UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Footprint Power Salem Harbor Development LP	))	Docket No. ER15-____-000

FOOTPRINT POWER SALEM HARBOR DEVELOPMENT LP'S APPLICATION FOR DEFERRAL OF CAPACITY SUPPLY OBLIGATION

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Pursuant to section 205 of the Federal Power Act[1] and Section III.13.3.7 of the ISO-NE Tariff, Footprint Power Salem Harbor Development LP[2] files this application requesting that the Commission grant it a one-year deferral of its Capacity Supply Obligation. Footprint is the first and only new merchant plant to clear in any of ISO-NE's first eight Forward Capacity Auctions. Footprint qualified and cleared the full 674 MW capacity of a new quick-start, combined-cycle natural gas facility (the "Facility") in ISO-NE's seventh Forward Capacity Auction ("FCA 7") and chose to lock in a five-year commitment as provided in the ISO-NE Tariff. Notwithstanding Footprint's best efforts, delays associated with resolving appeals of the project's permits have delayed development of the Facility beyond Footprint's control, despite the fact that: (i) all of its local, state and federal permits necessary for construction have been granted, (ii) not a single member of any body considering any of these permits cast a negative vote, and (iii) all previously-filed appeals of these permits have been denied, dismissed or settled. As a result, Footprint now will not be able to achieve Commercial Operation by the start of its Capacity

[1] 16 U.S.C. § 824d.

[2] Hereafter, "Footprint" shall refer to Footprint Power Salem Harbor Development LP and its affiliated entities including but not limited to its parent, Footprint Power LLC.

Supply Obligation on June 1, 2016.[3] The Commission should grant Footprint a one-year deferral of its Capacity Supply Obligation as provided in the recently approved ISO-NE market rule.[4]

Granting such a deferral is just and reasonable. Footprint satisfies all of the criteria for obtaining a deferral as set forth in section III.13.3.7 of the ISO-NE Tariff. *First*, ISO-NE formally determined on August 18, 2014 that Footprint is needed for reliability during the first year of its Capacity Supply Obligation and the subsequent year. Footprint's Facility is in the Boston load pocket, i.e., the NEMA/Boston capacity zone. The Facility is the best option to meet the reliability need by the earliest possible date as no other projects have cleared in an FCA or even begun to navigate the lengthy permitting process.

Second, the delays preventing the Facility from achieving timely commercial operation are outside of Footprint's control. The most recent cause of delay was an appeal by four individuals of a single federal permit—the last of a long series of appeals by a handful of individuals of the various required federal, state and local permits. Footprint did everything within its power to expedite the permitting and appellate processes. It filed each permit application as early as possible, including on the afternoon of the very same day Footprint took ownership of the site. It engaged in extensive community outreach—starting long before it even acquired the site. It negotiated and ultimately settled with the key environmental group that had participated in the permitting process to resolve any concerns they had with the Facility and prevent further appeals.

As a result of these efforts, Footprint obtained all of the eight major local, state and federal permits needed for the Facility to begin construction in time to achieve Commercial

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[3] Capitalized terms not defined herein shall have the meaning provided in the ISO-NE Tariff.

[4] *See* ISO-NE Tariff § III.13.3.7; *ISO New England Inc.*, Order Accepting Tariff Revisions, 148 FERC ¶ 61,185 (2014).

Operation by June 1, 2016. But then four individuals filed an additional appeal of one of these eight permits. While this final appeal—like all those before it—proved to be entirely meritless, Footprint could not obtain financing and begin construction until all permit appeals were resolved.

It ultimately became clear that these appellants were relying on the very market rules that were intended to ensure that new merchant generation was built in New England to instead reward their delay tactics. Absent corrective action these rules would allow them to succeed procedurally where they were sure to fail substantively. As a result, it became impossible to finance the project until ISO-NE, and ultimately the Commission, determined whether such tactics would be allowed to prevent new merchant generation from enjoying the benefits of competitively secured capacity supply awards. Footprint did everything it could to expedite each and every step of the permitting and appeals processes, but the delay ultimately was outside of Footprint's control.

Third, this deferral is critical for this necessary project to achieve commercial operation. The delay caused by the final appeal of a single permit—and the resulting uncertainty of revenues associated with the first year of Footprint's five-year capacity commitment—prevented Footprint from obtaining necessary financing. Moreover, without a deferral, financing parties will assume that Footprint will be entitled to only four years of capacity payments. As ISO-NE and the Commission well know, four years of capacity payments is insufficient to finance a new merchant generating project in New England. In fact, ISO-NE recently proposed, and the Commission approved, an increase to a seven-year lock-in for capacity payments beginning with FCA 9. The fact that Footprint—the first new merchant generator to attempt to build a New Resource solely based on the Forward Capacity Market ("FCM")—has been unduly delayed by

meritless appeals has not improved financial institutions' willingness to take on additional risk in New England absent at least a five-year lock-in period.

Footprint is required to demonstrate the second and third of these elements (the first element—reliability need—was already determined by ISO-NE). We make this demonstration with this filing and the appendices submitted herewith, which includes the affidavit of Scott G. Silverstein—COO and President of Footprint Power LLC—and the exhibits thereto as well as the affidavit of Ross Warner—Senior Vice President at Macquarie Group Limited.[5]

Granting this deferral is also good policy. It is necessary not only to expeditiously meet the Boston load pocket's pending reliability need, but also to enable the Forward Capacity Market to work. As the first new merchant plant to clear in the market—and thus the first to rely solely upon capacity market revenues to build a new resource—Footprint's experience unfortunately has been that it is *impossible* for a merchant project to obtain all of the necessary permits within the timelines required by the Forward Capacity Market as long as a single determined individual is committed to exercise all of his or her due process rights. Opponents of new infrastructure have realized that, under these tight timelines, delay may be the only weapon they need to kill a new project. Even appeals that facially suffer from untenable legal arguments, standing issues or material procedural infirmities still must be heard by tribunals with already clogged dockets. No project will ever achieve *unanimous* support and any motivated individual can very easily litigate a project to death—needing nothing more than delay to succeed. It would be a heavy blow to the Forward Capacity Market if the first new merchant project to clear in the market was allowed to die on the vine due to very same time line that originally was created to support the construction of such projects.

[5] *See* Affidavit of Scott G. Silverstein attached hereto as Attachment A ("Silverstein Affidavit"); Affidavit of Ross Warner attached hereto as Attachment B ("Warner Affidavit").

Where Footprint *has* received unanimous support is among the regulatory and political establishment of the City of Salem and the Commonwealth of Massachusetts. The project is strongly supported by Salem's Mayor, City Council and state legislative delegation. Its construction has been backed by a state-sponsored task force, created through legislation aimed directly at ensuring the demolition, remediation and re-use of the Salem Harbor site.[6] But even such strong backing by the elected and appointed leaders in the Commonwealth cannot prevent individuals from filing meritless appeals. And those appeals must be reviewed and disposed of by the agencies and courts tasked with such review. As the Commission well knows, a party may request expedited review from an agency or court, but a party cannot compel such expedited review.

For these reasons, Footprint meets the criteria for a deferral as set forth in section III.13.3.7 of the ISO-NE Tariff and respectfully requests that the Commission approve this application.[7] This is the surest and quickest path to address the Boston load pocket's pending reliability need. As Footprint's experience demonstrates, delay is the enemy of merchant development. The Commission therefore should reject any attempt to use this proceeding as an avenue for further delay.

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[6] *See* Salem Harbor Revitalization Task Force, Pathway to Renewal: A Review of Site Remediation and Redevelopment Options for Salem Harbor Power Station (June 15, 2013) ("Salem Harbor Task Force Report"), *available at* http://www.mass.gov/eea/docs/eea/salem-harbor/full-task-force-report.pdf.

[7] *See ISO New England Inc.*, Docket No. ER14-2440-000, Revisions to Allow a Non-Commercial Capacity Resource to Seek a One-Year Deferral (July 16, 2014) (the "ISO-NE Deferral Filing"); *ISO New England Inc.*, Docket No. ER14-2440-000, Footprint Power Salem Harbor Development LP's Motion to Intervene and Supporting Comments (Aug. 6, 2014).

BACKGROUND

I. FOOTPRINT AND THE SALEM HARBOR FACILITY

A. Footprint Power LLC

Footprint Power Salem Harbor Development LP's parent company, Footprint Power LLC was founded with one purpose in mind. Hundreds of aging, inefficient coal- and oil-fired generating facilities are near, at, or—in some cases—past the end of their useful lives. Those facilities must be retired, but the future of the sites they sit upon are major causes for concern in the communities in which they are located. In many cases, the power plant is the community's largest taxpayer and the prospect of the facility being shuttered with no redevelopment plan in sight has the potential to result in urban blight and an attractive nuisance that can cause problems for the community. Footprint saw an opportunity to work with existing owners of these facilities and the communities in which they are located to repurpose the sites of these units by demolishing the existing plant, performing any necessary environmental remediation on the site, replacing the plant with new, efficient, flexible generating solutions, and making surplus land available for future non-power related development. The local community already is accustomed to a local power plant and the jobs and tax base associated with it, and Footprint works with the local community from the outset as neighbors and partners.

The loss of a retiring plant can have reliability implications, but Footprint's model addresses that too by adding a newer, more efficient unit, providing much greater flexibility to the grid operator. In Salem, Footprint is doing all of this as a true merchant, within the existing capacity auction structure, without relying upon the distortion of out-of-market, state-sponsored subsidies.

B. The Old Salem Harbor Power Station

In early 2010, Footprint identified the Salem Harbor Power Station ("Salem Harbor") as its first potential target facility for redevelopment.[8] At that time Salem Harbor consisted of four separate generating units—three coal-fired units (Units 1, 2 and 3) and one oil-fired unit (Unit 4).[9] Unit 1 had been in operation since 1951, followed by Unit 2 in 1952, Unit 3 in 1958 and Unit 4 in 1978.[10] The owner, Dominion Energy Salem Harbor, LLC ("Dominion"), had owned the plant since 2005.[11] While Dominion had not yet announced plans to shut down the facility, to Footprint it seemed clear that the facility was a likely candidate for shut down.[12] In April 2010—almost two years before FCA 7—Footprint began meeting with members of the Salem community, including business and civic leaders and the Mayor.[13] Footprint also reached out at that time to the Conservation Law Foundation ("CLF"), an environmental advocacy group that had historically been active in opposing the existing coal- and oil-fired units at the site to engage CLF in a dialogue regarding a repowering solution.[14] Footprint then began discussions with Dominion.[15] During the course of these discussions, Dominion announced that it was retiring Units 1 and 2 at the end of December 2011, and was in the process of obtaining the necessary

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8 *See* Silverstein Affidavit at 3.

9 *See Dominion Energy Salem Harbor, LLC*, Order Authorizing Disposition of Jurisdictional Facilities, 140 FERC ¶ 62,085 (2012).

10 *See* Salem Harbor Task Force Report at 12-13.

11 *See id.* at 14; *see also USGen New England, Inc.*, Order Authorizing Disposition of Jurisdictional Facilities, Docket No. EC05-4-000 (Dec. 23, 2004) (approving acquisition of Salem Harbor Power Station by Dominion Energy Salem Harbor, LLC).

12 *See* Silverstein Affidavit at 3.

13 *See id.*

14 *See id.*; CLF, Salem Harbor Station, http://www.clf.org/our-work/clean-energy-climate-change/coal-free-new-england-2020/salem-harbor-station/ (last visited Oct. 2, 2014).

