility in accordance with: (1) G.L. c. 164, § 69L½ (which requires that an Application contain certain information and representations); (2) G.L. c. 164, § 69O½ (which requires the Siting Board to include three specific findings and opinions in its decision); and (3) G.L. c. 164, § 69H (which requires the Siting Board to implement the energy policies in its statute to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost).

C. Procedural History

This proceeding commenced with the filing by Footprint of an Initial Petition for a Certificate with the Siting Board on August 5, 2013, pursuant to G.L. c. 164, §69K½ (Exh. FP-1). On August 8, 2013 and pursuant to 980 CMR 6.02(4), the Acting Chair of the Siting Board deferred the Board's decision on the Initial Petition until after the Company filed an Application for a Certificate and to consider the merits of the Initial Petition concurrently with the hearing on the Application. The Acting Chair also determined that Footprint could not file its Application unless and until the Siting Board approved the Company's petition to construct the generating facility pursuant to G.L. c. 164, §69J¼ (Determination on Review of Initial Petition and Filing of Application (August 8, 2013)). As mentioned above, the Siting Board approved the petition to construct on October 10, 2013. The Company then filed its Application for a Certificate on October 11, 2013, pursuant to G.L. c. 164, §69L½ (Exh. FP-2). The Initial Petition and Application were consolidated for review, consistent with Siting Board practice.

The Presiding Officer granted intervention status to the City of Salem (“City”), MassDEP, the Conservation Law Foundation (“CLF”), and Salem residents William Dearstyne and Michael Furlong, and limited participant status to National Grid USA Service Company, Inc.

Beginning in October 2013, and continuing through December 2013, the Siting Board and CLF conducted written discovery. On December 3, 2013, the Company submitted the prefiled direct testimony of two witnesses: Scott Silverstein, Footprint’s President and Chief Operating Officer; and Peter Furniss, Footprint’s Chief Executive Officer. On December 5, 2013, MassDEP submitted the prefiled direct testimony of Ben Lynch, Section Chief of the MassDEP Waterways Program. MassDEP also sponsored two witnesses from the MassDEP Northeast Region Bureau of Waste Protection: James Belsky, Permit Chief; and Edward Braczyk, Permit and Compliance Environmental Engineer. The City sponsored one witness: Michael Lutrzykowski, Assistant Building Inspector. The exhibits entered into the record include: (1) responses by the Company and the relevant permitting agencies to information requests and record requests issued in this proceeding by the Siting Board and the parties; and (2) all exhibits entered into the record in EFSB 12-2, the adjudicatory proceeding in which the Siting Board originally approved the project (“underlying proceeding”). Evidentiary hearings were conducted on December 10 and 11, 2013. On December 24, 2013, Footprint, MassDEP, the City, and CLF filed briefs and responses to specific briefing questions issued by the Siting Board.

On February 4, 2014 the Siting Board issued a Tentative Decision approving Footprint’s Initial Petition and Application and issuing a Certificate containing seven state and local permits. On February 18, 2014 CLF and Footprint filed a Settlement Agreement (“Settlement Agreement”) (Exh. FP/CLF-1; also, Exhibit A, Attachment 4, to this Decision). CLF and Footprint requested that the Siting Board include the Settlement Agreement without modification as a condition to the Certificate of Environmental Impact and Public Interest. On February 20, 2014 the Siting Board voted to adopt the Tentative Decision with amendments including the Settlement Agreement as a condition to the Final Decision.

D. Motion to Dismiss

On November 26, 2013, CLF filed a Motion to Dismiss Footprint’s Initial Petition and Application (“CLF Motion to Dismiss”) alleging that Footprint failed to: (1) demonstrate that it meets any of the statutory grounds on which an Initial Petition may be based, as set forth in

G.L. c. 164, § 69K½; (2) meet the requirement in G.L. c. 164, § 69L½ that a “good faith effort” be made by the applicant to obtain the permits the applicant seeks to include in the Certificate; and (3) provide sufficient evidence to allow the Siting Board to make findings regarding Footprint’s compliance with the Massachusetts Global Warming Solutions Act (“GWSA”) (CLF Motion to Dismiss at 1-2). In the alternative, CLF requested clarification of the scope of the proceeding with respect to: (1) whether the scope extends to a determination by the Siting Board of the facility’s consistency with the GWSA; and (2) whether the scope of the proceeding is limited to permits “that are not preempted by federal law,” *i.e.*, whether the Siting Board can include the two MassDEP air permits for the facility, which CLF asserted are federal permits that the Siting Board is preempted from including in a Certificate (*id.*). On December 3, 2013, Footprint filed an opposition to the CLF Motion to Dismiss (“Footprint Opposition to Motion to Dismiss”).

The Presiding Officer issued a ruling on December 9, 2013, denying the CLF Motion to Dismiss (“Ruling on CLF Motion to Dismiss”) on the basis that none of CLF’s assertions supported a motion to dismiss; rather, that resolution of the issues raised by CLF would be appropriate only after development of the record and legal argument by the parties in their briefing had been completed. With respect to the GWSA, the ruling stated that the issue of GWSA compliance had been litigated in the EFSB 12-2 proceeding and would not be relitigated in this proceeding. With respect to the two MassDEP air permits, the ruling stated that the propriety of including these permits in the Certificate would be determined after development of the record and legal arguments on the issue had been completed (Ruling on CLF Motion to Dismiss at 2). On December 16, 2013, CLF moved for reconsideration of the Ruling on the Motion to Dismiss, which the Siting Board denied in a ruling on January 8, 2014.

In addition to the rulings issued on December 9, 2013 and January 8, 2014, this Decision further addresses the grounds asserted by CLF for its motion to dismiss and motion for reconsideration. Analysis of the Initial Petition and Application, and its compliance with statutory requirements, is addressed in Section II.B, below; whether Footprint has met the statutory “good faith effort” requirement is discussed in Section III.C.4, below; Footprint’s compliance with the GWSA in this proceeding is discussed in Section III.B.1 and 4, below; and finally the issue of whether the Siting Board is preempted from including the two MassDEP air permits in the Certificate is addressed in Section III.C.3, below.

II. INITIAL PETITION

A. Standard of Review

To initiate a Certificate proceeding, an applicant must file an Initial Petition.

G.L. c. 164, § 69K½; 980 CMR 6.02. For generating facilities, the Certificate statute provides that the Siting Board shall grant an Initial Petition if: (1) the applicant asserts at least one of the seven grounds for a Petition set forth in G.L. c. 164 § 69K½; and (2) the Siting Board determines that, on the merits, at least one of the asserted grounds constitutes a valid basis for granting the Initial Petition. Id.

B. Analysis and Findings

1. Delay Caused by Appeal

Footprint's Initial Petition is based solely on G.L. c. 164, § 69K½ (vi). This provision of the Certificate statute provides that the Siting Board shall grant an Initial Petition if it finds that "the facility cannot be constructed because of delays caused by the appeal of any approval, consent, permit, or certificate." Footprint asserts that the Zoning Appeal prevents timely construction of the facility.

As noted above, the Zoning Appeal was filed in Essex Superior Court on July 13, 2013 (Exhs. FP-1, at 12; FP-2, at 14).⁷ Footprint noted that the Superior Court estimated that it would require approximately 22 months to issue a decision on the Zoning Appeal (Exhs. FP-1, at 12, and at 29 n.16). Footprint noted that, once issued, a decision on the Zoning Appeal may be further appealed, thus resulting in additional significant delay in the commencement of project construction (id. at 12).

Footprint stated that ISO New England ("ISO-NE") has found a need for additional capacity in the electric power supply region of northeastern Massachusetts (known as NEMA/Boston) beginning in June 2016; to meet this need, Footprint is under contractual

⁷ The Company indicated that the Zoning Appeal has since been removed to the Land Court (Company Brief at 16 n.8). CLF stated that the Zoning Appeal and the appeal of the Salem Planning Board Approval have been consolidated and both removed to Land Court (CLF Brief at 9 n.6). CLF alleged that the appeals are "likely to move along more quickly" in Land Court (id. at 11), but there is no record evidence to support this assertion.

obligation to ISO-NE to begin operation of the proposed facility by June 2016 (Exh. FP-2, at 50-51; Footprint Opposition to Motion to Dismiss). Footprint stated that if the Company fails to meet the June 2016 in-service date, potential consequences include: (1) a 300 MW capacity shortfall in NEMA/Boston in June 2016, as currently estimated by ISO-NE; and (2) significant financial losses for the Company under the ISO-NE tariff (Footprint Opposition to Motion to Dismiss at 6-7). To meet the June 2016 in-service date for the project, Footprint has calculated that it must obtain project financing by February 2014 and begin project construction by June 2014 (Exh. FP-1, at 13; Tr. 2, at 170-177; Company Brief at 24). Footprint stated that delay due to the Zoning Appeal will prevent the Company from achieving this timetable (Company Brief at 24).

Footprint stated that the existence of the Zoning Appeal precludes the Company from commencing facility construction as a matter of law. Footprint stated that, in accordance with state law, the variances that the Salem ZBA granted for the facility cannot become effective until the Zoning Appeal has been denied or dismissed (Exh. FP-1, at 12; Company Brief at 23). Additionally, Footprint stated that construction of the facility cannot begin until the City issues a building permit (Exh. FP-2, at 29-30). The City stated that its Inspectional Services Department cannot issue a building permit that requires a variance, unless the variance has been granted and is not under appeal (RR-EFSB-COS-2; City Brief at 4; Company Brief at 23).

Mr. Furniss testified that, based on his experience in financing of electric generation facilities in Massachusetts and the region, banks will not provide financing for a project where permits “that go to the heart of the project” are under appeal or even under the threat of an appeal (Tr. 2, at 172, 178-179). He added that construction could not commence without such financing (*id.*).

CLF asserts that while the Zoning Appeal may delay the project to some extent, Footprint has failed to demonstrate that: (1) the delay would preclude project construction as defined by G.L. c. 164, § 69K½ (vi); or (2) the delay would be so significant as to preclude commencement of construction by June 2014 (CLF Brief at 9-11). CLF also asserts that Footprint has not demonstrated that, but for the Appeal, project construction could proceed, since other project permits beyond the scope of this proceeding have potentially longer appeal periods (*id.* at 11).

Regardless of whether the matter is pending in Superior Court or Land Court, the precise timing of the issuance of a decision on the Zoning Appeal cannot be ascertained. However, the record in this case is sufficient to establish that the pendency of the Zoning Appeal will preclude

project construction at least until a decision on the Appeal has been issued. Further, because the parties to the court proceeding would have the opportunity to appeal the decision, project construction may be further, and significantly, delayed.