15 *See* Silverstein Affidavit at 3.

regulatory approvals to retire the two remaining units (Units 3 and 4) on June 1, 2014.[16] After extensive negotiations, on August 3, 2012, Footprint acquired Salem Harbor from Dominion (the "Acquisition").[17]

C. Footprint's Plan for a New Salem Harbor Power Station

In place of Salem's vintage coal and oil generating units and their requisite coal storage pile and fuel-oil tank farms, Footprint will build a gas-fired, combined-cycle facility with an aggregate capacity of 674 MW on a roughly 20-acre portion of the 65-acre Salem Harbor site (the "Facility").[18] The existing Salem Harbor power station is being demolished.[19] An extensive subsurface site characterization has been conducted to identify areas of concern and these areas are being remediated pursuant to the requirements of the Massachusetts Contingency Plan.[20] Construction of the Facility will begin upon completion of demolition on the required portion of the site.[21]

The proposed Facility will include two state-of-the-art, efficient, low-emission, quick-start natural gas turbine generators; two steam-turbine generators; and two heat-recovery steam generators, including pollution control equipment.[22] About half of the output of the Facility will be available in 10 minutes, and the entire output of the Facility will be available within another

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[16] *See* Salem Harbor Task Force Report at 14. Although Dominion sought to retire Units 3 and 4 earlier, ISO-NE determined they were needed for reliability purposes in the Northeastern Massachusetts/Boston ("NEMA/Boston") Capacity Zone and thus were required to continue operations until June 1, 2014. *See id.* at 14-15.

[17] *See Dominion Energy Salem Harbor, LLC*, 140 FERC ¶ 62,085; Silverstein Affidavit at 3.

[18] *See* Silverstein Affidavit at 4.

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *See id.*

30 minutes, thus providing ISO-NE with significant quick-start capability.[23] This quick-start capability in turn will facilitate the integration of additional renewable resources into the ISO-NE system.

D. Community Reaction to the Proposed Facility

Footprint began working with the local Salem Harbor community as soon as it identified the site as a strong candidate for development, and long before closing on the Acquisition.[24] Given its manifest benefits, Footprint's development plans at Salem Harbor have been well-received by the vast majority of stakeholders, including the Mayor and other local elected officials, the Salem Alliance for the Environment, and the union that represents the existing Salem Harbor employees.[25]

There are of course some who oppose new infrastructure. On the environmental side, the small but vocal opposition to Footprint was initially publicly led by a non-profit conservation group, CLF.[26] CLF had a long history with the Salem Harbor power station and had sought retirement of the prior Salem Harbor power station—which it eventually achieved pursuant to a settlement with Salem Harbor's prior owner, Dominion.[27]

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[23] *See id.*

[24] *See id.* at 3.

[25] *See id.* at 5; *Our View: Footprint Power Plant Purchase a Step Forward for Salem*, THE SALEM NEWS (July 2, 2012), http://www.salemnews.com/opinion/article_4b89be1e-e90c-5ab1-87d9-a6b312c562bc.html; Dan Adams, *N.J. Firm Seals Deal on Boston Power Plant*, THE BOSTON GLOBE (Aug. 7, 2012), http://www.bostonglobe.com/business/2012/08/06/deal-sell-salem-power-plant-closes-new-gas-plant-and-development-planned/2QXaYxH8CEQ9pvciaNISuN/story.html; *Power Plant Public Hearing Attracts Crowd in Salem*, THE SALEM NEWS (Sept. 20, 2012), http://www.salemnews.com/news/local_news/article_a3a10022-3e72-5d96-be45-dc83c92eab82.html; Stewart Lytle, *How Much Will Footprint Power Pay Salem in Taxes*, MARBLEHEAD PATCH (Aug. 22, 2012), http://marblehead.patch.com/articles/how-much-will-footprint-power-pay-salem-in-taxes.

[26] *See* Silverstein Affidavit at 5.

[27] *See* CLF, Salem Harbor Station, http://www.clf.org/our-work/clean-energy-climate-change/coal-free-new-england-2020/salem-harbor-station/ (last visited Oct. 2, 2014).

While CLF initially also objected to Footprint's proposed Facility,[28] Footprint successfully addressed that group's concerns pursuant to a settlement executed as of February 18, 2014.[29] Although the settlement was viewed as a "groundbreaking" success by CLF—a sophisticated environmental group founded in 1966—it did not satisfy the concerns of four individuals who had originally allied themselves with CLF but continued to object to the Facility's development after the settlement.[30] These individuals apparently took issue with the development of any fossil-fuel-powered plant in Salem.[31] They maintained this opposition despite reliability concerns and the area's obvious need for additional energy assets, the lack of viable alternatives, and the fact that a fossil-fuel facility has existed at the site for more than 60 years. Moreover, these four individuals maintained their opposition even though the new Facility represents a massive aesthetic, environmental and functional improvement over the prior oil- and coal-fired units.[32]

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[28] CLF primarily raised concerns regarding the Commonwealth of Massachusetts' ability to demonstrate the Facility's compliance with the Massachusetts Global Warming Solutions Act, which requires dramatic reductions in greenhouse gas emissions culminating in an 80% reduction of such emissions from 1990 levels by 2050.

[29] *See* Settlement Agreement between CLF and Footprint Power Salem Harbor Development LP (Feb. 18, 2014) ("CLF Settlement Agreement"), *available at* http://www.clf.org/wp-content/uploads/2014/02/Final-Settlement-Agreement-2_18_20142.pdf; CLF Press Release, Groundbreaking Settlement Reached on Salem Natural Gas Facility (Feb. 18, 2014) ("CLF Press Release"), *available at* http://www.clf.org/blog/tag/salem-harbor-station/; Silverstein Affidavit at 5.

[30] *See* CLF Press Release; *In re Footprint Power Salem Harbor Dev., LP*, EPA EAB Appeal No. PSD 14-02, Petition for Review and Motion for Permission to File Amended Petition (Mar. 3, 2014) ("PSD Petition for Review"), *available at* http://yosemite.epa.gov/oa/eab_web_docket.nsf/Dockets/PSD+14-02.

[31] *See* Silverstein Affidavit at 5. These four individuals maintained that position despite the fact that the Commonwealth's Salem Harbor Task Force reiterated the findings of the City of Salem's own Salem Harbor Reuse Study (*see* n.70, infra) in finding that "[s]ince neither wind nor solar will generate more than 10-15 MW utilizing the entire site area, neither appear to be economically viable relative to regional scale power generation." Salem Harbor Task Force Report at 33.

[32] Instead these individuals argued that any and all new energy resources should be renewable ones. *See* Silverstein Affidavit at 5. Footprint does not dispute the benefits of developing renewable resources but notes that under current technological limitations even if such resources are developed the area will still need to rely on some fossil fuel resources in order to balance generation and load. Indeed, Footprint firmly believes that the future of power generation lies with a system of wind, solar and other no-carbon generating solutions for base load but recognizes they will need to be supported by a network of flexible natural gas burning generating facilities, like the

E. Footprint's Proposed Facility Clears in Merit in FCA 7

As it was in negotiations to acquire Salem Harbor, Footprint began the interconnection process and qualified the Facility for ISO-NE's FCA 7, which was conducted on February 5, 2013.[33] Footprint bid the Facility in FCA 7 and it cleared in merit.[34] To Footprint's knowledge this is the first (and, so far, only) time an unsubsidized and uninstalled resource cleared in ISO-NE's Forward Capacity Market.[35] Footprint also exercised its right under the ISO-NE Tariff to lock-in its capacity revenues for a period of five years.[36] This provision is intended to make it possible for a merchant resource to obtain financing based on revenues to be received in the Forward Capacity Market. Five years of capacity market revenues was viewed as the minimum time necessary for lenders to be willing to finance a new merchant project.[37]

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proposed Salem Harbor Facility, that are available to run when the renewable assets cannot meet demand. Footprint believes the proposed new Salem Harbor Facility is just such a facility and because of its location it is uniquely situated to support development of renewable resources in Massachusetts, which will likely come in the form of offshore wind resources. More importantly, however, this vocal minority ignores the immediate need for new generation assets in the NEMA/Boston zone for reliability. This is a need that must be filled in the short term and cannot at this time be filled by an entirely renewable portfolio.

[33] *See* Silverstein Affidavit at 6; *ISO New England Inc.*, ISO New England Inc. Submits 7th Forward Capacity Auction Results Filing, Docket No. ER13-992-000 (Feb. 26, 2013) (indicating FCA 7 was conducted on February 4-5, 2013). Even in advance of acquiring the existing facility from Dominion, the parties entered into a site option agreement sufficient to permit Footprint to begin the ISO-NE interconnection process and FCA qualification process. *See* Silverstein Affidavit at 6.

[34] *See ISO New England Inc.*, ISO New England Inc. Submits 7th Forward Capacity Auction Results Filing, Docket No. ER13-992-000 (Feb. 26, 2013).

[35] *See* Silverstein Affidavit at 6.

[36] *See ISO New England Inc.*, ISO New England Inc. Submits 7th Forward Capacity Auction Results Filing, Docket No. ER13-992-000 (Feb. 26, 2013), Attachment B (Testimony of Stephen J. Rourke) at 10:17-22.

[37] Given the lack of new merchant entry—other than Footprint—the five-year lock-in recently was extended to seven years beginning with FCA 9. *See ISO New England Inc.*, Order Accepting Tariff Revisions, 147 FERC ¶ 61,173 at P 56 (2014) (granting ISO-NE's request to extend the lock-in period from five to seven years because, among other things, the "Filing Parties have sufficiently demonstrated that, in the circumstances here, extending the lock-in period is an appropriate way to provide investor assurance").

As a result of clearing FCA 7, Footprint had 39 months to achieve Commercial Operation under ISO-NE's current Tariff.[38] Since no other merchant plant besides Footprint has ever cleared in the market, the adequacy of the 39-month timeline to obtain all necessary permits, secure financing arrangements and complete construction of the plant has never been tested for a new plant not subsidized or sponsored by a state.

II. ISO-NE'S DEFERRAL PROCESS

On July 16, 2014, ISO-NE requested the Commission approve a change to its Forward Capacity Market rules allowing a new capacity resource to seek a deferral of its Capacity Supply Obligation when a new resource is needed for reliability but delayed for reasons outside of its control. ISO-NE determined that the current 39-month planning period between the time a Capacity Supply Obligation is incurred and the Capacity Commitment Period starts may not always be sufficient (the "Deferral Process").[39] If the Commission grants a deferral, the new resource's Capacity Supply Obligation—and all capacity payments owed to the new resource—will be deferred one year.[40] The five-year revenue lock-in simply would begin one year later.[41] ISO-NE argued that this was the best option to maintain reliability.[42] On September 12, 2014, the Commission approved the Deferral Process effective as of July 17, 2014.[43]

Under the Commission-approved Deferral Process, a deferral is granted only if three specific criteria are met. *First*, in order to be eligible to even apply for a deferral, ISO-NE must

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38 *See* ISO-NE Tariff § III.13.1.10.

39 *See* ISO-NE Deferral Filing at 1, 4.

40 *Id.* at 2, 8.

41 *Id.* at 8.

42 *Id.* at 4-5.

43 *ISO New England Inc.*, 148 FERC ¶ 61,185.

determine that a resource is needed for reliability for at least the next two years pursuant to a formal reliability study—the year of its Capacity Supply Obligation and the year following.[44]

Second, the resource must demonstrate to the Commission that "the reasons the deferral is being sought are beyond the control of the Project Sponsor."[45] As ISO-NE noted, "[a] delay beyond the control of the Project Sponsor might include, for example, that receipt of required permits was delayed through litigation despite the Project Sponsor's having begun the permitting process well in advance of the FCA."[46]

Third, the resource must also demonstrate to the Commission "that the deferral is critical to the resource's ability to achieve Commercial Operation."[47]

ARGUMENT

FOOTPRINT MEETS THE CRITERIA NECESSARY TO OBTAIN A DEFERRAL

Footprint satisfies the three Commission-approved criteria to obtain a deferral: (i) the Facility is needed for reliability for at least two years; (ii) the delay giving rise to the need for a deferral is beyond Footprint's control; and (iii) a deferral is critical to ensure the Facility achieves Commercial Operation.