The Siting Board has previously addressed the question of what an applicant must assert to demonstrate that a facility “cannot be constructed” due to delays caused by the appeal of a project permit within the meaning of G.L. c. 164, § 69K½ (vi). Indeed, the Board determined that G.L. c. 164, § 69K½ (vi) was satisfied in similar circumstances when an appeal of zoning permits to the Land Court caused a delay in commencing construction of a generating facility. IDC Bellingham LLC, 13 DOMSB 1, at 11-17 (2001) (“IDC Bellingham”). In IDC Bellingham, the appeal likewise precluded obtaining a building permit needed to begin construction, and prevented other steps required for construction. Although the Siting Board concluded that it could not determine when the Land Court would decide the appeal, the Board noted that the appeal had been pending for nine months and had not yet been decided. Id. at 16. The Board also noted that further delay was possible because parties to the Land Court proceeding could appeal the Land Court decision. Id. Furthermore, the Siting Board specifically rejected two of the arguments asserted by CLF here. The Board determined that an applicant is not required to show that: (1) the facility could never be constructed because of the delay caused by an appeal; or (2) but for the appeal, the facility could be constructed. Id. at 15-16.

Based on the Siting Board’s analysis in IDC Bellingham and the record in this proceeding, the Siting Board finds that the pendency of the Zoning Appeal could prevent the Company from completing project construction in time to meet its required June 2016 in-service date. This showing is sufficient to demonstrate that the facility cannot be built due to delay caused by the Appeal, within the meaning of G.L. c. 164, § 69K½ (vi).

C. Decision on the Initial Petition

As noted in Section II.B, above, the Company asserted in its Initial Petition one of the seven grounds on which the Siting Board’s grant of an Initial Petition may be based. The Siting Board has found that Footprint has raised a substantively valid basis for granting the Company’s Initial Petition. Accordingly, the Siting Board GRANTS the Company’s Initial Petition.

III. THE APPLICATION

A. Standard of Review

Pursuant to G.L. c. 164, § 69O½, if the Siting Board issues a Certificate for a generating facility, the Certificate must include the Siting Board's findings and opinions with respect to the following: (1) the compatibility of the facility with considerations of environmental protection, public health, and public safety; (2) the extent to which construction and operation of the facility will fail to conform with existing state or local laws, ordinances, by-laws, rules and regulations and the reasonableness of exemption thereunder, if any, consistent with the implementation of the energy policies contained in this chapter; and (3) the public interest or convenience requiring construction and operation of the generating facility. G.L. c. 164, § 69O½. See Berkshire Power Development, Inc., 8 DOMSB 1, at 291 (1999) ("Berkshire Power"); IDC Bellingham at 20 (2001).

The Siting Board bases its findings and opinions on both the record developed in the Certificate proceeding and the record developed in the underlying Siting Board proceeding in which the Board reviewed and approved the proposed facility. See Cape Wind Associates, LLC, EFSB 07-8 (2009) ("Cape Wind"); see also G.L. c. 164, § 69O, 69O½. The Siting Board does not relitigate in a Certificate proceeding issues already fully and fairly determined in the underlying proceeding. Berkshire Power at 296-297. However, in order to provide a full review of a previously approved facility, the Board: (1) reviews the decision from the underlying Siting Board proceeding; and (2) determines the extent to which new information has been developed or the circumstances of a project may have changed in the intervening period. See, e.g., Cape Wind at 9-10.⁸

⁸ Additionally, in Certificate cases where the applicant is challenging an adverse agency permitting decision, the Siting Board verifies that the issues raised by the agency have been addressed in a comprehensive manner by the Board, either in its review of the facility under G.L. c. 164, § 69J¼ and/or in its review under G.L. c.164, § 69K½. G.L. c. 164, §§ 69O, 69O½; Cape Wind at 9-10. Such an inquiry is not relevant here, as the Company's Initial Petition and Application are based on the appeal by third parties of an agency decision favorable to the Company; the Company does not seek to overturn or modify an adverse agency decision.

B. Opinions and Findings

The three specific findings the Siting Board must make to support the issuance of a Certificate of Environmental Impact and Public Interest for a facility are discussed below.

1. Compatibility With Environmental Protection, Public Health and Safety

Pursuant to G. L. c. 164, § 69O½, the Siting Board must make a finding with respect to the compatibility of the facility with considerations of environmental protection, public health, and public safety.

a. Prior Siting Board Review

As indicated above, the Siting Board conducted a full adjudicatory proceeding on the Company's petition to construct the facility, and issued a Final Decision approving the project in October 2013. In the underlying proceeding, the Siting Board conducted a comprehensive review of the environmental impacts of the proposed facility. See Footprint 12-2 Decision at Sections IV.B through IV.K. The Siting Board found that with conditions relating to air, hazardous and solid waste, visual, noise, safety, traffic, and land use impacts, Footprint's plans for the construction of the proposed facility would minimize the environmental impacts of the facility consistent with the minimization of costs associated with the mitigation, control, and reduction of the facility's environmental impacts. Footprint 12-2 Decision at 101, 106. The Siting Board also found that the plans for the construction of the proposed generating facility are consistent with current health and environmental protection policies of the Commonwealth, and with such energy policies of the Commonwealth as have been adopted by the Commonwealth for the specific purpose of guiding the decisions of the Siting Board. Id. at 105. The Siting Board found that, with the required mitigation, the construction and operation of the proposed generating facility is consistent with the GWSA. Id. at 32, 104.

b. CLF

CLF asserts that the Siting Board must consider the greenhouse gas ("GHG") emissions of the facility in the context of the current Certificate proceeding (CLF Brief at 14). In order to comply with the GWSA, CLF asserts that the Board must also review the Footprint 12-2 Decision and determine the extent to which new information has been developed or whether the

circumstances of a project may have changed in the intervening period (id.). CLF points to record evidence provided by Footprint regarding new carbon dioxide (“CO₂”) emission rates from the facility with and without duct firing (id.). Specifically, CLF asserts that the Siting Board relied on a different CO₂ emissions rate in the Footprint 12-2 Decision than the rate presented in this proceeding, and that no new modeling was conducted using the new rate (id. at 15).⁹

c. Settlement Agreement

As mentioned above, Footprint and CLF requested that the Siting Board issue a Certificate that includes the Settlement Agreement as a condition. The main substantive component of the Settlement Agreement is titled “Additional Measures Regarding Greenhouse Gases” (Settlement Agreement at 4). In that provision of the agreement, Footprint agrees to a GHG cap for the first ten years of the facility’s operation (through 2025) that is identical to the annual and uniform GHG emission limit allowed in the MassDEP CPA Approval (id.). Beginning in 2026, Footprint agrees to annually decreasing GHG caps continuing through 2049. Footprint also agrees to cease operation of the facility no later than January 1, 2050, and to fully decommission the facility within two calendar years of its shutdown (id. at 6).

CLF agrees not to file or support any appeal of the Final Decision in this Certificate proceeding, and to voluntarily dismiss its pending appeal of the Footprint 12-2 Decision. CLF also agrees not to file any appeals or other challenges of the CPA Approval and PSD Permit issued for the facility, and to voluntarily dismiss a civil lawsuit it filed challenging the authority of MassDEP to issue PSD permits (Settlement Agreement at 7-8).¹⁰

d. Analysis

As noted above, the Siting Board does not relitigate in a Certificate proceeding issues that have been fully and fairly decided in the underlying proceeding. This practice reflects considerations of both fairness and administrative efficiency. See Berkshire Power at 296-297. Here, in the underlying proceeding, the Board conducted a comprehensive review of the facility’s potential environmental impacts, including its consistency with the GWSA. Thus, the Siting

⁹ CLF made these arguments prior to the submission of the Settlement Agreement.

¹⁰ This description does not include all of the provisions of the Settlement Agreement. The entire agreement is attached to this Decision (Exhibit A, Attachment 4).

Board will not conduct a de novo environmental review, including GWSA review, in this proceeding.

The Siting Board does compare the record evidence and the decision in the underlying Siting Board proceeding with the information provided in a Certificate proceeding, to determine whether new information has been developed or the circumstances of a project have changed in the intervening period. The Siting Board notes, and the Company confirmed, that no new or updated relevant evidence regarding the proposed project has been presented in this proceeding (Company Brief at 8 n.4). With respect to CLF's assertion that new CO₂ emission rates have been introduced in this proceeding, we note that the CO₂ emission rates referred to by CLF as "new" actually were provided by Footprint in the underlying proceeding and are included in the record of that proceeding. See Footprint 12-2 Decision at 23.

In the underlying proceeding, the Company initially presented a CO₂ emission rate of 842 lbs/MWh. Footprint 12-2 Decision at 23. In making the finding in the underlying proceeding that the proposed generating facility is consistent with the GWSA, the Siting Board focused on this 842 lbs/MWh CO₂ emission rate. Later in the underlying proceeding, the Company updated the record by noting that it had selected the General Electric F Class turbine, which has a CO₂ emission rate of 825 lbs/MWh. Footprint 12-2 Decision at 23 n.23. In comments on the Tentative Decision in the underlying case, the Company clarified that the 825 lbs/MWh emission rate figure does not reflect operation of the facility with supplementary duct firing, and that the facility would emit 895 lbs/MWh of CO₂ with duct firing. Id. To address this additional information in the underlying case, the Siting Board directed Footprint to submit a compliance filing explaining the higher emissions rate associated with duct firing. Id.

In the instant proceeding, the Company explained that, assuming operations at 100 percent of capacity (8,760 hours per year) and the maximum duct firing (720 hours per year) allowed by the air permit, the annual average CO₂ emission rate for the facility would be 835 lbs/MWh (Tr. 1, at 98-102). This annual average CO₂ emission rate of 835 lbs/MWh is slightly lower than the 842 lbs/MWh emission rate used in the underlying proceeding to calculate emissions impacts. Likewise, the Settlement Agreement does not allow any increase from the maximum CO₂ levels contained in the MassDEP CPA Approval, and also includes a declining annual CO₂ emissions cap after 2025. Accordingly, regardless of whether the Board were to incorporate the Settlement Agreement as a condition to the decision, there is no basis for the Siting Board to reach a

conclusion that differs from the Footprint 12-2 Decision that the project is consistent with the GWSA.

We find in this case no new information or project changes requiring additional analysis beyond that which occurred in the underlying proceeding. Therefore, the conclusions and findings reached in the Footprint 12-2 Decision regarding environmental impacts, public health and safety remain valid and will be used for purposes of this decision. Accordingly, the Siting Board finds that construction and operation of the proposed generating facility is compatible with considerations of environmental protection, public health and public safety.

2. Conformance with Laws and Reasonableness of Exemption Thereunder

Pursuant to G. L. c. 164, § 69O½, the Siting Board must make a finding with respect to the extent to which construction and operation of the facility will fail to conform with existing state or local laws, ordinances, by-laws, rules and regulations and the reasonableness of exemption thereunder, if any, consistent with the implementation of the energy policies applicable to the Siting statute.

The Siting Board acknowledges that the granting of a Certificate in this proceeding will allow the Company to construct the project, notwithstanding the pending judicial appeals of the Salem ZBA Approval and the Salem Planning Board Approval, and the pending administrative appeal of the MassDEP Chapter 91 Written Determination for the project. See Section III.C.2, below. Issuance of the Certificate also precludes any appeals of the other state and local permits included in the Certificate. The Siting Board notes that this result was intended by the Legislature in enacting the Certificate statute, and is consistent with the statute. See House No. 6190, Third Report of the Massachusetts Electric Power Plant Siting Commission (March 30, 1974).

With the exception of the State Fire Marshal Permit, Footprint has applied for each permit it requests in its Application, and the relevant permitting agencies have issued either a draft or final permit.¹¹ Further, although the Certificate statute does not require it, the Board provided each of the permitting agencies with the opportunity to recommend appropriate permit conditions, and to indicate whether it opposed inclusion of its permit(s) in the Siting Board Certificate. Each of the permitting agencies provided the Board with proposed permit conditions, and stated that it did not

¹¹ The State Fire Marshal Permit is discussed in Section III.C.4, below.

oppose inclusion of its permit or permits in the Certificate (Exhs. EFSB-COS-1; EFSB-SFM-1; EFSB-SFM-2; EFSB-DEP-GEN at 1-2; MassDEP Brief at 2-3; City Brief at 5). The record in this proceeding does not demonstrate any area of actual or potential non-conformance with local or state laws, ordinances, by-laws, rules or regulations.

3. Public Interest or Convenience

Pursuant to G. L. c. 164, § 69O½, the Siting Board must make a finding with respect to the public interest or convenience requiring construction and operation of the facility. After conducting an extensive review of the potential environmental impacts of the generating facility, the Siting Board found in the underlying proceeding that upon compliance with specific conditions set forth in the Footprint 12-2 Decision, construction and operation of the generating facility will provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost, in keeping with the Siting Board's statutory obligations under G.L. c. 164, § 69H. Footprint 12-2 Decision at 106. Nothing in the record of the instant proceeding changes any of the Siting Board's findings in the underlying proceeding. Additionally, nothing in the Settlement Agreement would require any change of these findings.

Accordingly, the Siting Board finds, that pursuant to G. L. c. 164, § 69O½, the public interest or convenience requires the construction and operation of the project as described in this proceeding.

4. Findings

The Siting Board has made the three findings that it must include in a Certificate in order to issue the Certificate pursuant to Section 69O½. Specifically, the Siting Board has found that: (1) granting a Certificate containing approvals for the project is compatible with considerations of environmental protection, public health and safety; (2) there is no evidence of non-compliance with any applicable state and local laws, ordinances, by-laws, rules or regulations; and (3) issuing such a Certificate would serve the public interest or convenience. The three findings made by the Siting Board support granting a Certificate for the project so that it may go forward, and the Siting Board hereby grants such a Certificate and includes the Settlement Agreement as a condition (see Condition C.11 in Exhibit A, below).

C. Scope of the Certificate

As noted in Section I.A.2, above, Footprint has requested that the Certificate include eight separate permits identified by the Company as necessary for project construction and operation. The Siting Board considers below which of these permits should be included in the Certificate.

1. The City of Salem Permits

a. Salem ZBA Approval

Footprint applied to the Salem ZBA on May 29, 2013 for: (1) a Special Permit for an Essential Service Use; and (2) Variances from the City's Dimensional Requirements (Exh. FP-2, at 9). The site is located in an Industrial Zoning District, which allows the construction of essential services (such as utility facilities) with a Special Permit (id.). The dimensional variance pertains to the request to exceed the maximum height allowance of 45 feet in an Industrial Zoning District (id.). The ZBA held a public hearing on June 19, 2013, and thereafter voted unanimously to approve the Company's application for the Special Permit and Variances subject to certain terms and conditions (id. at 10). The ZBA issued a written decision on June 28, 2013 (id.). As discussed above, Mr. Furlong and Mr. Dearstyne, appealed the Salem ZBA Approval on July 17, 2013 (id. at 12).

The City stated that it has no objection to including the Salem ZBA Approval in a Certificate, provided that all conditions contained in the permit and the written decision are included in their entirety (City Brief at 5). The Siting Board hereby determines that the Certificate issued in this proceeding shall include the Salem ZBA Approval issued by the Salem ZBA on June 28, 2013. The Salem ZBA Approval is incorporated in its entirety into the Certificate, as provided in Exhibit A.

b. Salem Planning Board Approval

Footprint applied on April 8, 2013 to the Salem Planning Board for: (1) Site Plan Approval; (2) a PUD Special Permit; and (3) a Special Permit for a Flood Hazard Overlay District (Exh. FP-2, at 12). All non-residential structures or premises exceeding 10,000 gross square feet must undergo Site Plan review (id.). The site is located within a Wetlands and Flood Hazard Overlay District and, therefore, to construct the proposed project a Flood Hazard District Special Permit is required (id.). The Planning Board held six public hearings on the Company's

application between May 2, 2013 and July 25, 2013 (*id.* at 12-13). The Planning Board voted unanimously on July 25, 2013, to approve the two Special Permits and the Site Plan subject to certain terms and conditions. The written decision was issued on August 1, 2013 (*id.*).

Mr. Furlong and Mr. Dearstyne appealed this decision on August 27, 2013.

The City stated that it has no objection to including in a Certificate: (1) the Site Plan Approval; (2) a PUD Special Permit; and (3) a Special Permit for a Flood Hazard Overlay District provided that all conditions contained in the permits and the written decision are included in their entirety (City Brief at 5). The Siting Board hereby determines that the Certificate issued in this proceeding shall include the Site Plan Approval, the PUD Special Permit, and the Special Permit for a Flood Hazard Overlay District issued by the Salem Planning Board on August 1, 2013. The Salem Planning Board Approval is incorporated in its entirety into the Certificate, as provided in Exhibit A.

c. Phase II Demolition Permit and Building Permit

Footprint applied to the Salem Inspectional Service Department for a Phase II Demolition Permit on November 18, 2013 (RR-EFSB-4).¹² The City provided the Siting Board with: (1) a draft Phase II Demolition Permit; and (2) a draft Building Permit, both issued December 23, 2013 (City Brief, Exhibit A and Exhibit B).¹³ The City of Salem stated that Footprint has applied for all necessary permits from the City (City Brief, Briefing Question 1).

The City stated that it does not have concerns with the Siting Board issuing a Certificate containing a Phase II Demolition Permit and a Building Permit, as long as the conditions contained in the Salem Planning Board Approval are included (Exhs. EFSB-COS-1; EFSB-COS-3). In addition to adhering to the Planning Board decision, the City requested that the Certificate include a requirement that Footprint comply with all applicable federal, Massachusetts, and Salem statutes, regulations, guidelines, ordinances, and permitting conditions (City Brief at 5). Further, with

¹² Footprint received a Phase I Demolition Permit from the Salem Inspectional Services Department on May 16, 2013; the permit was not appealed (Exh. FP-2, at 28).

¹³ These exhibits have been entered into the record as Exhibits EFSB-COS-1(Supp) and EFSB-COS-3(Supp), respectively.

regard to all inspectional tasks, the City noted that Footprint has committed to a combination of “permit fee” inspections and “controlled construction” inspections for the project (*id.*).¹⁴

Both a demolition permit and a building permit may be appealed to the Massachusetts Board of Building Regulations and Standards within 45 days after the issuance of the permit (*see* G.L. c. 143 § 100; Exh. EFSB-COS-4). Further, an appeal may also be brought alleging a violation of the City’s zoning ordinance within 30 days after the issuance of the permit (*see* G.L. c. 40A § 8 and § 15; (Exh. EFSB-COS-4)).

The City stated that it has no objection to including a Phase II Demolition Permit and the Building Permit in a Certificate, provided that all conditions contained in the permits and the Salem Planning Board Approval, as well as adherence to a City-approved inspectional services plan are included. The Siting Board hereby determines that the Certificate issued in this proceeding shall include the equivalent of a Phase II Demolition Permit and a Building Permit. These approvals are included in Exhibit A.

2. MassDEP Chapter 91 Variance and Waterways License

Footprint applied to MassDEP for a Chapter 91 Waterways License and a Variance on May 17, 2013, and MassDEP determined the application to be administratively complete on July 26, 2013 (Exh. FP-2, at 24, 26). MassDEP issued a favorable Variance Request and Written Determination (“Written Determination”) on November 1, 2013 (Exhs. DEP-1; EFSB-DEP-5). The Written Determination stated that MassDEP would allow the project to proceed as a new non-water dependent use on filled tidelands within a Designated Port Area and that MassDEP would grant Footprint a Chapter 91 Waterways license if an appeal were not filed within 21 days (Exh. DEP-1, at 25). The Written Determination contained 17 Special Conditions and eight General Conditions that must be met by the Company in accordance with the approval

¹⁴ Permit fee inspections consist of a negotiated fee between Footprint and the City to allow inspections to be carried out under the auspices of the City either through consulting engineers or Inspectional Services staff. Controlled construction inspections are conducted and certified by Footprint architects or engineers, acting as agents for the City (City Brief at 5).

(Exh. EFSB-DEP-1). On November 22, 2013, CLF and others filed with MassDEP a request for an administrative appeal of the Written Determination (Exh. DEP-3, at 4).¹⁵

MassDEP stated that it has no objection to including the Written Determination in its entirety in a Certificate to be issued by the Siting Board in this proceeding as the final Chapter 91 License for the project, provided that all conditions contained in the Written Determination are included (Exhs. EFSB-DEP-GEN at 1-2; EFSB-DEP-5; Tr. 1, at 16). The Siting Board hereby determines that the Certificate issued in this proceeding shall include the equivalent of a final Chapter 91 License, which shall be the Written Determination and Variance decision issued by MassDEP on November 1, 2013. This approval is incorporated in Exhibit A.

3. Air Permits

In accordance with mandates under the federal Clean Air Act (“CAA”), the Company is required to obtain two permits that regulate the air emissions of the proposed project: a CPA Approval and a PSD Permit (Exh. EFSB-DEP-GEN at 6, 8). MassDEP issued the Proposed CPA Approval and the Draft PSD Permit together on September 9, 2013 (Exh. EFSB-DEP-GEN at 2). MassDEP held a public hearing on October 10, 2013 in Salem and accepted written public comments until November 1, 2013 (*id.*; Exh. EFSB-FP-4). MassDEP issued the Revised CPA Approval and the Revised PSD Permit on January 30, 2014. The Revised CPA Approval becomes a Final CPA Approval at the end of a 21-day appeal period, unless a request for an adjudicatory appeal is filed with MassDEP (Exh. EFSB-DEP-GEN at 3). The Revised PSD Permit becomes a Final PSD Permit at the end of a 30-day appeal period, unless the permit is appealed to the Environmental Appeals Board (“EAB”) of the U. S. Environmental Protection Agency (“USEPA”) (Exh. EFSB-DEP-GEN at 3).