I. THE FACILITY IS NEEDED FOR RELIABILITY

The Facility is eligible to seek a one-year deferral from the Commission because ISO-NE has found that the Facility is needed for reliability in the 2016-2017 Capacity Commitment Period as well as the subsequent 2017-2018 period. On July 8, 2014, Footprint notified ISO-NE

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[44] ISO-NE Deferral Filing at 6-7.

[45] *Id.* at 7.

[46] *See id.*

[47] *Id.* Note that in the ISO-NE Deferral Filing, the second and third factors are presented in the opposite order. *Id.* To eliminate duplication in and aid in the organization and clarity of this application, these factors are addressed in reverse order.

of its intention to seek a deferral under ISO-NE's then-proposed Deferral Process and requested that ISO-NE perform the necessary reliability review.[48] ISO-NE performed the requested reliability review and found that the Facility was needed for reliability for the requisite two-year period.[49] Footprint thus meets the reliability prerequisite to seek a deferral at the Commission.

As has been discussed at length in the ISO-NE Deferral Filing, and in Footprint's comments and answer in support of that filing, the whole reason for the deferral process is that it provides the most efficient option to meet a pressing reliability need.[50] If there is no reliability need, there is no deferral. If there is a reliability need—as ISO-NE has found there is here in the Boston area—granting a deferral to a resource already far down the development path but just short of the finish line is the best option for ensuring reliability. It certainly is a better option than starting over from scratch. This is particularly true for the current reliability need in Boston because no resource besides Footprint has filed for a single permit.[51] Footprint, on the other hand, already has obtained all eight of the required major local, state and federal permits necessary to begin construction—beginning the process roughly six months *before* FCA 7 even occurred and concluding it on September 11, 2014, about two years later (as set forth further below).[52] Accordingly, even with a one-year deferral, Footprint's Facility is the best (and currently only) hope for satisfying the NEMA/Boston zone's reliability needs.

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[48] *See* Silverstein Affidavit at 14 & Ex. 4.

[49] *See id.* at 14 & Ex. 5. Although Footprint filed its request for a reliability determination on July 8, ISO-NE considered Footprint's request to be filed on July 17, 2014—the Effective Date of the Deferral Process as approved by the Commission—for purposes of computing the time permitted to issue the determination.

[50] *See* ISO-NE Deferral Filing; *ISO New England Inc.*, Footprint Power Salem Harbor Development LP's Motion to Intervene and Supporting Comments, Docket No. ER14-2440-000 (Aug. 6, 2014).

[51] The open dockets page of the Massachusetts Energy Facility Siting Board website does not include a single generating facility as of the date of this filing. *See* http://www.mass.gov/eea/energy-utilities-clean-tech/energy-facilities-siting-board/siting-board-dockets.html.

[52] *See* Silverstein Affidavit at 11.

II. THE DELAYS AT ISSUE ARE BEYOND FOOTPRINT'S CONTROL

The delays that give rise to Footprint's request for a deferral are entirely beyond Footprint's control. Specifically, development of the Facility was substantially delayed by a last-minute appeal of one of eight required major permits—the federal PSD permit. The appeal was filed by four individuals with perceived environmental concerns—*after* Footprint already had negotiated and settled with the environmental group representing the same interests.[53] Footprint originally filed an application for the PSD permit in question on December 21, 2012, more than a month before FCA 7 was even conducted.[54] The appeal was not rejected until September 2, 2014—20 months later—and the Massachusetts Department of Environmental Protection subsequently issued the final PSD permit on September 11, 2014.[55] There is nothing more that Footprint could have done to expedite the permit process. After giving effect to the procedural due process rights of individuals, even those raising meritless objections, it simply takes longer to obtain all of the necessary permits and to build a plant in Massachusetts than the 39 months the Forward Capacity Market rules currently allow.

In this section, we provide an overview of the permit process Footprint has undertaken and completed. We demonstrate that the delays in the permit process that will prevent Footprint from meeting its Capacity Supply Obligation starting on June 1, 2016 were entirely outside of Footprint's control.

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[53] *See* CLF Settlement Agreement; PSD Petition for Review.

[54] *See* Silverstein Affidavit at 8.

[55] *See In re Footprint Power Salem Harbor Dev., LP*, Order Denying Review, EPA EAB Appeal No. PSD 14-02 (Sept. 2, 2014) ("EAB Order"), *available at* http://yosemite.epa.gov/oa/eab_web_docket.nsf/Dockets/PSD+14-02.

A. The Disconnect Between the Market Rules and Permitting Timelines Creates Pitfalls for New Merchant Entry

We begin with some general comments. Opponents of new infrastructure quickly realized that, under the tight deadlines of the Forward Capacity Market, the easiest way to defeat a new project would be simply to delay the permitting process. Each permit application already involves an extensive and complicated process that often includes, among other things: preparing substantial and detailed paper filings, performing complex environmental assessments, submitting detailed environmental impact reports, providing public notice; allowing for lengthy and repeated public comment periods, holding extensive and numerous public hearings, addressing and resolving various stakeholder concerns, and resolving any potential appeals. No matter how spurious, our legal system requires that all appeals must be considered and all arguments heard. Try as they might, overloaded tribunals frequently are incapable of acting quickly enough so as to not jeopardize the 39-month planning period. The result is that a permit process that originally was envisioned to take possibly one year out of the 39-month planning period in fact takes at least two years or more, at least in Massachusetts.[56]

Some who have not traversed the permitting path in Massachusetts for a merchant plant have argued that Footprint should have started the process earlier, or waited longer before participating in a Forward Capacity Auction. Others have argued that Footprint should have invested more dollars. As we demonstrate below, Footprint started the process of building community support long before it ever acquired the Salem Harbor site.[57] Footprint then filed its

[56] Ironically, the individuals who have opposed the construction of the Facility have argued before agencies and in the press that there has been a rush to judgment with respect to the permitting of this project, particularly in comparison to the decade-long odyssey experienced by Cape Wind.

[57] *See* Silverstein Affidavit at 3.

first two permit applications *on the same day* that the Acquisition closed.[58] Other permit applications could not be filed until Footprint cleared in FCA 7 because one of the necessary showings to obtain some permits is that there is a demonstrated need for or overriding public interest in the facility, which could not be established until it cleared in ISO-NE's Forward Capacity Market.[59] Thus waiting for the next auction (FCA 8) would not have made the process any faster, and Footprint likely would still be a year from completing the permit process rather than having just finished completing it. Other permits could not be filed until previously-filed permits already had been acted upon.[60]

Throughout the process, Footprint has worked extensively with the community, local and state leaders, key stakeholders, environmental groups, ISO-NE and others to build support. But no matter how much support a project has, there always will be someone who opposes it. No project of this kind ever has *unanimous* support of every single resident of a state.

Finally, Footprint is a true merchant—relying upon auction revenues to obtain financing and to construct the Facility.[61] Footprint does not have a large utility backstopping its efforts; nor does it have subsidies or other state financial support.[62] It is participating in the Forward Capacity Market precisely in the way that the Forward Capacity Market was intended—as a merchant. Tellingly, no other merchant resource has done so in New England. As a merchant

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[58] *See id.* at 6-7; *In the Matter of the Petition of Footprint Power Salem Harbor Dev. LP for Approval to Construct a Bulk Generating Facility in the City of Salem, Mass.*, Docket No. EFSB 12-2, Final Decision, at 7 (Oct. 10, 2013) ("EFSB Petition to Construct Final Decision") (noting Footprint filed a Petition to Construct with the EFSB on August 3, 2012), *available at* http://www.mass.gov/eea/docs/dpu/siting/efsb-12-2-footprint-final-decision.pdf.

[59] *See* Silverstein Affidavit at Ex. 2 at 19-21; Certificate of the Secretary of Energy and Environmental Affairs on the Final Environmental Impact Report: Salem Harbor Station Redevelopment at 8 (May 17, 2013) ("May 2013 MEPA Certificate"), *available at* http://www.env.state.ma.us/mepa/mepacerts/2013/sc/eir/14937feir.pdf.

[60] *See, e.g.*, 310 CMR 9.00 *et seq.* (indicating that a variance under Massachusetts Chapter 91 requires, where necessary, that the applicant first obtain a Massachusetts Environmental Policy Act Certificate).

[61] *See* Silverstein Affidavit at 12.

[62] *See id.*

developer, Footprint cannot just proceed with construction while some permits are pending or while financing still is in limbo. In fact, even if it were backed by a utility or a state-sponsored contract, the appeal of the PSD Permit discussed in detail below would still have prevented construction of the Facility from beginning during the pendency of that appeal because, by statute, that appeal stays the effectiveness of the PSD Permit.

B. Footprint Made Every Reasonable Effort to Timely Obtain the Necessary Regulatory Approvals

1. Preliminary Steps

Footprint acquired the Salem Harbor plant on August 3, 2012.[63] Before that date, there was a definite limit to the steps Footprint could take to begin the process of developing and building a new plant at the site (akin to the fact that you cannot register a car until you buy it). Nevertheless, Footprint took several key steps toward development even before the Acquisition.

Footprint identified the Salem Harbor site as a strong candidate for redevelopment in early 2010.[64] Footprint began its community outreach as part of this initial process by April 2010.[65] Footprint's model of purchasing an existing plant that is near retirement and replacing it with a newer plant at the same site requires strong community support to succeed. To that end, Footprint met with business and civic leaders in Salem, the Mayor of Salem and members of the city's legislative delegation in an effort to gauge the level of public support for such an effort.[66] In addition, as described above, Footprint began a dialogue with CLF, a leading regional environmental advocacy group, which ultimately resulted in a groundbreaking settlement.[67]

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[63] *See id.* at 3.

[64] *See id.*

[65] *See id.*

[66] *See id.*

[67] *See id.*; CLF Settlement Agreement; *see also* CLF Press Release.

Through CLF, Footprint began a dialogue with the members of the Salem Alliance for the Environment, a local environmental advocacy group.[68] These discussions resulted not only in improvements to Footprint's plans, but led to strong support from the Salem Alliance for the Environment for the new Facility.[69] At the same time, the City of Salem was undertaking a comprehensive site reuse study funded by a grant from the Commonwealth's Clean Energy Center. That study concluded that, but for the uncertainty of the financial viability of a new power plant under the ISO-NE market rules, such a plant would be an important part of the redevelopment of the power plant site.[70] Throughout this period, Footprint was in negotiations with Dominion in an effort to acquire the site and existing facility.[71]

Even as Footprint was in negotiations with Dominion, the plant owner, it also submitted an interconnection request and a show of interest in participating in FCA 7 in January 2012—13 months before FCA 7 was conducted.[72] Footprint began preparing permit applications at the same time.[73]

Footprint executed an agreement to acquire Salem Harbor with Dominion in June 2012. The Commission approved the Acquisition on July 27, 2012.[74] That transaction closed on August 3, 2012.[75]

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[68] *See* Silverstein Affidavit at 3.

[69] *See id.*

[70] *See* City of Salem, A Site Assessment Study on Potential Land Use Options at Salem Harbor Power Station Site (Jan. 2012) ("Salem Harbor Reuse Study"), *available at* http://www.salem.com/pages/salemma_dpcd/studiesreports/Power%20Plant%20Study%20FINAL.pdf.

[71] *See* Silverstein Affidavit at 3, 6.

[72] *See id.* at 6.

[73] *See id.* at 6-7.

[74] *See Dominion Energy Salem Harbor, LLC*, 140 FERC ¶ 62,085.

[75] *See* Silverstein Affidavit at 3.