Footprint asked the Siting Board to include in the Certificate both the CPA Approval and the PSD Permit (Exh. FP-2, at 26; Company Brief at 52). Footprint asserts that the Board may, and in fact, must, include both permits in the Certificate, primarily because the Certificate statute requires a certificate to include “all” permits necessary for construction and operation of a proposed energy facility (Company Brief, Briefing Question 2A). MassDEP asserts that the Board may include the CPA Approval, as it is a state permit, but may not include the PSD Permit, as it is

¹⁵ As part of the Settlement Agreement, on February 18, 2014 CLF withdrew its administrative appeal (Exh. FP/CLF-3).

a federal permit issued by MassDEP under delegation from the USEPA (MassDEP Brief, Exhibits 1 and 2). CLF asserts that the Board may not include either permit in the Certificate, as both permits have a federal component (CLF Brief at 4-5).

a. The CPA Approval

i. Footprint

Footprint asserts that the express language of the Certificate statute requires the Board to include the CPA Approval as a Certificate “*shall* be in the form of a composite of *all*” permits necessary for construction and operation of the generating facility (emphasis added) (Company Brief, Briefing Questions at 6-7, citing G.L. c. 164, § 69K½). Footprint argues secondarily that including the CPA Approval is consistent with other applicable language in the Certificate statute, which prohibits the inclusion of permits that “if so granted or modified by the appropriate state or local agency, would be invalid because of a conflict with federal air standards and requirements” (*id.*). Footprint argues that, since the Board would be incorporating the CPA Approval exactly as issued by MassDEP, no conflict with federal air standards or requirements would occur (*id.* at 7). Footprint indicates that it would view as acceptable a Certificate incorporating either the Revised CPA Approval (subsequently issued by MassDEP on January 30, 2014) or the Final CPA Approval issued by MassDEP after the conclusion of any administrative appeal process (Footprint Opposition to CLF Motion to Dismiss at 19).

ii. MassDEP

MassDEP asserts that a CPA Approval is a state permit, and that the Board may include a CPA Approval in a Certificate as long as the Board incorporates the Approval exactly as issued by MassDEP (MassDEP Brief at 2-3). MassDEP states that the Board may include in the Certificate either the Revised CPA Approval or the Final CPA Approval (*id.* at 4). In a reversal of its pre-hearing position, MassDEP asserts in its brief that its research shows that the federal CAA does not require MassDEP to provide an opportunity for administrative appeal of a CPA; therefore, in MassDEP’s view, the Board may include either the Revised CPA Approval or the Final CPA Approval in the Certificate without causing a conflict with federal requirements (*id.* at 3-4). MassDEP advises the Board, in making its choice, to balance the competing interests of: (1) allowing the administrative appeal process to go forward, and thus allowing MassDEP to

receive evidence that could lead to further revisions to the Revised CPA Approval; and (2) eliminating the administrative appeal, and any subsequent state court appeals, of the Revised CPA Approval and thus avoiding possibly significant project delay (id. at 4-6).

iii. CLF

CLF asserts that the Board is preempted from including the CPA Approval in the Certificate because the MassDEP regulations governing such permits were incorporated into the state's federally approved State Implementation Plan ("SIP"), and thus "became federal law" (CLF Brief at 7). CLF also asserts that only an agency "which has demonstrated that it meets all the requirements of the CAA may issue permits and implement requirements of the SIP" and that the Board lacks any such authority under the CAA (id.).¹⁶

iv. USEPA

The USEPA did not intervene, testify, or otherwise participate in the proceeding. However, MassDEP submitted as an exhibit a November 13, 2013 letter from USEPA to MassDEP, in which the USEPA stated that "the EFSB is not authorized, for federal CAA purposes, to issue or modify either a CPA under the Massachusetts SIP or a PSD permit under the Delegation Agreement" (Exh. EFSB-DEP-GEN, Exhibit C).

v. Analysis and Findings

The record shows that MassDEP issues CPA Approvals pursuant to Massachusetts state law and regulations. As stated on the cover page to the proposed CPA Approval itself, for example, MassDEP issued that approval pursuant to "310 CMR 7.02 Plan Approval and Emission Limitations as contained in 310 CMR 7.00 'Air Pollution Control' regulations adopted by MassDEP pursuant to the authority granted by Massachusetts General Laws, Chapter 111, Section 142 A-J, Chapter 21C, Section 4 and 6, and Chapter 21E, Section 6" (Exh. EFSB-FP-4-1).

MassDEP, the agency with authority to issue CPA Approvals in Massachusetts, is of the view that a CPA Approval, if unmodified by the Siting Board, is a state permit that may be included in a Certificate. Although a USEPA staff member has stated in a letter to MassDEP that

¹⁶ CLF made these arguments prior to submission of the Settlement Agreement.

the Siting Board “is not authorized ... to issue or modify” a CPA Approval, the letter does not address the possibility that the Siting Board might adopt a Revised or Final CPA Approval, as issued by MassDEP, without modification. The USEPA statement is conclusory and is outweighed by the careful and comprehensive analysis provided by MassDEP.¹⁷ The Siting Board concludes that, in Massachusetts, CPA Approvals are state permits and, accordingly, that the Siting Board is authorized by G.L. c. 164, § 69K½ to include in a Certificate a CPA Approval issued by MassDEP for the Footprint generating facility.

Originally, MassDEP took the position that the Board could not include the Revised CPA Approval in the Certificate, but could include the Final CPA Approval – after the MassDEP administrative appeal process is concluded. Significantly, MassDEP revised its position, and now expresses the view that the Board may include either version of the Approval in the Certificate. Including the Revised CPA Approval in the Certificate would preclude both administrative and judicial appeals of the Approval. This would eliminate potentially significant delay in the commencement of facility construction, consistent with the intent of the Certificate statute.

Allowing the MassDEP administrative appeal process to go forward would allow for further public input in the permitting process, and accordingly could result in further changes by MassDEP to the Revised CPA Approval. MassDEP has indicated that it would expedite the administrative appeal process in this case, and that a Final CPA Approval could be issued within six months of the filing of a request for an adjudicatory hearing (Tr. 1, at 19-20). Additionally, Footprint has stated that it would not oppose any permit conditions arrived at through the administrative appeal process, and that the Company is willing to accept inclusion of the Final CPA Approval, rather than the Revised CPA Approval in the Certificate.

Notwithstanding MassDEP’s agreement to limit the appeal process, its Final CPA Approval would be subject to further appeals in the courts. Thus, the potential for project delay attributable to allowing the administrative appeal process to go forward ultimately may be significant and could prevent timely construction of the project. The Siting Board hereby includes

¹⁷ This position reflects particularly thorough research and analysis by MassDEP; the agency submitted over 100 pages of pleadings and briefing in this proceeding. *See, e.g.*, MassDEP Responses to EFSB Information Requests (November 15, 2013; MassDEP Response to CLF Motion to Dismiss (December 5, 2013); MassDEP Brief and Responses to EFSB Briefing Questions (December 24, 2013).

the Revised CPA Approval, as issued on January 30, 2014, in the Certificate issued in this proceeding. This approval is included in Exhibit A.

b. PSD Permit

i. Footprint

As with the CPA Approval, Footprint asserts that the Certificate statute not only authorizes, but requires, the Siting Board to include the PSD Permit in the Certificate (Company Brief, Briefing Questions at 10). Again, Footprint asserts that, as long as the PSD Permit is incorporated exactly as issued by MassDEP, no conflict with federal law results (*id.* at 10-11). Footprint asserts that USEPA delegated implementation of the PSD program to MassDEP in a 2011 Delegation Agreement, and that language in the Delegation Agreement referencing the Siting Board “affirms the Siting Board’s authority to issue certificates which contain PSD requirements” (*id.* at 11).

ii. MassDEP and CLF

MassDEP and CLF both assert that the PSD Permit is a federal permit, and as such, is not a state or local permit that can be included in a Certificate (CLF Brief at 4; MassDEP Brief, Exh. 2, at 3-5) (*see* G.L. c. 164, § 69K½: the EFSB is authorized to issue Certificates that include “state or local agency” permits). MassDEP notes that, in contrast to CPA Approvals, MassDEP has not promulgated any regulations that authorize MassDEP to issue PSD Permits under the applicable state statute (G.L. c. 111, § 142A-142N) nor included the PSD permitting program in its SIP. As a result, there currently is no Massachusetts state program for issuing federally required PSD Permits, and MassDEP issues such permits exclusively under federal law and regulations (MassDEP Brief, Exh. 2, at 1).

iii. Analysis and Findings

The record shows that MassDEP issues PSD Permits pursuant to federal, not state, law. As stated in the Draft PSD Permit itself, for example, MassDEP issues PSD Permits “pursuant to the provisions of the Clean Air Act (CAA) Chapter 1, Part C (42 USC Section 7470 *et seq.*), the regulations found at the Code of Federal Regulations Title 40, Section 52.21, and the Agreement for Delegation of the Federal Prevention of Significant Deterioration Program” from USEPA Region I to MassDEP, dated April 11, 2011 (Exh. EFSB-FP-4-2). The Delegation Agreement

states that MassDEP “agrees to implement and enforce the federal PSD regulations as found in 40 CFR 52.21” (Exh. EFSB-DEP-GEN, Exh. A). The Delegation Agreement also contains numerous other provisions supporting the proposition that PSD Permits are creatures of federal law, including the requirement that MassDEP “follow USEPA policy, guidance and determinations” in issuing such permits, and the right of EPA to issue the permit in place of MassDEP if MassDEP and USEPA disagree on certain substantive components of the permit (*id.*). Further, unlike CPA Approvals, which are appealable to MassDEP and then to state court, PSD Permits are appealable exclusively to USEPA’s EAB and then to federal court. 40 CFR 124.19; 42 USC §7607.

Case law from both the federal courts and the USEPA EAB has uniformly held that a PSD Permit issued by a state pursuant to a delegation agreement with USEPA is considered a federal, USEPA-issued, permit. *See, e.g., Greater Detroit Resource Recovery Authority and Combustion Engineering v. U.S. EPA*, 916 F. 3d 317 (6th Cir. 1990); *In re Seminole Electric Corp., Inc.*, PSD Appeal No. 08-09, USEPA Environmental Appeals Board (September 22, 2009).

Both the regulatory structure of the PSD program in Massachusetts and relevant federal case law support the conclusion that the PSD Permit is a federal permit. The Board’s authority under the Certificate statute is limited to the issuance of state and local permits; preventing an appeal of the PSD Permit to the federal EAB and federal court would conflict with requirements of federal law, as prohibited by the Certificate statute. Accordingly, the Siting Board will not include the requested PSD Permit in the Certificate issued in this proceeding.

4. Above Ground Storage Tank Construction Permit and Use Permit

Approval from the State Fire Marshal is required for the construction, maintenance or use of the 34,000-gallon ammonia tank because the tank exceeds the 10,000-gallon regulatory threshold (Exhs. EFSB-FP-1; EFSB-SFM-Attachment 1). According to 502 CMR 5.00, two separate permits are required – a Permit to Construct (*see* 502 CMR 5.04(3)(a)) and a Use Permit (*see* 502 CMR 5.04(3)(d)) (Exhs. EFSB-FP-1; EFSB-SFM, Attachment 1). With regard to the Permit to Construct, regulations require that construction of the new tank must begin within six months of the date of the permit, and that the tank must be completed within one year of commencement of construction (Exh. EFSB-SFM-1). In conjunction with the state permitting scheme for the ammonia tank, the Salem City Council approved a Fuel Storage Tank Permit and Inflammables License on September 26, 2103 (Exh. EFSB-FP-6). The Company stated that this

approval fulfills the requirement of the State Fire Marshal that applicants who are seeking an Above Ground Storage Tank Permit obtain a land license from the municipal fire department prior to submitting the application for construction and installation of the tank (RR-FP-1).

The State Fire Marshal stated that he has no specific concerns with the Siting Board issuing a Permit to Construct as long as the Company complies with all applicable codes, standards and good engineering practices (Exh. EFSB-SFM-1). Specifically, the Company and its contractors must comply with G.L. c. 148 § 37, 780 CMR, 502 CMR 5.04, 527 CMR 9.03, 527 CMR 14.03, and 2003 NFPA 30 (Exh. EFSB-SFM-1). Further, the State Fire Marshal stated that he has no specific concerns with the Siting Board issuing a Use Permit as long as the Company complies with all applicable codes, standards and good engineering practices (Exh. EFSB-SFM-2). Specifically, the Company and its contractors must comply with G.L. c. 148 § 37, 502 CMR 5.05 and 502 CMR 5.06 (Exh. EFSB-SFM-2).

The Certificate statute requires an applicant to include in its Application “a representation as to the good faith effort made by the applicant to obtain” the permits the applicant seeks to include in the Certificate. G.L. c. 164, § 69L½. CLF argues that because Footprint has not yet applied for the State Fire Marshal permit, the Company has failed to satisfy the statute’s good faith effort requirement. Footprint argues that it is premature or futile to apply for this permit now because: (1) State Fire Marshal regulations require the Company to begin work on the storage tank within six months of the permit-issuance date and, largely because of the uncertainty regarding the timing of other facility permits, it is not yet clear when Footprint will be permitted to begin that work; (2) preparing an application to the State Fire Marshal will require expenditures of “millions of dollars” in detailed engineering design, and Footprint cannot make such expenditures until it has closed on its project financing, which is anticipated in February 2014; and (3) the tank Use Permit cannot be applied for until after the tank has been constructed (Company Brief, Briefing Questions at 3-4). Footprint argues that the Siting Board should not interpret the good faith effort language in the statute to require an applicant to file permit applications where to do so would be unreasonable or futile (*id.*). Footprint in its brief cites to state court cases interpreting good faith in a uniform commercial code context supporting such an interpretation of “good faith effort.” (*id.* at 3-5).

The record shows that Footprint cannot reasonably obtain, or even apply for, the State Fire Marshal permit for its proposed ammonia storage tank at this stage in the project’s development.

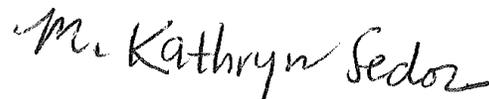
The Siting Board notes that, in applying for and obtaining the necessary City permit for the storage tank, Footprint has completed a necessary prerequisite for applying for the Fire Marshal permit. The Siting Board finds that the “good faith effort” language in the Certificate statute is satisfied where, as here, actually applying for a particular permit would be futile or is not reasonable under the circumstances.

The State Fire Marshal has stated that it has no objection to including an Above Ground Storage Tank Construction Permit and Use Permit in a Certificate, provided that the Company complies with all applicable codes, standards, and good engineering practices as delineated above. The Siting Board hereby determines that the Certificate issued in this proceeding shall include the equivalent of an Above Ground Storage Tank Construction Permit and Use Permit. This approval is included in Attachment 3.

IV. CONCLUSION

The Siting Board GRANTS the Initial Petition and the Application of Footprint Power Salem Harbor Development LP, for a Certificate of Environmental Impact and Public Interest, pursuant to G.L. c. 164, § 69 K½. The Certificate granted “shall 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 facility.” To that end, the granted Certificate is a composite permit including the equivalent of: (1) the Salem ZBA Approval; (2) the Salem Planning Board Approval; (3) a City of Salem Phase II Demolition Permit; (4) a City of Salem Building Permit; (5) a MassDEP Chapter 91 License; (6) a MassDEP Final CPA Approval; and (7) a State Fire Marshal Above Ground Storage Tank Construction Permit and Use Permit.

This Decision, the appended Certificate of Environmental Impact and Public Interest, and the seven approvals contained in the Certificate each are conditioned on compliance by the Company with Conditions C.1 through C.11 set forth in the Certificate.



M. Kathryn Sedor
Presiding Officer

Dated this 25th day of February, 2014

**COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD**

In the Matter of the Petition of Footprint Power Salem Harbor Development LP for a Certificate of Environmental Impact and Public Interest)))))	EFSB 13-1
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EXHIBIT A TO FINAL DECISION IN EFSB 13-1

**CERTIFICATE OF ENVIRONMENTAL IMPACT AND
PUBLIC INTEREST**

Pursuant to its authority under G.L. c.164, §§ 69K½ -69O½, the Energy Facilities Siting Board hereby: (1) grants the Initial Petition and the Application of Footprint Power Salem Harbor Development LP (“Footprint” or Company”); and (2) issues this Certificate of Environmental Impact and Public Interest (“Certificate”) to Footprint. This Certificate constitutes Exhibit A to, and is part of, the Final Decision in EFSB 13-1.

I. **SCOPE OF CERTIFICATE**

In accordance with G.L. c. 164, § 69K½, this Certificate is in the form of a composite of all individual state and local permits, approvals or authorizations requested by the applicant, which would otherwise be necessary for the construction and operation of the facility and it acts in the place of the seven permits referenced below. The Certificate authorizes the applicant to construct a 630 MW natural gas-fired, quick-start, combined-cycle facility at the present location of the Salem Harbor Station in Salem, Massachusetts, as approved and conditioned by the Siting Board in Footprint Power Salem Harbor Development LP, EFSB 12-2 (October 10, 2013) (“Footprint 12-2 Decision”).

II. APPROVALS

This Certificate contains the following seven approvals (collectively, “Approvals”):

1. A final approval that comprises a Special Permit for an Essential Service Use pursuant to Section 3.0 of the City of Salem’s Zoning Ordinance Use Regulations, and Variances from the City's Dimensional Requirements pursuant to Section 4.0 of the Zoning Ordinance, issued by the Salem Zoning Board of Appeals on June 28, 2013 (“Salem ZBA Approval”). The Salem ZBA Approval is marked as Exhibit FP-1, App. D in the EFSB 13-1 Certificate proceeding and is incorporated by reference in its entirety into this Certificate.
2. A final approval that comprises (1) the Site Plan Approval; (2) the Planned Unit Development Special Permit; and (3) the Special Permit for a Flood Hazard Overlay District, pursuant to G.L. c. 40A and Sections 7.3, 8.1 and 9.5, respectively, of the Salem Zoning Ordinance, issued by the Salem Planning Board on August 1, 2013 (“Salem Planning Board Approval”). The Salem Planning Board Approval is marked as Exhibit EFSB-COS-1(a)-1 in the EFSB 13-1 Certificate proceeding and is incorporated by reference in its entirety into this Certificate.
3. A final approval that is the equivalent of a Phase II Demolition Permit of existing buildings, pursuant to Chapter 12 of the Salem Code of Ordinances, ordinarily issued by the Salem Inspectional Services Department. This approval is appended hereto as Attachment 1.
4. A final approval that is the equivalent of a Building Permit for new construction, pursuant to Chapter 12 of the Salem Code of Ordinances, ordinarily issued by the Salem Inspectional Services Department. This approval is appended hereto as Attachment 2.

5. A final approval that is the equivalent of a Chapter 91 License, ordinarily issued by the Massachusetts Department of Environmental Protection (“MassDEP”) pursuant to G.L. c. 91. This approval comprises the “Written Determination” pursuant to M.G.L. c. 91, Waterways Application No. W13-3886-N issued by MassDEP to Footprint on November 1, 2013. This approval is marked as Exhibit DEP-1 in the EFSB 13-1 Certificate proceeding and is incorporated by reference in its entirety into this Certificate.
6. A final approval that is the equivalent of a Final Comprehensive Plan Approval (“CPA”), ordinarily issued by Mass DEP pursuant to G.L. c. 111 §§ 142A – 142N and 310 CMR 7.00. This approval comprises the Revised CPA Approval issued by MassDEP on January 30, 2014. The Revised CPA Approval is marked as Exhibit DEP-4 in the EFSB 13-1 Certificate proceeding and is incorporated by reference in its entirety into this Certificate.
7. A final approval that is the equivalent of a combined State Fire Marshal Above Ground Storage Tank Construction Permit and Use Permit, pursuant to G.L. c. 148, § 37, ordinarily issued by the Massachusetts Department of Public Safety, Office of the State Fire Marshal. This approval is appended hereto as Attachment 3.

III. CONDITIONS

The granting by the Siting Board of this Certificate and each of the Approvals herein is subject to the following conditions:

- C.1 Conditions A-W of the Footprint 12-2 Decision are incorporated by reference into and are conditions to this Certificate.

C.2 The applicant shall comply with all applicable federal, Massachusetts, and City of Salem statutes, regulations, guidelines, ordinances and permitting conditions in the demolition of the existing power plant and structures, and in the construction and operation of the proposed project.

C.3 With regard to the four permits issued by the City of Salem and the approval that is the equivalent of a combined State Fire Marshal Above Ground Storage Tank Construction Permit and Use Permit, the applicant must allow the City of Salem to have a meaningful opportunity to review the issues related to the permits, and to inspect construction of the tank as it progresses. With respect to the four City of Salem permits, the applicant must allow the City to retain its enforcement authority, as provided in G.L. 164, § 69K

C.4 With respect to the four City of Salem permits, the applicant must file with the City of Salem, for approval by the City, an inspectional services plan that provides for the scheme of the required inspectional tasks through a combination of permit fee and controlled construction inspections for the demolition, construction, and operation of the proposed project.

C.5 The Footprint 12-2 Decision provides that construction of the proposed project must begin within three years of the issuance date of that Decision, *i.e.*, around and about October 10, 2016. This Certificate does not change that date. Each of the seven approvals granted in this Certificate also shall expire on or about October 10, 2016, if construction of the project has not yet begun by that date. Extensions may be granted by written request to the Siting Board filed prior to the expiration date.