2. Closing Day Permit Applications

Footprint required eight major local, state and federal permits to construct the Facility.[76] Footprint applied for the first two state approvals on or before the day it closed on the transaction, after spending seven months preparing the applications.[77]

The first required permit was the Massachusetts Environmental Policy Act ("MEPA") Certificate, issued by the Massachusetts Secretary of Energy and Environmental Affairs. Projects such as the Facility that meet or exceed certain emission, land use or other applicable thresholds must obtain this certificate from the Massachusetts Secretary of Energy and Environmental Affairs certifying to the project's consistency with the Commonwealth's environmental laws prior to obtaining other permits. Obtaining this certificate requires, among other things, that the applicant file an Environmental Notification Form.[78] After a public hearing and after taking public comments, Footprint was required to file both Draft and Final Environmental Impact Reports prior to the issuance of the Secretary's certificate.[79] Opportunities for public comment are provided at each step of the process.[80] This certificate was issued on

[76] The permitting process is a maze of applications, orders and appeals, and we provide a detailed visual chronology and a breakdown of development costs with the Silverstein Affidavit. *See* Silverstein Affidavit at Ex. 3.

[77] *See* Silverstein Affidavit at 6-7; *see also* EFSB Petition to Construct Final Decision at 7 (noting Footprint filed a Petition to Construct with the EFSB on August 3, 2012).

[78] *See* 301 CMR 11.05. The Environmental Notification Form for the Project was filed on July 31, 2012—several days *before* Footprint even acquired Salem Harbor. *See* Silverstein Affidavit at 7. This filing was made in advance of closing because the Massachusetts Environmental Monitor is only published twice a month. Thus, by filing on July 31, rather than August 3, public notice of Footprint's project was published on August 8, 2012, two weeks earlier than it otherwise would have been, thereby jump-starting the permitting process. For purposes of this application, we will refer to both the MEPA filing and the EFSB filing as having been made on the date of the Salem Harbor acquisition.

[79] *See* 301 CMR 11.06(3) (providing for public comment on Environmental Notification Form); 310 CMR 11.07 (providing that proponent must file Draft and Final Environmental Impact Reports and describing form for each).

[80] *See, e.g.*, 301 CMR 11.06(3) (providing for public comment on Environmental Notification Form); 301 CMR 11.08(3) (providing for public comment on Environmental Impact Reports).

May 17, 2013.[81] On June 17, 2013, the Secretary also issued a Public Benefits Determination for the project, finding that the construction of the facility would provide a public benefit.[82] Unlike many of the project's later permits, the Secretary's issuances were not appealed.

The second required permit was the Energy Facilities Siting Board ("EFSB") Approval to Construct. The Energy Facilities Siting Board is a Massachusetts state board that reviews proposals to construct certain major energy facilities in Massachusetts, including large power plants, and is charged with ensuring that a proposed facility provides "a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost."[83] By statute, the EFSB permit process may only take one year, but in practice the process often takes 16 months or longer.[84] The EFSB also holds a public hearing at the outset of the process and then proceeds to interventions, written testimony, discovery, and evidentiary hearings similar to the FERC litigation process.[85] Once the Hearing Officer and the EFSB staff conclude the hearings (in Footprint's case, the hearings consumed 10 days of testimony spread over the course of a month), they present an issues memorandum to the EFSB itself.[86] After receiving written comments on the memo, the EFSB considers the issues in a public meeting and directs the staff to draft a Tentative Decision—in this case an order approving construction of the project.[87] Staff

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81 *See* May 2013 MEPA Certificate.

82 *See* Silverstein Affidavit at Ex. 1.

83 Energy Facilities Siting Board, Frequently Asked Questions, http://www.mass.gov/eea/energy-utilities-clean-tech/energy-facilities-siting-board/faqs.html (last visited Oct. 2, 2014).

84 *See* M.G.L. c. 164, § 69H; *Pioneer Valley Energy Ctr.*, 17 DOMSB 294 (2009) (sixteen months from filing of Petition to Construct to issuance of Final Decision); *Montgomery Energy Billerica Power Partners, LP*, 16 DOMSB 317 (2009) (twenty-two months from filing of Petition to Final Decision); *Mass. Mun. Wholesale Elec. Co.*, 16 DOMSB 233 (2008) (seventeen months from filing of Petition to Final Decision); Silverstein Affidavit at 7.

85 *See* EFSB Petition to Construct Final Decision at 7-8 (describing procedural history).

86 *See id.* at 8; Silverstein Affidavit at 7.

87 *See* EFSB Petition to Construct Final Decision at 7-8.

then drafts the Tentative Decision and the EFSB again takes comments on the Tentative Decision and then considers the Tentative Decision in another public meeting.[88] A final order then is issued based on the results of that meeting.[89] Footprint's process took 14 months, and EFSB approval of the Petition to Construct was issued on October 10, 2013.[90] CLF—the regional environmental group that originally opposed Footprint's project—appealed that permit shortly thereafter.[91] This appeal was resolved on February 18, 2014, via the settlement with CLF discussed further below, approximately 19 months after the original Petition to Construct was filed.[92]

While both of these permits took an extended period of time, ultimately neither caused the delay at issue in this case.[93] They demonstrate, however, that all along Footprint was taking proactive measures to expedite the permit process, including preparing applications well in advance of and initiating filings for the first two permits on or before the day of acquisition of the existing Salem Harbor facility.

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88 *See id.* at 8.

89 *See id.*

90 *See id.* (approving Footprint's Petition to Construct); *see also* Silverstein Affidavit at 7.

91 *See Conservation Law Found., Inc. v. Energy Facilities Siting Bd.*, No. SJ-2013-0450, Case Entered (Mass. Nov. 8, 2013); *see also* CLF Settlement Agreement at 2 ("On November 8, 2013, CLF filed with the Supreme Judicial Court a Petition for Appeal of the EFSB Final Decision[.]").

92 *See* CLF Settlement Agreement; *Conservation Law Found., Inc. v. Energy Facilities Siting Bd.*, No. SJC-11600, Dkt. No. 13, Motion for Voluntary Dismissal (Mass. Feb. 26, 2014). In the interim, Footprint filed a motion at the Massachusetts Supreme Judicial Court seeking to expedite the hearing of this appeal—a process that would normally take over a year. *See Conservation Law Found., Inc.*, No. SJ-2013-0450, Dkt. No. 5, Footprint Power Salem Harbor Development LP's Motion for Expedited Treatment (Mass. Nov. 25, 2013). ISO-NE intervened in the docket and filed an answer in support of Footprint's motion. *Id.*, Dkt. No. 11, ISO-New England Inc.'s Motion for Leave to Intervene (Mass. Dec. 11, 2013). The Court, which hears oral argument only during the first week of each month, granted the motion and scheduled oral argument for March 4, 2014. *Conservation Law Found., Inc.*, No. SJC-11600, Dkt. No. 7, Ordered for Argument on March 4, 2014 (Mass. Jan. 22, 2014), Pursuant to the settlement with CLF, that appeal was voluntarily dismissed prior to oral argument, but not before the matter was fully briefed *See id.*, Dkt. No. 13.

93 *See* Silverstein Affidavit at 7.

3. The Second Round of Permit Applications

Footprint filed its next round of two permit applications on December 21, 2012—still six weeks before FCA 7 was to be conducted.[94] Both of these permit applications required much more advanced modeling and further developed site plans and construction details than those included in the first two permit applications submitted on or before the date of closing.[95] Final engineering designs require an iterative process including the developer, environmental consultants and equipment manufacturers to ensure that the final design meets expected permit requirements. By the time the second round of permit applications were filed, Footprint already had spent over $3 million on non-refundable development costs, with no guarantee that it would clear in FCA 7.[96]

The third major required permit that Footprint sought was the Massachusetts Major Comprehensive Air Quality Plan Approval. This Massachusetts state permit was adopted and approved pursuant to the state and federal Clean Air Acts and accompanying regulations and applies to certain types of emitting facilities.[97] Before such a facility can be built or modified, a comprehensive air quality plan must be submitted to the Massachusetts Department of Environmental Protection for review and approval.[98]

The fourth major required permit was the federal Prevention of Significant Deterioration ("PSD") permit, the only federal permit of the eight major required permits. The PSD permitting

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94 *See id.* at 8.

95 *See id.*

96 *See id.* at 13-14.

97 *See* M.G.L. Chapters 11, § 142A-J, 21C, §§ 4 and 6, 21E, § 6; 310 CMR 7.00 *et seq*.—of which Appendix A constitutes 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); 310 CMR 7.02 (4-5)).

98 *See* 310 CMR 7.02(1)(b).

program is a Clean Air Act permitting requirement for any new or modified source of air pollution including power plants.[99] While it is a federal permit, issuance of a PSD permit in the NEMA/Boston area is controlled by the Massachusetts Department of Environmental Protection pursuant to authority delegated by Region 1 of the United States Environmental Protection Agency ("EPA").[100] The PSD permit application requires, among other things, performance of an air quality analysis, preparation of an impact analysis, demonstration that the Best Available Control Technology for certain criteria pollutants is being installed and a public notice and comment period.[101]

The Massachusetts Department of Environmental Protection issued both permits on January 30, 2014, 13 months after the respective applications were filed.[102] As discussed further below, Footprint's settlement with the Conservation Law Foundation led to the subsequent resolution of any potential appeals by CLF of these permits.[103] Nevertheless, as set forth in detail below, four individuals did appeal the federal PSD permit.[104] This is the appeal that

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[99] *See* 42 U.S.C. §§ 7470 *et seq.*; 40 C.F.R. § 52.21.

[100] In Massachusetts, the EPA administered the PSD permit program through April 2011. In April 2011, an agreement for delegation of the federal PSD program was executed by EPA Region 1 to the Massachusetts Department of Environmental Protection. *See* Agreement for Delegation of the Federal Prevention of Significant Deterioration Program (PSD) by the United Stated Environmental Protection Agency, Region 1 to the Massachusetts Department of Environmental Protection (Apr. 11, 2011), *available at* http://www.epa.gov/region1/communities/pdf/Agreement4Delegation.pdf. Like many other aspects of this project, the Footprint Facility was the first PSD permit to be considered by the Massachusetts Department of Environmental Protection under this delegation agreement. *See* Silverstein Affidavit at 11.

[101] *See* 42 U.S.C. § 7475.

[102] *See* Massachusetts Department of Environmental Protection Letter to Footprint regarding Footprint Power Salem Harbor Development LP Air Quality Plan Approval and Prevention of Significant Deterioration Permit Transmittal No. X254064, Application No. NE-12-022, at 1 (Jan. 30, 2014) ("approv[ing] the construction and operation of the proposed Facility, subject to [certain] conditions" and enclosing the plan approval and PSD Permit), *available at* http://www.mass.gov/eea/docs/dep/air/approvals/final2014/fpshcvrltr14.pdf.

[103] *See* CLF Settlement Agreement at 7.

[104] *See* PSD Petition for Review.

ultimately delayed Footprint's project beyond its June 1, 2016, obligation date.[105] From application to final issuance (including the resolution of all appeals), the PSD permit process took over 20 months.[106]

4. The Final Round of Permit Applications

Footprint filed its final round of four permit applications (one state, three local) between April and June, 2013.[107] Unlike the earlier permit applications, these later permits required near-final development plans with specific details such as architectural blueprints, final stack height, detailed demolition and constructions sequencing information, noise analysis, a detailed traffic study and a full landscaping plan.[108] Many of these details could not be finalized until the permit process was already far down the path. Some of these permits—such as the Chapter 91 Variance—also required evidence that the new power plant was needed, as demonstrated by its clearing in the Forward Capacity Market.[109] The Chapter 91 application also could not be processed until a previously-filed permit application had been granted.[110]

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[105] *See* Silverstein Affidavit at 11.

[106] *See id.* at 8 (application for PSD permit filed on December 21, 2012); EAB Order (dismissing appeal of PSD on September 2, 2014). To illustrate just how slow the permitting process can be for administrative reasons beyond Footprint's control, even though the EAB denied review of the petition for review of the PSD permit on September 2, Footprint's PSD permit still did not become effective until the Massachusetts Department of Environmental Protection issued a formal Notice on September 11, 2014. Moreover, despite the fact that the Clean Air Act provides parties whose appeal has been denied by the EAB 60 days to seek review in the United States Circuit Court of Appeals, that clock does not begin to run until notice of the denial is published in the Federal Register. That notice was published in the Federal Register on October 2, 2014, *see* 79 Fed. Reg. 59489 (Oct. 2, 2014), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-10-02/pdf/2014-23539.pdf, thus effectively transforming a 60-day appeal period into a 90-day appeal period (an increase of 50%). While Footprint does not anticipate that any such appeal will impact its ability to finance and construct the Facility—particularly because any appeal to a United States Circuit Court of Appeals would not involve a statutory stay of the PSD Permit—this administrative delay is further evidence of the types of issues outside of the control of a merchant developer such as Footprint.

[107] *See* Silverstein Affidavit at 8-9.

[108] *See id*.

[109] *See* 310 CMR 9.21(1)(c) (requiring inter alia a finding that the project is "necessary . . . to accommodate an overriding municipal, regional, state or federal interest").

[110] *See* 310 CMR 9.11(3)(b)7.

a. Chapter 91 Variance

The fifth required major permit was the Chapter 91 (Massachusetts Public Waterfront Act) Variance.[111] Massachusetts Chapter 91 (The Massachusetts Public Waterfront Act) imposes certain restrictions on the use and development of waterfront property.[112] Among other things Chapter 91 requires licenses for projects on waterfront property and also prohibits the use of waterfront property for certain industrial uses such as a power plant when the facility does not need to be placed next to a source of water.[113] As a result, even though the new air-cooled Facility will have significant benefits to the ecology of Salem Harbor over the existing water-cooled plant, both a Chapter 91 License and a Chapter 91 Variance were required for the new Facility.[114]

The Massachusetts Department of Environmental Protection could not process the Chapter 91 application until the Massachusetts Secretary of Energy and Environmental Affairs had issued Footprint a "MEPA" Certificate (the first required permit discussed above).[115] The MEPA Certificate was granted on May 17, 2013, and that same day Footprint filed with the Massachusetts Department of Environmental Protection for its Chapter 91 License and

[111] By way of example, we provide a detailed breakdown of the efforts required to obtain the Chapter 91 Variance in Appendix A hereto.

[112] *See* M.G.L. Chapter 91.

[113] *See* M.G.L. Chapter 91, § 14 ("no structures or fill may be licensed on private tidelands or commonwealth tidelands unless such structures or fill are necessary to accommodate a water dependent use").

[114] Despite the fact that the new Facility is more efficient, cleaner and is being built on the same site as the old Salem Harbor facility (although taking up less than 1/3 of the area), Footprint had to get a variance under Chapter 91 for the Facility because Chapter 91 prohibits the development of such industrial facilities that are not dependent on water use without a variance regardless of historical usage. Under Chapter 91, it does not matter that the new, cleaner, air-cooled (thus nonwater-dependant) Facility is replacing a dirtier water-cooled facility. *See* M.G.L. Chapter 91.

[115] *See* 310 CMR 9.11(3)(b)7 ("[I]f the project triggers M.G.L. c. 30, §§ 61 through 62H review, a copy of the Environmental Notification Form (ENF) and Certificate from the Secretary of the Executive Office of Energy and Environmental Affairs demonstrating compliance with MEPA, with the exception of a joint MEPA Application under 310 CMR 9.11(2)(b)4. For a project subject to MEPA, the Department will not hold a public hearing until the Secretary has issued a Certificate on the Final EIR").

Variance.[116] The Chapter 91 License and Variance was granted on November 1, 2013 and was appealed on November 22, 2013.[117] The appeal was resolved after settlement and issuance of the EFSB Certificate as set forth below.

b. Local Permits

Footprint also had to obtain three major local permits (the 6th, 7th and 8th major permits it needed). Footprint applied for these permits last as they were not deemed to be on the critical path—Footprint anticipated that these permitting processes would be much faster than the state and federal processes, which they were, and had already developed substantial local community support to further expedite these local permitting processes.

The sixth required permit was a Special Permit/Site Plan Review from the Salem Planning Board. This comprehensive site survey and construction plan required near-final details for everything on the site.[118] Footprint applied for this permit on April 8, 2013—after FCA 7.[119] The Planning Board conducted six public hearings on the application through the late spring and summer of 2013.[120] On August 1, 2013, the Planning Board unanimously granted the

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[116] *See* May 2013 MEPA Certificate; Silverstein Affidavit at 8; *see also In the Matter of the Initial Petition and Application of Footprint Power Salem Harbor Dev. LP for a Certificate of Envtl. Impact and Pub. Interest*, Docket No. EFSB 13-1, Final Decision, at 18 (Feb. 25, 2014) ("EFSB Certificate Final Decision") (noting that "Footprint applied to [the Massachusetts Department of Environmental Protection] for a Chapter 91 Waterways License and a Variance on May 17, 2013"), *available at* http://www.mass.gov/eea/docs/dpu/siting/efsb-13-1-final-decision.pdf.

[117] *See* EFSB Certificate Final Decision at 18-19 ("[The Massachusetts Department of Environmental Protection] issued a favorable Variance Request and Written Determination . . . on November 1, 2013" and "[o]n November 22, 2013, CLF and others filed with [the Massachusetts Department of Environmental Protection] a request for an administrative appeal of the Written Determination"). The administrative appeal was dismissed as moot by the Final Decision of Massachusetts Department of Environmental Protection Commissioner David W. Cash dated June 2, 2014. *See In the Matter of Footprint Power Salem Harbor Dev. LP*, MassDEP OADR Docket No. 2013-045, File No. W13-3886-N, Final Decision (June 2, 2014).

[118] *See* Silverstein Affidavit at 9.

[119] *See id.*

[120] *See* City of Salem Planning Board Decision Regarding Petitions of Footprint Power Salem Harbor Development, LP for a Planned Unit Development Special Permit, Site Plan Review and Flood Hazard District Special Permit for

requested permit and approved Footprint's Salem Harbor project.[121] Two residents appealed this approval on August 19, 2013.[122]

The seventh required permit was the Salem Zoning Board of Appeal Variance Application regarding the height of the buildings.[123] Absent a variance, Salem's zoning ordinance limits building heights within the zone where the power plant site is located to 45 feet.[124] Of course, the existing plant is significantly taller (the buildings range in heights up to 175 feet and the stacks are 250, 430 and 500 feet tall).[125] Although the new Facility's maximum building height will be substantially shorter than the previously existing structures—126 feet for the building and 230 feet for the single common stack—thus constituting a significant improvement to the view, a variance is still required because the new buildings still exceed the building height limit.[126] Footprint applied for this permit on May 29, 2013, and the variance was unanimously approved one month later on June 28, 2013.[127] Two residents appealed the variance on July 17, 2013.[128]

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the Property Located at 24 Fort Avenue (Aug. 1, 2013) ("Salem Planning Board Approval") (indicating public hearings were held on May 2, 2013, May 16, 2013, June 6, 2013, June 20, 2013, July 18, 2013 and July 25, 2013), *available at* http://www.env.state.ma.us/dpu/docs/siting/efsb12-2/8813fpsr5-2a.pdf.

[121] *See id.* (indicating board unanimously approved Footprint's petitions).

[122] *See Furlong v. Footprint Power Salem Harbor Dev. L.P.*, Case No. ESCV2013-01346 ("*Furlong II"*), Dkt. No. 1, Appeal from Salem Planning Board (Mass. Sup. Ct. Essex Cnty. Aug. 19, 2013).

[123] Footprint also simultaneously applied to the Zoning Board for a Special Permit for an Essential Services Use.

[124] *See* Salem Massachusetts Zoning Ordinances, Section 4.1, Table 4.1.1 (indicating maximum height for buildings in industrial zones, such as the Salem Harbor Power Station site, is 45 feet), *available at* https://library.municode.com/index.aspx?clientId=14924.

[125] *See* Silverstein Affidavit at 4.

[126] *See id.* (height of new facility will be 126 feet for building and 230 feet for single stack); Salem Massachusetts Zoning Ordinances, Section 4.1, Table 4.1.1 (height restrictions apply to any new construction except with respect to certain inapplicable residential exemptions), *available at* https://library.municode.com/index.aspx?clientId=14924.

[127] *See* Silverstein Affidavit at 9; City of Salem, Massachusetts Board of Appeal Decision, at 1 (June 28, 2013) (approving Petition of Footprint Power Salem Harbor Development, LP dated May 29, 2013 for a permit to exceed

The process Footprint endured in the appeal of these two local permits is instructive. The appeals were initially filed in Essex County Superior Court in Salem.[129] In order to expedite appeals, Footprint moved to transfer the cases to the Permit Session of Land Court—a special department of the state trial court conducted in Boston that deals exclusively with zoning and land use issues.[130] The Appellants opposed the motion to transfer, which was granted over their objections.[131] "The permit session was created by the Legislature to serve as a specialized judicial forum, bound by strict time standards, in order to promote the expeditious resolution of permit-based civil cases stemming from large development projects."[132] Once in the Permit Session of Land Court, Footprint further expedited the appeal by convincing the Land Court that it should first rule on whether the appellants had proper legal standing to file the appeal before it set a trial on the merits. After deposing the appellants, Footprint filed motions for summary judgment (with supporting briefs and affidavits) seeking dismissal of the appeals on the grounds that the appellants lacked standing. However, before the Court was in a position to rule on the standing issue, the appeals became moot as a result of the issuance of a Certificate of Environmental Impact and Public Interest ("EFSB Certificate") by the EFSB discussed below. The appellants, who were represented by three different attorneys during the course of the appeal,

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the maximum allowable height allowance of 45 feet in an Industrial Zoning District), *available at* http://www.salem.com/Pages/SalemMA_ZoningAppealsMin/2013Minutes/BOA_NOD_24_FortAve_06192013_Final.pdf.

[128] *See Furlong v. Footprint Power Salem Harbor Dev. L.P*, Case No. ESCV2013-01130 ("*Furlong I"*), Dkt. No. 1, Appeal from Zoning Board Filed (Mass. Sup. Ct. Essex Cnty. July 17, 2013). The same two residents appealed both the Zoning and Planning Board permits. *Compare Furlong I with Furlong II*. One of these appellants was also in the group of four people who appealed the PSD permit. While never formally consolidated, the two local appeals were heard together in companion dockets.

[129] *See Furlong I*; *Furlong II*.

[130] *See Furlong I*, Dkt. No. 5, Footprint Power Salem Harbor Development LP's Motion to Remove Actions to Land Court and Consolidate (Sept. 23, 2013); *Furlong II.*, Dkt. No. 5 (same) (Sept. 23, 2013).

[131] *Furlong I*, Dkt. No. 7, Order of Transfer (Oct. 22, 2013); *Furlong II*, Order of Transfer (Oct. 22, 2013).

[132] *Buccaneer Dev., Inc. v. Zoning Bd. of Appeals of Lenox*, 980 N.E.2d 458, 461 (Mass. App. Ct. 2012).

attempted to further delay the matter by disputing the effect of the EFSB Certificate before changing their minds and agreeing that it mooted the appeals.[133] Thus, the question of whether the appellants even had standing to bring the appeals in the first instance was never answered. This process took 7 months.[134]

The eighth and final required permit was the Salem Conservation Commission Approval. Under section 50-3 of the Salem Ordinances and the state Wetlands Protection Act, the Salem Conservation Commission must hold a hearing and approve any application to engage in certain activity prohibited under section 50-2 of the Salem ordinances including any substantial change to any facility for providing power that is located within 100 feet of any waterway. Footprint filed for this approval on June 13, 2013, and it was unanimously approved on July 31, 2013.[135] No appeal was filed.