C.6 The applicant has an absolute obligation to construct the project in conformance with all aspects of the project as presented to and approved by the Siting Board in the Footprint 12-2 Decision. The applicant is required to notify the Siting Board of any changes other than minor variations to the project so that the Siting Board may determine whether to inquire further into a particular issue. The applicant is obligated to provide the Siting Board with sufficient information on changes to the project to enable the Siting Board to make these determinations.

C.7 The applicant shall provide a copy of this Certificate, including all Attachments, to its general contractor prior to the commencement of construction.

C.8 In accordance with G.L. c. 164, § 69K½, no agency listed in Section II of this Certificate shall require any approval, consent, permit, certificate or condition for the construction, operation, or maintenance of the project. No agency listed in Section II shall impose or enforce any law, ordinance, by-law, rule or regulation nor take any action nor fail to take any action which would delay or prevent construction, operation, or maintenance of the project.

C.9 In accordance with G.L. c. 164, § 69K½, that portion of the Certificate which relates to subject matters within the jurisdiction of the state or local agencies listed in Section II shall be enforced by such agency as if it had been directly granted by such agency.

C.10 This Certificate shall be appealable only by timely appeal of the EFSB 13-1 Footprint Certificate Decision to the Massachusetts Supreme Judicial Court, in accordance with G.L. c. 25, § 5 and G. L. c.164, § 69P.

C.11 The Settlement Agreement between CLF and Footprint dated February 18, 2014 and attached to this Certificate as Exhibit A, Attachment 4, is a condition of this Certificate. By attaching the Settlement Agreement as a condition, the Siting Board does not, and cannot, cede its responsibility to decide future proceedings in accordance with applicable statutory and regulatory requirements and the specific facts of each case. The Settlement Agreement is a private agreement between two parties to this proceeding, Footprint and CLF. The parties' expression of their intention concerning future Siting Board proceedings does not bind the Siting Board. Additionally, nothing in the Settlement Agreement changes the Board's standard of review for intervention. Footprint shall provide to the Siting Board all documentation described in the Settlement Agreement necessary to report on its compliance with the Settlement Agreement.



Steven Clarke, Acting Chair
Energy Facilities Siting Board

ATTACHMENT 1**EFSB 13-1, FOOTPRINT POWER SALEM HARBOR DEVELOPMENT LP
CERTIFICATE OF ENVIRONMENTAL IMPACT AND PUBLIC INTEREST****APPROVAL IN LIEU OF A PHASE II DEMOLITION PERMIT**

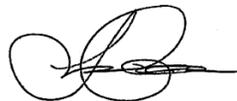
1. Pursuant to its authority under G.L. c. 164, §§ 69K½ -69O½, the Energy Facilities Siting Board hereby grants to Footprint Power Salem Harbor Development LP an Approval in lieu of a Phase II Demolition Permit from the Salem Inspectional Services Department. This Approval authorizes construction and operation of the project as approved by the Energy Facilities Siting Board in Footprint Power Salem Harbor Development LP, EFSB 12-2 (October 10, 2013).
2. This Approval is issued subject to Conditions C.1 through C.11 in the Certificate of Environmental Impact and Public Interest that is appended as Exhibit A to the Final Decision, Footprint Certificate Decision, EFSB 13-1 (February 25, 2014).
3. The Approval incorporates in its entirety the draft Phase II Demolition Permit and all attachments issued by the Salem Inspectional Services Department on December 23, 2013, marked as Exhibit City of Salem Brief, Exhibit A and Exhibit EFSB-COS-1(Supp) in the EFSB 13-1 Certificate proceeding.
4. This Approval incorporates all of the conditions contained in the Salem Planning Board Approval, issued by the Salem Planning Board on August 1, 2013, marked as Exhibit EFSB-COS-1(a)-1 in the EFSB 13-1 Certificate proceeding.
5. The applicant and its contractors must comply with any other requirements of the Salem Inspectional Services Department pertaining to demolition on the project site.
6. The applicant and its contractors must conform to all applicable statutes, regulations, codes, standards and good engineering practices.



Steven Clarke, Acting Chair
Energy Facilities Siting Board

ATTACHMENT 2**EFSB 13-1, FOOTPRINT POWER SALEM HARBOR DEVELOPMENT LP
CERTIFICATE OF ENVIRONMENTAL IMPACT AND PUBLIC INTEREST****APPROVAL IN LIEU OF A BUILDING PERMIT**

1. Pursuant to its authority under G.L. c. 164, §§ 69K½ -69O½, the Energy Facilities Siting Board hereby grants to Footprint Power Salem Harbor Development LP an Approval in lieu of a Building Permit from the Salem Inspectional Services Department. This Approval authorizes construction and operation of the project as approved by the Energy Facilities Siting Board in Footprint Power Salem Harbor Development LP, EFSB 12-2 (October 10, 2013).
2. This Approval is issued subject to Conditions C.1 through C.11 in the Certificate of Environmental Impact and Public Interest that is appended as Exhibit A to the Final Decision, Footprint Certificate Decision, EFSB 13-1 (February 25, 2014).
3. The Approval incorporates in its entirety the draft Building Permit and all attachments issued by the Salem Inspectional Services Department on December 23, 2013, marked as Exhibit City of Salem Brief, Exhibit B and Exhibit EFSB-COS-3(Supp) in the EFSB 13-1 Certificate proceeding.
4. This Approval incorporates all of the conditions contained in the Salem Planning Board Approval, issued by the Salem Planning Board on August 1, 2013, marked as Exhibit EFSB-COS-1(a)-1 in the EFSB 13-1 Certificate proceeding.
5. The applicant and its contractors must comply with any other requirements of the Salem Inspectional Services Department, including but not limited to requirements related to pre-construction and post-construction inspection of the proposed project.
6. The applicant and its contractors must conform to all applicable statutes, regulations, codes, standards and good engineering practices.



Steven Clarke, Acting Chair
Energy Facilities Siting Board

ATTACHMENT 3**EFSB 13-1, FOOTPRINT POWER SALEM HARBOR DEVELOPMENT LP
CERTIFICATE OF ENVIRONMENTAL IMPACT AND PUBLIC INTEREST****APPROVAL IN LIEU OF A STATE FIRE MARSHAL ABOVE GROUND
CONSTRUCTION PERMIT AND USE PERMIT**

1. Pursuant to its authority under G.L. c. 164, §§ 69K½ -69O½, the Energy Facilities Siting Board hereby grants to Footprint Power Salem Harbor Development LP an Approval in lieu of a State Fire Marshal Above Ground Construction Permit and Use Permit from the Office of the State Fire Marshal, Massachusetts Department of Public Safety. This Approval authorizes construction and operation of the project as approved by the Energy Facilities Siting Board in Footprint Power Salem Harbor Development LP, EFSB 12-2 (October 10, 2013).
2. This Approval is issued subject to Conditions C.1 through C.11 in the Certificate of Environmental Impact and Public Interest that is appended as Exhibit A to the Final Decision, Footprint Certificate Decision, EFSB 13-1 (February 25, 2014).
3. The applicant and its contractors must conform to all applicable statutes, regulations, codes, standards and good engineering practices, including but not limited to: (1) G.L. c. 148 § 37, 780 CMR, 502 CMR 5.04, 527 CMR 9.03, 527 CMR 14.03, and 2003 NFPA 30 for the Construction Permit; and (2) G.L. c. 148 § 37, 502 CMR 5.05 and 502 CMR 5.06 for the Use Permit.
4. The applicant and its contractors must comply with any other requirements of the State Fire Marshal or Department of Public Safety, including but not limited to requirements related to pre-construction and post-construction inspection of the proposed aboveground ammonia storage tank.



Steven Clarke, Acting Chair
Energy Facilities Siting Board

ATTACHMENT 4

**EFSB 13-1, FOOTPRINT POWER SALEM HARBOR DEVELOPMENT LP
CERTIFICATE OF ENVIRONMENTAL IMPACT AND PUBLIC INTEREST**

**SETTLEMENT AGREEMENT BETWEEN CONSERVATION LAW
FOUNDATION AND FOOTPRINT POWER SALEM HARBOR**

SETTLEMENT AGREEMENT

This **SETTLEMENT AGREEMENT** (“Agreement”) is entered into by and among the Conservation Law Foundation, (“CLF”) and Footprint Power Salem Harbor Development LP (“Footprint Power”) (hereinafter collectively referred to as, the “Parties”), as of the 18th day of February, 2014 (“Effective Date”).

WHEREAS: Footprint Power submitted a petition to construct a generating facility pursuant to G.L. c. 164, §§ 69H and 69J¼ to the Massachusetts Energy Facilities Siting Board (“Siting Board”) on August 3, 2012 which was docketed as EFSB 12-2 (the “EFSB Approval Case”). The Siting Board issued a Final Decision (“EFSB Final Decision”), dated October 10, 2013, approving Footprint Power’s petition to construct a nominal 630 MW natural gas-fired, quick start, electric generation facility (the “Facility”) with certain conditions.

WHEREAS: Footprint Power submitted an Initial Petition in August 2013 and Application for a Certificate of Environmental Impact and Public Interest in October 2013 pursuant to G.L. c. 164, §§ 69K ½ to 69O½ to the Siting Board, which was docketed as EFSB 13-1 (the “EFSB Certificate Case”). The Siting Board issued a Tentative Decision, dated February 4, 2014, on Footprint Power’s Initial Petition for a Certificate of Environmental Impact and Public Interest (“EFSB Tentative Decision”) proposing to issue a composite certificate incorporating all state and local permits, approvals or authorizations that would otherwise be necessary to construct and operate the Facility.

WHEREAS: The Massachusetts Department of Environmental Protection (“MassDEP”) issued the following approvals in connection with the Facility:

- (1) Decision on Variance Request and Written Determination (“DEP Variance/Written Determination”) dated November 1, 2013 pursuant to its authority under M.G.L. Chapter 91 and waterways regulations at 310 CMR 9.00;
- (2) Air Quality Plan Approval dated January 30, 2014 (the “CPA Approval”) pursuant to its authority under M.G.L. Chapters 111, § 142A-J, 21C, §§ 4 and 6, 21E, § 6, and air pollution control regulations at 310 CMR 7.00: Appendix A, the Nonattainment New Source Review Program established pursuant to the requirements of the federal Clean Air Act at 42 U.S.C. § 7502 and § 7503 and implemented through the regulations approved by EPA pursuant to 42 U.S.C. § 7410; and
- (3) Prevention of Significant Deterioration Permit (“PSD Approval”) dated January 30, 2014, under 42 U.S.C. §§ 7470 *et seq.*, 40 C.F.R. § 52.21, and the Agreement for Delegation of the Federal Prevention of Significant Deterioration Program, dated April 2011, by the United States Environmental Protection Agency, (Region 1) to the MassDEP.