The appeals of the Planning Board and Zoning Board approvals were resolved as a result of the issuance of the EFSB Certificate, as set forth below.[136]

5. Settlement and the EFSB Certificate Process

Massachusetts law provides that in the event a generating facility that has been approved by the EFSB is delayed through the denial of any state or local permit or the appeal of any state or local permit, an applicant may file a petition for an EFSB Certificate that serves as a

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[133] *See Furlong I*, Plaintiffs' Response to Footprint Power Salem Harbor Development LP's Motion to Dismiss (Mar. 27, 2014); *Furlong II*, Plaintiffs' Response to Footprint Power Salem Harbor Development LP's Motion to Dismiss (Mar. 27, 2014).

[134] *See Furlong I*, Judgment of Dismissal - Mass. R. Civ. P. 41(a)(2) (Mar. 27, 2014); *Furlong II*, Judgment of Dismissal - Mass. R. Civ. P. 41(a)(2) (Mar. 27, 2014).

[135] *See* Silverstein Affidavit at 9; City of Salem Conservation Commission Order of Conditions—DEP #64-552—24 Fort Avenue (July 31, 2013) (indicating date of notice of intent filed on June 13, 2013 and approving project on July 31, 2013), *available at* http://www.salem.com/Pages/SalemMA_ConCommMin/2013%20Minutes/64-552%20Power%20Plant%20order.PDF.

[136] EFSB Certificate Final Decision at 16-17 (resolving appeals of local Salem permits), *available at* http://www.mass.gov/eea/docs/dpu/siting/efsb-13-1-final-decision.pdf.

composite certificate incorporating all required permits.[137] As discussed above, the EFSB unanimously voted to direct EFSB staff to draft a Tentative Decision approving Footprint's Petition to Construct (2nd permit discussed above) the Salem Harbor project on July 11, 2013.[138] With the filing of the first of the local appeals on July 17, Footprint began the process of preparing a Petition to the EFSB seeking an EFSB Certificate.[139] Footprint filed its Petition on August 5, 2013.[140] On August 8, 2013, the EFSB determined that its regulations prevented it from considering Footprint's Petition until after it issued a final decision approving the Petition to Construct.[141] The EFSB issued its Final Decision approving the Petition to Construct on October 10, and permitted Footprint to file its Application for the EFSB Certificate (an application must be filed after the Petition) on October 11, 2013.[142]

Throughout this period, Footprint continued negotiations with CLF, the only group that had fully participated in the state permitting processes.[143] After extensive discussions that, at times, included the Mayor of Salem and senior representatives of the Massachusetts Executive Office of Energy and Environmental Affairs, Footprint and CLF reached a comprehensive settlement on February 18, 2014.[144] Among other things, the settlement imposed a hard shut-

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[137] *See* M.G.L. c. 164, §§ 69K½ - 69O½. This process is often referred to as an override process because the EFSB has the authority to override the rejection of any state or local permit or any appeal of such a permit. *See* Silverstein Affidavit at 10. Of course, since none of Footprint's permits were denied, it was the appeal override that Footprint sought from the EFSB. Each of the local and state boards, commissions and agencies whose permits were at issue in the EFSB Certificate proceeding consented to the incorporation of the permits they had already issued into the EFSB Certificate. *See id*.

[138] *See* EFSB Petition to Construct Final Decision at 8.

[139] *See* Silverstein Affidavit at 10.

[140] *See* EFSB Certificate Final Decision at 4.

[141] *See id.*

[142] *See id.*

[143] *See* Silverstein Affidavit at 5, 9-10.

[144] *See id.* at 5.

down date on the Facility and provided for annual declining limits on carbon dioxide emissions.[145]

On February 20, 2014, at its public meeting, the EFSB unanimously decided to adopt the settlement as a condition to the EFSB Certificate sought by Footprint.[146] The EFSB subsequently issued a Final Decision approving Footprint's petition for an EFSB Certificate on February 25, 2014.[147] The EFSB Certificate approval was not appealed. As a result, all seven major state and local permits became final and non-appealable.[148] Six individuals nevertheless attempted to appeal the approval of the Major Comprehensive Air Quality Plan (3rd required permit discussed above), but this appeal was dismissed as moot because of the EFSB Certificate.[149]

C. Notwithstanding All of Footprint's Efforts, an Appeal of One Permit Caused Delays Outside of Footprint's Control

As a result of Footprint's diligence, by late February 2014, only one permit had not been finalized—the federal Prevention of Significant Deterioration ("PSD") (4th required permit discussed above).[150] It had not been approved until January 30, 2014.[151] Notwithstanding the settlement with the Conservation Law Foundation, on March 3, 2014 four individuals with

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145 *See* CLF Settlement Agreement at 4-6; *see also* CLF Press Release.

146 *See* EFSB Certificate Final Decision at 5.

147 *See id.* at 26.

148 *See id.* at 26; *id.*, Ex. A at 5.

149 *See In the Matter of Footprint Power Salem Harbor Dev. LP*, MassDEP OADR Docket No. 2014-004, File No. X254064, Final Decision of Massachusetts Department of Environmental Protection Commissioner David W. Cash (June 2, 2014).

150 *See* Silverstein Affidavit at 11. Again, even though this is a federal permit under the Clean Air Act, it is issued by the Massachusetts Department of Environmental Protection.

151 *See* Massachusetts Department of Environmental Protection Letter to Footprint regarding Footprint Power Salem Harbor Development LP Air Quality Plan Approval and Prevention of Significant Deterioration Permit Transmittal No. X254064, Application No. NE-12-022 (Jan. 30, 2014) (approving and enclosing the PSD Permit), *available at* http://www.mass.gov/eea/docs/dep/air/approvals/final2014/fpshcvrltr14.pdf.

primarily environmental concerns filed an appeal with the federal Environmental Appeals Board.[152] The state EFSB Certificate could not override this federal appeal.[153]

The delays caused by the appeal of the PSD permit are entirely outside of Footprint's control. Despite Footprint's best efforts, obtaining a PSD permit—even if it is not appealed—necessarily takes time. As the EPA has stated, applying for a PSD requires at a minimum that (i) the applicant demonstrate it is utilizing the Best Available Control Technology; (ii) permit an extensive air quality analysis; (iii) perform any additional impacts analysis; and (iv) allow public participation.[154] According to the EPA, this involves a five-phase process that includes "(1) pre-application, (2) application, (3) draft permit preparation, (4) public participation, and (5) final decision to issue or deny a PSD permit."[155]

Each of these phases can take a substantial amount of time, even where, as here, an applicant acts expeditiously. For example, EPA Region 9 has estimated that the draft permit preparation stage alone "may take from six months to a year from the time the application is deemed complete."[156] In Footprint's case, the Massachusetts Department of Environmental Protection took nearly 9 months to complete the draft permit application.[157] That is certainly not

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[152] *See* PSD Petition for Review.

[153] *See* EFSB Certificate Final Decision at 23-24 (finding that the PSD is a federal permit that is outside the Board's authority under the Certificate statute and "[a]ccordingly, the Siting Board will not include the requested PSD Permit in the Certificate issued in this proceeding").

[154] *See* EPA Overview of the Prevention of Significant Deterioration Program (describing program in Region 9 but requirements for this federal permit are essentially the same in Region 1), http://www.epa.gov/region9/air/permit/psd-public-part.html (last visited Oct. 2, 2014).

[155] *See* EPA Region 9's PSD Permitting Process (although this details the process in Region 9, essentially the same process is applicable in Massachusetts to obtain this federal permit), http://www.epa.gov/region9/air/permit/psd-issuing.html (last visited Oct. 2, 2014).

[156] *Id.*

[157] *See* Massachusetts Department of Environmental Protection Draft PSD Permit for Footprint Power Salem Harbor Development LP, Application No. NE-12-022, Transmittal No. X254064 (Sept. 9, 2013), *available at* http://www.mass.gov/eea/docs/dep/air/approvals/draft/footprint-drpsd.pdf.

outside of the expected range—in fact it is right in the middle—and for a project of this size it is arguably slightly faster than usual.

The public participation stage can also be very time consuming. *First*, a public comment period of around 30 days is required—longer if the issuing agency determines there is significant public interest.[158] In Footprint's case, that comment period commenced the very same day that the draft permit application was completed by the Massachusetts Department of Environmental Protection, although it was subsequently extended.[159] The comment period lasted until the public hearing on October 10, 2013, or roughly 60 days, which is more than twice the normal 30-day average (a factor that is within the Massachusetts Department of Environmental Protection's control, not Footprint's).[160] After carefully considering all comments, the Massachusetts Department of Environmental Protection provided a written response, revised the draft permit and decided to issue a final permit, which it did on January 30, 2014, around three and a half months after the close of the public comment period.[161] Thus, Footprint was able to obtain a PSD from the Massachusetts Department of Environmental Protection within 13 months of submitting its initial application.

Obtaining a final PSD permit within 13 months of the date of application is a substantial feat considering that this process can often take years to navigate in Massachusetts. For example,

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[158] *See* EPA Region 9's PSD Permitting Process (although this details the process in Region 9, essentially the same process is applicable in Massachusetts to obtain this federal permit), http://www.epa.gov/region9/air/permit/psd-issuing.html (last visited Oct. 2, 2014).

[159] *See* Massachusetts Department of Environmental Protection Press Release, Public Comment Extended Three Weeks on Draft Air Quality Permits for Proposed Natural Gas-Fired Power Plant in Salem (Oct. 3, 2013), *available at* http://www.mass.gov/eea/agencies/massdep/news/releases/extended-public-comment-on-footprint-power-permit.html.

[160] *See* Massachusetts Department of Environmental Protection Responses to Comments on Footprint Draft PSD Permit, Application No. NE-12-022, Transmittal No. X254064, *available at* http://www.mass.gov/eea/docs/dep/air/approvals/final2014/fpshrtc4.pdf.

[161] *See id.*; Final Footprint PSD Permit, Application No. NE-12-022, Transmittal No. X254064 (Jan. 30, 2014), *available at* http://www.mass.gov/eea/docs/dep/air/approvals/final2014/cpa-footprint14.pdf.

in the case of the Pioneer Valley Energy Center—a 431 MW combined-cycle facility to be built in Westfield, MA—the process took nearly *3½ years*.[162] Likewise, the Cape Wind Energy Project—an offshore wind generation project being developed near Cape Cod, MA—took more than two years from the date of application to obtain a final PSD permit and roughly another five additional months to resolve an appeal to the EAB.[163] Footprint was able to obtain a final PSD permit substantially faster than both of these facilities despite having a larger, non-renewable project in a more controversial location (near the waterfront and within the NEMA/Boston zone). Of course, neither of these facilities had participated in the Forward Capacity Market, nor were they determined to be needed for reliability.

Despite Footprint's impressive effort, however, more than a month after obtaining the PSD permit—on the last possible day, March 3, 2014—four individual "residents of Salem and other nearby towns" filed an appeal with the EAB, thus halting any further progress.[164] Moreover, these four individuals have resisted all of Footprint's reasonable efforts to resolve the matter (as it was able to do with the other permits and the appeals by CLF).[165] These four individuals were unwilling to accept *any* settlement that involved development of the Facility, despite the NEMA/Boston zone's imminent need for the Facility's megawatts.[166]

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[162] *See* Pioneer Valley Energy Center PSD Application (Nov. 24, 2008) and Final Pioneer Valley Energy Center Final PSD (Apr. 12, 2012), *both available at* http://www.epa.gov/region1/communities/nsemissions.html.

[163] *See* Cape Wind Energy Project PSD Application (Dec. 17, 2008); Final Cape Wind Energy Project PSD Permit (Jan. 7, 2011); Cape Wind Energy Project Notice of Final PSD Issuance (June 2, 2011), *all available at* http://www.epa.gov/region1/communities/nsemissions.html.

[164] *See* PSD Petition for Review.

[165] *See* Silverstein Affidavit at 5, 11.

[166] *See id.* at 5.

Although PSD permit appeals are given priority by the EAB, it still took six months to resolve.[167] Footprint could do nothing more to expedite a decision. And, with a pending PSD appeal, it was impossible for Footprint to begin construction on the Facility (due to the statutory stay) or to close on financing.[168] Footprint just had to wait.

While it was waiting, Footprint did shut down the old Salem Harbor station on May 31, 2014, in accordance with previous commitments entered into by the prior owner, Dominion. Footprint also began site demolition activities and related efforts, but without final permits and financing it became impossible for Footprint to complete construction in time for its June 1, 2016 Capacity Supply Obligation.[169] Footprint would have met its deadline absent this final appeal.[170]

The Environmental Appeals Board recently rejected the PSD permit appeal by order dated September 2, 2014—six months to the day after the appeal was filed.[171] It found the appeal to be entirely meritless.[172]

D. Footprint Incurred Significant Costs in Its Efforts to Promptly Navigate the Permitting Process

As of June 2014, Footprint has invested approximately $29 million in development costs,[173] including $400,000 of which it spent before it even acquired the Salem Harbor facility.[174]

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[167] *In re ConocoPhillips Co.*, PSD Appeal 07-02, Order (EAB Sept. 26, 2007) (noting the Board's ongoing practice of assigning PSD permit appeals the highest priority on its docket, relative to other appeals where resolution of the appeal is not a prerequisite to a facility's construction or operation); *see* Silverstein Affidavit at 11.

[168] *See* Silverstein Affidavit at 12-13.

[169] *See id.* at 13-14.

[170] *See id.* at 11.

[171] *See* EAB Order.

[172] *See id.*

[173] These development costs are limited solely to third-party costs and do not even include the substantial investment in time and money by Footprint's principals or the plant employees working on the project, nor do they include site acquisition, demolition or remediation expenses—all of which are being borne by Footprint.

[174] *See* Silverstein Affidavit at 13-14.

A substantial portion of these costs were incurred in connection with Footprint's efforts not only to navigate the regulatory process but to do so on an expedited basis.

E. There Is Nothing More Footprint Could Have Done to Complete the Permitting Process Any Earlier

As all of the above demonstrates, the delay in Footprint's ability to meet the start of its June 1, 2016 Capacity Supply Obligation is entirely outside of Footprint's control. Including before it purchased the site, Footprint did everything within its power to complete the permitting process in time to obtain financing and complete construction. The actions of others—four individuals appealing a single federal permit, notwithstanding an earlier settlement with like-minded parties—caused the delay.

III. THE DEFERRAL IS CRITICAL TO THE CONSTRUCTION OF THE FACILITY

The delays associated with resolving the appeal of the PSD permit have impaired Footprint's ability to procure the financing necessary to actually construct the Facility. Without a deferral, these delays will have effectively reduced the Facility's capacity revenue lock-in period from five to four years. Five years is barely enough to finance a new merchant project in New England and, in fact, the lock-in period recently was increased to seven years.[175] Four years is not enough. Thus, the deferral is critical to ensuring that the project can be built.

As is the case with the development of most projects of this size, Footprint is relying on financing in order to obtain the nearly $1 billion necessary to actually construct the Facility.[176] Potential investors in such projects require that the project will have some locked-in revenue

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[175] *See ISO New England Inc.*, 147 FERC ¶ 61,173 at P 56 (granting ISO-NE's request to extend the lock-in period from five to seven years because, among other things, the "Filing Parties have sufficiently demonstrated that, in the circumstances here, extending the lock-in period is an appropriate way to provide investor assurance") (rehearing requested). This change will go into effect in FCA-9, which is scheduled to be run in February 2015 for commitments starting on June 1, 2018.

[176] *See* Silverstein Affidavit at 12-13.

stream during its initial period of Commercial Operation. Unfortunately, pricing certainty for only four years of capacity payments does not provide enough of a stable revenue stream to make financing of a project of this size attractive to potential financiers, particularly in New England where no other merchant generator has built a project relying solely on the FCM.[177] Thus, prior to resolution of the PSD permit appeal to the EAB and issuance of the Commission's order approving the ISO-NE Deferral Filing, Footprint simply was not in a position to finalize the necessary financing.

With the denial of the EAB Appeal and the Commission's approval of the Deferral Process, Footprint believes that it is now in a position, upon approval of this application, to procure the long-term financing required to construct the facility.[178] In a project of this magnitude, long-term investors have demonstrated a low risk tolerance. Until Footprint had a clear path to financial close, it was not in a position to seek a deferral, and that path could not be illuminated until the Commission issued its deferral order. Footprint now believes it has a clear path to obtaining financing, but an approved deferral is essential.[179]

The use of financing to develop new infrastructure assets is not unusual or unanticipated, particularly for a merchant project. Nor is the fact that a stable revenue stream will be required to obtain such financing. Indeed, the Commission explicitly recognized that the five-year lock-in

[177] *See id.*; Warner Affidavit at 4. Moreover, those who participated in the last wave of merchant generation in New England at the turn of the century faced bankruptcy due to the failure of earlier efforts to provide for a stable New England capacity market. *See, e.g.*¸ *Blumenthal v. NRG Power Mktg., Inc.*, 103 FERC ¶ 61,344 at PP 5-6 (2003) (discussing certain potential impacts of NRG bankruptcy).

[178] *See* Warner Affidavit at 3.

[179] *See id.* at 3-4.

"is intended to provide predictable revenues and facilitate financing for new capacity."[180] Footprint's experience has demonstrated that the Commission's determinations were not wrong.

PARTIES AND COMMUNICATIONS

As described in greater detail above, Footprint is a private merchant generator that is developing a new 674 MW quick-start, natural gas-fired facility at the site of the old Salem Harbor Power Station.

Correspondence and communications in this proceeding should be addressed to the names in the signature block below.

STANDARD OF REVIEW

This filing is submitted pursuant to section 205 of the FPA and ISO-NE's Commission-approved Deferral Process. Under section 205, the Federal Energy Regulatory Commission should approve a filing if it is "'just and reasonable.'"[181] For all of the reasons stated above, the deferral requested herein is just and reasonable.

WAIVER OF PART 35 FILING REQUIREMENTS

Footprint respectfully requests that the Commission waive the section 205 filing requirements set forth in Part 35 of the Commission's regulations, 18 C.F.R. Part 35 *et seq.*, to the extent such filing requirements are applicable. As the D.C. Circuit has held, decisions over waiver are generally within FERC's discretion as "'Congress, through § 205, has clearly delegated waiver discretion to the Commission and not to the courts.'"[182] Part 35 of the Commission's regulations, 18 C.F.R. Part 35 *et seq.*, sets forth, among other things, certain

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[180] *Devon Power LLC*, 115 FERC ¶ 61,340 at P 16 (2006).

[181] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) *(*quoting *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984)).

[182] *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007) (citation omitted).

default filing requirements for a filing made under FPA section 205. The Commission has previously found good cause to waive such filing requirements where, for example, the information was nonexistent or had limited application to the proceedings.[183]

Such default filing requirements should not apply where, as here, the Commission has specifically indicated the criteria that must be satisfied to obtain the requested relief.[184] In approving ISO-NE's proposed Deferral Process, the Commission adopted the specific standards therein, which identify the three specific criteria a deferral application must satisfy. Footprint has fully addressed each of those specific requirements above and thus has satisfied the specific requirements necessary to obtain a deferral under the Commission-approved Deferral Process provided in ISO-NE's Tariff.[185] Accordingly, the Commission can and should waive its Part 35 filing requirements because those default requirements would require Footprint to submit information that is both nonexistent and irrelevant to these proceedings.

[183] *See, e.g., S. Co. Servs., Inc.*, 46 FERC ¶ 61,007 at 61,037 (1989) (granting request to waive certain filing requirements of section 35.13 because they "have limited application" to the issues); *Va. Elec. & Power Co.*, 31 FERC ¶ 61,197 at 61,405 (1985) (granting request to waive section 35.13 filing requirements because "section 35.13 does not require the filing of nonexistent information").

[184] Moreover, this deferral pursuant to ISO-NE's proposed Rule Change is associated with the FCM and not traditional "rates" thus, to the extent necessary, further supporting Footprint's requested waiver of the Part 35 filing requirements.

[185] *See* ISO-NE Tariff § III.13.1.10.

CONCLUSION

Although Footprint has exercised all reasonable diligence in developing the Facility, for reasons beyond Footprint's control, the Facility will not reach Commercial Operation by the start of the Capacity Commitment Period—June 1, 2016. Without a deferral, Footprint will not be able to build the Facility. As a recent reliability study by ISO-NE demonstrates, the Facility is needed to address reliability needs in the Boston area. Accordingly, Footprint submits that it has satisfied the criteria for obtaining a deferral under the Commission-approved Deferral Process and that a deferral is otherwise just and reasonable.

Footprint therefore respectfully requests that the Commission defer the start of Footprint's Capacity Supply Obligation until June 1, 2017.

Respectfully submitted,

/s/

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October 7, 2014

APPENDIX A

The Chapter 91 Variance: A Case Study of Regulatory Complexity

As an example of the complexity associated with obtaining even just one of the requisite permits, below is the Massachusetts Department of Environmental Protection's description of the procedure for obtaining a variance under Chapter 91:[186]

> **ENF Filing** - Prior to filing an application for a Chapter 91 license for a nonwater-dependent use project, the proponent must file an Environmental Notification Form (ENF) with the Massachusetts Environmental Policy Act (MEPA) Unit. If the project exceeds the MEPA thresholds set forth in 301 CMR 11, a copy of the ENF Certificate must be included with the Chapter 91 application. Additionally, if an EIR (Environmental Impact Report) is required, certification of said report must be obtained before [the Massachusetts Department of Environmental Protection] may publish public notice of a Chapter 91 application.
>
> **Chapter 91 Application Filed** - Upon receipt of a license application, the Waterways Regulation Program performs a preliminary review to determine its accuracy and completeness. . . .
>
> **Determining Water Dependency** - Once an application is assigned to a reviewer, the Waterways Regulation Program will classify the project as either water-dependent or nonwater-dependent. . . .
>
> **Public Notice** - Following determination of water-dependency, the Waterways Regulation Program sends a notice of license or permit application to the applicant or his/her representative for publication and distribution to property abutters and to certain municipal, state, and federal officials or agencies. . . . The applicant is required, at his/her own expense, to publish the notice in one or more newspapers that have general circulation in the area affected by the project. Publication of the notice begins a 30 day public comment period (15 calendar days for permit applications) during which the Waterways Regulation Program will accept written comment from any person.
>
> **Public Hearing** - In the case of nonwater-dependent projects, the Department will hold a public hearing within the city or town where the project is located.

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[186] Despite the fact that the new Facility is more efficient, cleaner and is being built on the same site as the old Salem Harbor facility (although taking up less than 1/3 of the area), Footprint had to get a variance under Chapter 91 for the Facility because Chapter 91 prohibits the development of such industrial facilities that are not dependent on water use without a variance regardless of historical usage. Under Chapter 91 it simply does not matter that the new, cleaner, air-cooled (thus nonwater-dependant) Facility was actually replacing a dirtier water-cooled (thus water-dependent) facility.