WHEREAS: CLF has challenged the legality of the EFSB Final Decision, the EFSB Tentative Decision, the DEP Variance/Written Determination, and has intervened in the CPA Approval and the PSD Approval as follows:

- (1) On November 8, 2013, CLF filed with the Supreme Judicial Court a Petition for Appeal of the EFSB Final Decision (“EFSB Appeal”);
- (2) On November 8, 2013, CLF filed with MassDEP a Motion for Mandatory Intervention in the Matter of Footprint Power Salem Harbor Development LP, Transmittal No. X254064, Application No. NE-12-022 (“Air Permitting Proceeding”); and
- (3) On November 22, 2013, CLF filed with the MassDEP Office of Appeals and Dispute Resolution (“OADR”) a Notice of Claim for an Adjudicatory Appeal and Request for Adjudicatory Hearing with respect to the DEP Variance/Written Determination (“DEP Appeal”).

Items (1) through (3) above are collectively referred to as the “Appeals.”

WHEREAS: The Appeals are currently pending before their respective tribunals.

WHEREAS: The Commonwealth of Massachusetts enacted the Global Warming Solutions Act, Chapter 298 of the Acts of 2008 (“GWSA”), in order to, among other things, reduce greenhouse gas (“GHG”) emissions to at least 80% below 1990 levels by 2050 (the “GWSA 2050 mandate”).

WHEREAS: The petition filed by Footprint Power is the first petition to construct a generating facility filed with the EFSB since the enactment of the GWSA and therefore there is no precedent with respect to the proper standard nor the scope and type of information necessary to demonstrate a proposed facility’s consistency with the GWSA in general or the GWSA 2050 mandate in particular.

WHEREAS: There are currently no regulations in place that provide guidance to applicants before the EFSB or other agencies of the Commonwealth with respect to demonstrating consistency with the GWSA 2050 mandate.

WHEREAS: Achieving the GWSA 2050 mandate is an essential element in mitigating the impacts of climate change on the Commonwealth’s environment.

WHEREAS: The Parties have engaged in settlement discussions to determine the appropriate basis to measure and demonstrate compliance with the GWSA and have arrived at a framework that demonstrates the Facility’s compliance with the GWSA 2050 mandate and that provides a potential set of minimum enforceable conditions that should be met for future applicants seeking to demonstrate compliance of future facilities.

WHEREAS: The absence of regulations imposing GHG emissions limits for the power sector as set forth in the GWSA makes it difficult for proposed natural gas power plant infrastructure to demonstrate conformity with the GWSA and the Act's deep emission reduction requirements. Although stack GHG emissions from natural gas combustion are lower than emissions from combusting coal or oil, natural gas is still a fossil fuel which results in substantial amounts of GHG emissions.

WHEREAS: To the extent that electricity generated from natural gas replaces electricity generated from coal or oil, it can result in decreased GHG emissions. However, the substantial GHG emissions resulting from natural gas combustion require that new natural gas infrastructure, including generating facilities, must be appropriately conditioned to require emission limits in conformance with the GWSA mandates. Such conditions must assure that sector-wide GHG emissions, inclusive of GHG emissions from new natural gas infrastructure including generating facilities, are at or below the 80% reduction level by 2050.

WHEREAS: The Parties agree that the conditions established in this settlement agreement, including the adoption of declining annual carbon dioxide emission limits and a limitation on the useful life of a facility, represent the types of threshold conditions that may permit new fossil fuel infrastructure, including generating facilities, to demonstrate compliance with the GWSA, including the GWSA's 2050 mandate.

WHEREAS: The Facility has been designed as an efficient and flexible generating solution capable of supplanting less efficient, more highly polluting facilities and includes quick start capabilities that may provide reliability services or firming support for renewable resources, a critical element of reaching the GWSA 2050 mandate.

WHEREAS: The Parties have raised competing and disputed claims with regard to various issues contained in the Tentative Decision and the Appeals but have agreed that it is in their mutual interest to resolve and settle the matters raised in the Appeals upon the terms and conditions more fully set forth herein, such resolution and settlement being without any admission by the Parties of any fault or liability or any legal issue not explicitly addressed in this Agreement.

WHEREAS: The Massachusetts Executive Office of Energy and Environmental Affairs has made certain commitments to CLF related to continuing its efforts to achieve the GWSA objectives, as embodied in a "Commitment Letter" enumerating future actions by Massachusetts.

NOW, THEREFORE: In consideration of the following mutual promises, agreements and covenants set forth herein and for other good and valuable consideration, the Parties agree,

subject to approval and incorporation, without modification, of this Agreement into the Certificate of Environmental Impact and Public Interest granted by the EFSB, as follows:

1. Additional Measures Regarding Greenhouse Gases.

In addition to the requirements set forth in the CPA Approval and the PSD Permit (collectively, with this Agreement, the “Permits”), the parties agree that, provided that CLF fully complies with the terms of this Agreement:

- a. GHG Reductions. Subject to the following provisions, the annual Facility-Wide emissions of CO_{2e} (“CO_{2e} Cap”), from the date of commencement of commercial operation of the Facility through the end of calendar year 2025, shall not exceed 2,279,530 tons per year (“tpy”), and, thereafter, the CO_{2e} Cap shall be reduced in amounts consistent with the GWSA mandate of at least 80% reductions of GHG from 1990 levels, as follows:

Year	CO _{2e} Cap (tpy)	Year	CO _{2e} Cap (tpy)	Year	CO _{2e} Cap (tpy)
2016	2,279,530	2028	2,060,698	2040	1,185,370
2017	2,279,530	2029	1,987,754	2041	1,112,426
2018	2,279,530	2030	1,914,810	2042	1,039,482
2019	2,279,530	2031	1,841,866	2043	966,538
2020	2,279,530	2032	1,768,922	2044	893,594
2021	2,279,530	2033	1,695,978	2045	820,650
2022	2,279,530	2034	1,623,034	2046	747,706
2023	2,279,530	2035	1,550,090	2047	674,762
2024	2,279,530	2036	1,477,146	2048	601,818
2025	2,279,530	2037	1,404,202	2049	528,874
2026	2,206,586	2038	1,331,258		
2027	2,133,642	2039	1,258,314		

- b. Demonstration of Compliance. In order to demonstrate compliance with the Facility-Wide CO_{2e} Cap in each calendar year, the Facility may achieve the CO_{2e} Cap by:
 - (i) controlling operations at the Facility to limit Actual CO_{2e} Emissions to a level at or below the applicable year’s CO_{2e} Cap, and/or
 - (ii) in the event that Actual CO_{2e} Emissions exceed the applicable CO_{2e} Cap, the Facility may demonstrate compliance by retiring offsets, as set forth in section c., below, to offset the amount by which the Actual CO_{2e} Emissions exceed the CO_{2e} Cap.

- c. Offsets. For purposes of demonstrating compliance with the CO_{2e} Cap, as set forth in Section 1.b.(ii), above, allowances will be created to be used as offsets as follows:
- (i) **CO_{2e} Operating Offsets :** In any calendar year in which the Facility’s actual annual facility-wide emissions of CO_{2e} (“Actual CO_{2e} Emissions”) are less than the Facility’s CO_{2e} Cap, the difference (in tpy) between Actual CO_{2e} Emissions and the CO_{2e} Cap for such calendar year shall be deemed offsets at the following rates:
 - a. For CO_{2e} Operating Offsets created from 2016–2021: Offset = 90%
 - b. For CO_{2e} Operating Offsets created from 2022–2026: Offset = 80%
 - c. For CO_{2e} Operating Offsets created from 2027–2031: Offset = 70%
 - d. For CO_{2e} Operating Offsets created from 2032–2036: Offset = 60%
 - e. For CO_{2e} Operating Offsets created from 2037–2046: Offset = 50%
 - f. CO_{2e} Operating Offsets may not be created after 2046.
 - (ii) **RGGI Offsets:** Actual Regional Greenhouse Gas Initiative (RGGI)¹ CO₂ or CO_{2e} credits or allowances (“Actual RGGI Allowance”) may be used to offset Actual CO_{2e} Emissions calculated as follows: Offset = Actual RGGI Allowance x (price paid per ton/ \$30²), but at no greater than a ton for ton basis.
 - (iii) **Other Offsets:** The Facility may also procure offsets by purchasing Class 1 Massachusetts Renewable Energy Certificates, investing in Massachusetts RPS-eligible, local renewable generation projects or energy efficiency and demand response projects that supply capacity to the NEMA/Boston area, or other methods that are approved by CLF as real, permanent, verifiable, surplus offsets of GHG emissions in Massachusetts or in connection with electricity supplied to Massachusetts customers. Any offsets created in accordance with this provision shall be calculated as follows:
 - a. **Massachusetts Class I REC Offset:** 1 Massachusetts Class I REC = Offset equivalent to the marginal CO₂ emission rate for all units in New England as reported in the ISO-NE Electric Generator Air Emissions Report for the year in which the REC was purchased.
 - b. **Investment in Massachusetts Class I RPS-eligible, local renewable generation, energy efficiency or demand response measures that supply capacity to the NEMA/Boston area:** 1 MWh of wind, solar, EE or DR = Offset equivalent to the marginal CO₂ emission rate for all units in New England as reported in the ISO-NE Electric Generator

¹ Or any similar mandatory program applicable to the Facility that replaces or supplements RGGI.
² Annually adjusted based on any increase in the Consumer Price Index commencing in 2017.

Air Emissions Report for the year in which the project first begins generating/reducing energy.

d. **Monitoring and Reporting Requirements:** Within 60 days after the end of each calendar year covered under this agreement, Footprint Power shall provide CLF with documentation demonstrating compliance with the CO_{2e} emissions limitations included in this agreement. Documentation of facility-wide emissions may be in the form of reports accepted by EPA in compliance with Title V, or such other form as mutually agreed upon by the Parties. Separate documentation shall be provided to the extent that compliance is achieved through the use of offsets. Documentation regarding offsets shall include proof of the purchase of RGGI offsets, Massachusetts Class I RECs, investment in Massachusetts Class I RPS-eligible local renewable generation, energy efficiency or demand response measures, or, in the case of any other CLF-approved offset, documentation that is mutually agreed upon by the Parties.

2. Final shut-down and decommissioning:

The parties agree that, provided that CLF fully complies with the terms of this Agreement, the Facility shall cease commercial operations no later than January 1, 2050, unless otherwise required by law and shall be fully decommissioned within two calendar years of shutdown.

3. Expiration of Conditions.

Notwithstanding anything in the foregoing to the contrary, the parties agree that the provisions of Paragraph 1 above shall no longer apply and be of no further force or effect in the event that either:

- a. MassDEP promulgates and implements new regulations, pursuant to the GWSA, which establish declining annual aggregate emissions limits consistent with the GWSA's requirements to reduce Massachusetts greenhouse gas emissions at least 25% below 1990 levels by 2020 and at least 80% below 1990 levels by 2050, provided that such new regulations are binding on new and existing power plants (including Salem Harbor Station) in Massachusetts until the ends of their operational lives; or
- b. the Federal government adopts and implements regulations restricting GHG emissions nationally to levels commensurate with those provided in the GWSA (i.e., no less stringent than 80% reduction from 1990 level by 2050);

4. Siting Board Proceedings:

The Parties agree jointly to file this Agreement with the Siting Board, during the comment period on the Tentative Decision requesting that the Siting Board append this Agreement to its final decision in the Certificate Case and require compliance with this Agreement as an enforceable condition of its approval of the Certificate.

5. Air Permits

Concurrent with filing its application for Title V Operating Permit for the Facility, Footprint Power shall submit an application for minor permit modification to MassDEP to incorporate the terms of this Agreement into the Facility's Comprehensive Plan Approval. In addition, Footprint Power shall include this Agreement as an appendix to its application for a Title V Operating Permit for the Facility and shall request that MassDEP include the terms of this Agreement in the Title V Operating Permit as part of the federally enforceable emission limitations for the facility.

6. Withdrawal of Appeals and Pleadings.

CLF agrees to voluntarily dismiss its pending Appeals, including, as follows: _

- (a) CLF agrees, within 5 business days of the approval of the Siting Board pursuant to paragraph 4 above, to file to voluntarily dismiss with prejudice the EFSB Appeal and that it will not file or support any future appeals of the EFSB Final Decision or any final decision that complies with Paragraph 4 above or the underlying permits contained therein; provided that Footprint Power fully complies with the terms of this Agreement. Notwithstanding the foregoing, CLF will not be barred from enforcing the terms of this Agreement nor does this Agreement in any way bar CLF from challenging any new application before the Siting Board;
- (b) CLF agrees, within 5 business days of the approval of the Siting Board pursuant to paragraph 4 above, to withdraw its motion for intervention in the Air Permitting Proceeding and to withdraw as Authorized Representative for the ten persons group;
- (c) CLF agrees that it will not file or support any appeals of the Comprehensive Plan Approval that was issued for the facility on January 30, 2014 provided that Footprint Power fully complies with the terms of this Agreement. Notwithstanding the foregoing, CLF will not be barred from enforcing the terms of this Agreement nor does this Agreement in any way bar CLF from challenging any future applications to modify or enforce the terms of the CPA Approval (except in accordance with this Agreement or that do not increase emission levels) or any applications for new air permits for sources at this site;
- (d) CLF agrees that it will not file or support any appeal of or other challenge or objection to the PSD Approval that was issued for the facility on January 30, 2014 provided that Footprint Power fully complies with the terms of this agreement. Notwithstanding the foregoing, nothing in this Agreement shall be construed to act as a bar to CLF challenging the authority of MassDEP to issue PSD permits pursuant to the existing Delegation Agreement with respect to any facility other than the Facility, nor does this Agreement represent an admission by CLF that such Delegation Agreement is authorized under Massachusetts or federal law;

- (e) CLF agrees that it will, within 5 business days of the approval of the Siting Board pursuant to paragraph 4 above, file to voluntarily dismiss without prejudice the action for declaratory judgment that it filed in Massachusetts Superior Court on behalf of CLF and a ten residents group on January 14, 2014, captioned as *CLF et al. v. Massachusetts Department of Environmental Protection*, Civil Docket #SUCV2014-00161-H. Notwithstanding the foregoing, nothing in this Agreement shall be construed to act as a bar to CLF challenging the authority of MADEP to issue PSD permits pursuant to the existing Delegation Agreement with respect to any facility other than the Facility, nor does this Agreement represent an admission by CLF that such Delegation Agreement is authorized under Massachusetts or federal law;
- (f) CLF agrees that it will, within 5 business days of the approval of the Siting Board pursuant to paragraph 4 above, file to voluntarily dismiss its appeal of the c. 91 variance/written determination issued by the Massachusetts Department of Environmental Protection on November 1, 2013 and will withdraw as the authorized representative for the ten residents group. Notwithstanding the foregoing, nothing in this Agreement shall have any precedential effect with respect to the authority of the Massachusetts Department of Environmental Protection to issue variances for non-water dependent electric generating facilities nor will it serve as an admission by CLF that the Siting Board has the authority to incorporate such decisions into a Certificate thereby terminating the administrative appeal process, nor shall it be construed to act as a bar to CLF challenging the authority of the Massachusetts Department of Environmental Protection to issue a variance for a non-water dependent electric generating facility other than the Facility or the authority of the Siting Board to incorporate such a variance into a Certificate, nor does this Agreement represent an admission by CLF that such a variance is authorized under Massachusetts law;
- (g) Footprint Power will work with CLF to obtain sufficient environmental information from Algonquin Gas Transmission with respect to the gas lateral from the HubLine to the Facility to ensure that the construction methods will appropriately protect the environment and will demonstrate that the construction of the lateral will not serve to increase the capacity of Algonquin's system. Upon receipt of such satisfactory information so demonstrating, CLF agrees not to protest or appeal or otherwise delay any approval of such lateral.

7. Level Playing Field.

It is the intention of the Parties that Footprint Power not be disadvantaged in the wholesale electricity market by agreeing to the foregoing terms. In addition, it is the intention of the parties that any subsequently permitted facility will be subjected to conditions at least as stringent as those set forth herein. Accordingly, if after five years of commercial operation of the Facility, Footprint Power reasonably believes that a power plant that received approvals from the EFSB and a MassDEP air permit, arising from applications filed on or after the date of this Agreement, is in any respect subject to materially less stringent requirements than those which are set forth in this

Agreement, Footprint Power may provide notice to CLF (including an explanation of the terms and conditions applicable to the subsequently approved power plant, and proposed modifications to the terms and conditions set forth herein), and may reopen these terms to seek agreement with CLF on conforming terms and conditions analogous to those applicable to the subsequently approved plant. The Parties will work cooperatively to identify proceedings before EFSB and MassDEP that may impact this provision with the intent that they will be in a position to submit public comments or intervene in the proceedings to advocate for terms consistent with this Agreement. Upon the approval of any applicable subsequent permits, CLF will negotiate in good faith to ensure analogous terms and will not oppose or unreasonably withhold consent to analogous terms.

8. Effective Date.

This Settlement Agreement is effective upon the Siting Board's adoption of the Agreement, without reservation, in its entirety as a condition of approving Footprint Power's Application for a Certificate.

9. Additional Conditions.

- (a) This Agreement establishes no principles, and shall not be deemed to foreclose any party from making any contention in any future proceeding or investigation, with respect to any issues raised in this proceeding except as to those issues and terms that are stated in this Agreement as being specifically resolved by approval and incorporation of this Agreement as a condition of the Certificate;
- (b) This Agreement shall not be deemed in any respect to constitute an admission by any party that any allegation or contention in this proceeding, or any fact relating to any other pending proceeding cited in this document, is true or false.
- (c) Except as specified in this Agreement to ensure compliance with the GWSA, the issuance of a Final Decision by the Siting Board incorporating this Agreement as a condition of the Certificate shall not in any respect constitute a determination by the Siting Board, by virtue of incorporation in this Agreement, as to the merits of any other issue raised in this proceeding or any proceeding cited in this document;
- (d) This Agreement is the product of settlement negotiations. The Parties agree that the content of those negotiations (including any workpapers or documents produced in connection with the negotiations) are confidential, that all offers of settlement are without prejudice to the position of any party or participant presenting such offer or participating in such discussion, and, except to enforce rights related to this Agreement or defend against claims made under this Agreement, that they will not use the content of those negotiations in any manner in these or other proceedings involving one or more of the parties to this Agreement, or otherwise;

- (e) The provisions of this Agreement are not severable. This Agreement is conditioned on its approval and incorporation into the Final Decision as a condition of the issuance of the Certificate by the Siting Board no later than March 3, 2014 (“Requested Approval Date”). The Parties agree that the Requested Approval Date of this Agreement may be extended upon the mutual consent of the Settling Parties and notification of such extension to the Siting Board;
- (f) If the Siting Board does not approve and incorporate this Agreement in its entirety by the Requested Approval Date, as may be extended by mutual Agreement of the Parties, this Agreement shall be null and void and this Agreement shall be deemed to be withdrawn and shall not constitute a part of the record in any proceeding or be used for any other purpose;
- (g) The Parties agree to bear their own costs, expenses and attorney fees associated with all proceedings referenced herein;
- (h) This Agreement shall constitute the complete and entire agreement and understanding between the Parties relating to the subject matter hereof, and all previous agreements, discussions, communications and correspondence with respect to the subject matter hereof shall be superseded by the execution and delivery of this Agreement. This Agreement may not be modified or amended except in a writing signed by or on behalf of the Parties hereto, or, if such modification or amendment affects less than all of the Parties hereto, signed by the affected ones of the Parties.
- (i) This Agreement shall be governed, interpreted and construed in accordance with the laws of the Commonwealth of Massachusetts, and, as applicable, the United States of America, the Massachusetts courts (including, as appropriate, the United States District Court for the District of Massachusetts) being the sole and exclusive jurisdiction for the determination of any future disputes relating hereto, arising hereunder or in connection herewith.
- (j) The undersigned represent and warrant that they have the right, capacity and all necessary authorization to execute this Agreement, and that the Agreement is binding upon the Parties their successors and assigns.
- (k) The Parties acknowledge that they have been represented with respect to this Agreement by legal counsel of their own choosing, that they have read this Agreement and have had it fully explained to them by counsel and are completely aware of its contents and legal effects, and agree that no presumption in the interpretation of this Agreement shall arise based upon the identity of the drafter of this Agreement or any of

its provisions. It is agreed and understood that this Agreement may be executed in multiple counterparts, each of which will be deemed to be an original and collectively shall constitute one Agreement.

- (1) Notwithstanding any foregoing provisions in this Agreement to the contrary, CLF and Footprint Power reserve their rights to enforce the Parties' obligations under this Agreement.

{Signature Page Follows}

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IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their respective duly authorized representatives as of the Effective Date.

CONSERVATION LAW FOUNDATION

By: _____

Sean Mahoney
Executive Vice-President

FOOTPRINT POWER SALEM HARBOR
DEVELOPMENT LP, by its General Partner,
FOOTPRINT POWER SH DEVCO GP LLC

By: _____

Scott G. Silverstein
President & COO

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APPROVED by the Energy Facilities Siting Board at its meeting of February 20, 2014, by the members present and voting. Voting for approval of the Tentative Decision as amended: Steven Clarke, (Acting Energy Facilities Siting Board Chair/Designee for Richard Sullivan, Secretary, Executive Office of Energy and Environmental Affairs); Ann G. Berwick, Chair, Department of Public Utilities, Jolette A. Westbrook, Commissioner, Department of Public Utilities; Mark Sylvia (Commissioner, Department of Energy Resources); and Erica Kreuter (Designee for Secretary, Executive Office of Housing and Economic Development).



Steven Clarke, Acting Chair
Energy Facilities Siting Board