> **Written Determination** - For nonwater-dependent projects and for water-dependent projects [the Massachusetts Department of Environmental Protection] intends to deny, the Department will issue a written determination of its intent to issue or deny a license. . . .
>
> **Appeal Period** - Following the issuance of the Written Determination, there is a 21-day appeal period. . . .
>
> **File Completion** - Upon expiration of the public comment period, the Waterways Regulation Program awaits receipt of any outstanding information required to complete the application. In addition, the Waterways Regulation Program will request written response from the applicant to written comments received during the comment period. Upon receipt of this information, the file will be deemed administratively complete and the final regulatory and technical review process begins. During technical review, the Waterways Regulation Program reviews the project to ensure conformance with the standards governing all projects in 310 CMR 9.31-9.50.
>
> **License Issuance and Fee Payment** - If the Department decides to issue a license, the applicant is notified in writing of any required fees. . . . Once payment is made, the license will be issued.
>
> ********[187]

As the above demonstrates, not only is this a complicated process, but Footprint could not even begin this process until after it obtained a MEPA Certificate. Footprint applied for its MEPA Certificate at the time it acquired the Salem Harbor Facility in August 2012.[188] It did not obtain the final certificate, however, until roughly 10 months later.[189] Although Footprint understands this is among the fastest any generating facility has ever obtained a MEPA Certificate,[190] this still means that Footprint was not even legally eligible to apply for a Chapter 91 Variance until roughly 10 months after it acquired Salem Harbor.

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[187] *Available at* http://www.mass.gov/eea/agencies/massdep/water/watersheds/chapter-91-the-massachusetts-public-waterfront-act.html.

[188] *See* n.77, *supra*.

[189] *See* Silverstein Affidavit at 6-7.

[190] It is estimated that obtaining a MEPA Certificate normally takes "at least one year." *See, e.g.*, Ocean Renewable Energy, *Massachusetts Environmental Policy Act* (June 21, 2012) (noting that "Process Time" for

Moreover, although Footprint was able to obtain a Chapter 91 Variance in less than 6 months from the date of its application, an appeal was filed on the last possible day, November 22, 2013.[191] This appeal became moot when the EFSB Certificate was issued in February 2013. The Chapter 91 Appeal was not finally dismissed as moot until June 2, 2014.[192] Thus, even given Footprint's extraordinary efforts and diligence, it took almost 22 months to obtain a final non-appealable Chapter 91 Variance including satisfying all prerequisites and resolving all appeals.

MEPA approval is "at least one year"), http://www.oceanrenewableenergy.com/content/massachusetts-environmental-policy-act (last visited Oct. 2, 2014).

[191] *See* Silverstein Affidavit at Ex. 3 at 2.

[192] *See id.*

Attachment A

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Footprint Power Salem Harbor Development LP	))	Docket No. ER15-___-000

TESTIMONY OF SCOTT G. SILVERSTEIN
ON BEHALF OF FOOTPRINT POWER SALEM HARBOR DEVELOPMENT LP

I. WITNESS IDENTIFICATION

Q: Please state your name, position and business address.

A: My name is Scott G. Silverstein. I am President and Chief Operating Officer of Footprint Power LLC ("Footprint Power"). Footprint Power indirectly owns over 70 percent of Footprint Power Salem Harbor Development LP ("Footprint"), with the remaining minority interests held indirectly by two individuals who are partners in the development project. My business address is 1140 Route 22 East, Suite 303, Bridgewater, NJ 08807.

Q: Please describe your educational background and professional experience.

A: I have a Bachelor of Arts degree in Political Science with a minor in History magna cum laude from Boston University and a J.D. cum laude from the Georgetown University Law Center. I have over twenty years of experience in the energy sector, which includes, prior to the founding of Footprint Power, working as (i) an associate in the energy practice of Hogan & Hartson LLP's Washington, D.C. office; (ii) Vice President, Chief Regulatory and Asset Optimization Counsel at Sithe Energies, Inc.; (iii) Senior Vice President, Regulatory Affairs at K Road Power Management LLC and EBG Holdings; and (v) President of Energy Market Strategy Group LLC. Peter Furniss—

Footprint Power's Chief Executive Officer—and I founded Footprint Power in October 2009.

II. BACKGROUND

Q: What is the purpose of your testimony?

A: My testimony here is to provide an overview of the facts and circumstances relating to Footprint's acquisition and redevelopment of the Salem Harbor Power Station ("Salem Harbor"). In particular, my testimony describes Footprint's efforts to navigate the federal, state and local regulatory processes associated with developing a new 674 MW quick-start, combined-cycle natural gas facility at the site (the "Facility") and the circumstances relating to certain delays in the development of the Facility.

Q: Please describe the basic business model of Footprint Power.

A: Footprint Power was founded in October 2009 for the purpose of working with stakeholders to develop and implement solutions to the unique environmental, economic and physical implications for owners, communities, grid operators and other stakeholders associated with shutting down aging fossil-fuel generating facilities. Our theory was, and remains, a simple one—that the best way to ensure the successful shut down, remediation, redevelopment and repurposing of existing, obsolete coal- and oil-fired power plants is to work together with the incumbent owners of those facilities and communities in which they are located to plan a new life for the sites.

III. FOOTPRINT'S ACQUISITION OF SALEM HARBOR AND ITS PLANS FOR A NEW FACILITY

Q: Please describe how Footprint came to acquire the Salem Harbor Power Station.

A: In early 2010, Footprint Power identified the aging coal- and oil-fired Salem Harbor Power Station, then owned by Dominion Energy Salem Harbor, LLC ("Dominion"), as a facility that was likely to be retired soon. For a variety of reasons, Footprint Power determined that Salem Harbor was a good potential first target for redevelopment. In April 2010, Footprint Power began meeting with numerous local and regional stakeholders to discuss potential redevelopment of Salem Harbor and gauge potential community support for such a project. Among others, Footprint Power met with business and civic leaders in Salem, including Salem's Mayor and members of Salem's legislative delegation, as well as a regional environmental advocacy group—the Conservation Law Foundation ("CLF")—that had historically opposed the existing Salem Harbor facility. Footprint also began discussing the Facility with the Salem Alliance for the Environment ("SAFE")—a local environmental advocacy group—as a result of its meetings with CLF. Footprint Power's discussions with SAFE not only helped Footprint improve its redevelopment plans but also resulted in strong support for the Facility from SAFE. Based in part on the favorable impression Footprint Power got from these preliminary stakeholder meetings, Footprint Power began seriously discussing a possible acquisition of Salem Harbor with Dominion. Following extensive negotiations, Footprint acquired Salem Harbor from Dominion on August 3, 2012.

Q: <u>What are Footprint's general plans for redeveloping Salem Harbor?</u>

A: Footprint is developing a new, more efficient Facility to replace the vintage generating facility at Salem Harbor. Footprint has already performed an extensive subsurface site characterization to identify areas of particular concern for remediation. Footprint is currently in the process of demolishing and remediating the vintage oil- and coal-fired facility. Once demolition and remediation are complete, Footprint will begin construction of the new Facility. The new Facility will be a gas-fired, combined-cycle facility with a maximum capacity of 674 MW, which will include two state-of-the-art, efficient, low emission, quick-start natural gas turbine generators; two steam turbine generators; and two heat recovery steam generators, along with pollution control equipment. The Facility's quick-start capabilities are impressive—about half of the full output of the Facility will be available in 10 minutes, and the entire 674 MW output of the Facility will be available within the next half hour.

Despite these impressive capabilities, the new Facility will still be substantially physically smaller than the previously existing 745 MW facility. It will only cover a roughly 20-acre portion of the 65-acre Salem Harbor site due, in part, to the elimination of any need for a coal pile or fuel-oil storage tanks. Moreover, the new Facility's physical structures will be significantly smaller in dimension; whereas the old Salem Harbor facility included buildings ranging in height up to 175 feet and three stacks that were roughly 250, 430 and 500 feet tall, the new Facility will have a maximum building height of only 126 feet and a single common stack of only 230 feet. Moreover, the

Facility's architecture and landscaping are specifically designed to minimize the Facility's visual impact while also improving its aesthetic appeal.

Q: How have local and regional stakeholders reacted to Footprint's redevelopment plans for Salem Harbor?

A: Although the majority of stakeholders, including the Mayor and other elected officials, the Salem Alliance for the Environment and the Salem Harbor's employees union, have all been supportive of Footprint's plans for Salem Harbor, a very small but vocal minority has opposed development of the new Facility. A handful of individuals had originally joined with the regional environmental advocacy group CLF in appealing several of Footprint's permits, but Footprint was able to successfully address CLF's concerns resulting in a settlement agreement that was executed in February 2014. Negotiation of this settlement was facilitated by the participation of the Mayor of Salem, and senior representatives of the Massachusetts Executive Office of Energy and Environmental Affairs. Following settlement with CLF, however, four individual residents that had originally been allied with CLF continued to oppose the project. These individuals were unwilling to consider any compromise that included the development of any new fossil fuel facility at Salem Harbor. Instead, these individuals argued that any and all new energy resources in the area should be strictly renewable resources notwithstanding current technological limitations, the Salem Harbor site's historical use and the imminent local reliability need.

IV. FOOTPRINT'S EFFORTS TO DEVELOP THE FACILITY

Q: When did Footprint first begin to take action to develop the Facility?

A: Footprint first began to take affirmative steps to develop the new Facility while it was still negotiating the acquisition of Salem Harbor with Dominion. During these negotiations Footprint and Dominion entered into a site option agreement which permitted Footprint to take certain initial development steps. First, it allowed Footprint to submit an interconnection request for the new Facility in January 2012 while it was still in negotiations with Dominion. Second, it allowed Footprint at the same time to begin the process of qualifying the Facility for participation in ISO New England's ("ISO-NE") seventh Forward Capacity Auction ("FCA 7"). Indeed, roughly eight months before it even acquired the Facility, Footprint submitted a show of interest in participating in FCA 7 to ISO-NE. Footprint eventually bid the Facility into FCA 7 in February 2013 and it cleared in merit, which is—to my knowledge—the first and only time as of the date of this affidavit that a new, unsubsidized or non-state sponsored non-intermittent New Resource has cleared in ISO-NE's Forward Capacity Market.

Q: When did Footprint first begin the process of applying for the necessary permits and regulatory approvals to build the Facility?

A: Footprint began the extensive work necessary to prepare and file the requisite permit applications while it was still in the process of negotiating the eventual acquisition of Salem Harbor with Dominion. We engaged permitting counsel and technical experts immediately upon submitting the Show of Interest for FCA 7. These consultants immediately began to prepare the myriad studies and detailed analyses required to submit state, local and federal permits. As a result, Footprint was able to apply for the first two

major state permits on the very same day that it acquired Salem Harbor, August 3, 2012.[1] Specifically, on July 31, 2012 (several days before it even acquired Salem Harbor), Footprint filed an Environmental Notification Form under the Massachusetts Environmental Policy Act ("MEPA") and on the day the site was acquired it filed a Petition to Construct with the Massachusetts Energy Facilities Sitting Board ("EFSB").

After an exhaustive process that included several rounds of public comment, a Draft Environmental Impact Report and a Final Environmental Impact Report, Footprint was issued a MEPA Certificate by the Massachusetts Secretary of Energy and Environmental Affairs on May 17, 2013. On June 17, 2013, the Secretary also issued a Public Benefits Determination for the Facility. A true and correct copy of the Secretary's Public Benefits Determination is attached hereto as Exhibit 1.

Similarly, the EFSB granted Footprint's Petition to Construct on October 10, 2013 after an extensive public process that lasted roughly 14 months and included a public hearing in Salem and evidentiary hearings that involved 10 days of testimony over the course of a month as well as two public meetings of the EFSB. My understanding is that in practice this process often takes 16 months or longer, despite the fact that, by statute, the EFSB must grant or deny such petitions within 12 months of filing.

While both of these permit processes took a substantial amount of time, neither of them independently caused any delay to the critical path of the Facility's development.

[1] The various local, state and federal permit applications discussed herein are quite voluminous and thus are not attached as exhibits hereto. If, however, the Commission wishes to review the actual applications I am happy to provide them.

Q: Please briefly describe the major permits that Footprint was required to obtain for the Facility and Footprint's efforts to obtain these permits?

A: In addition to the MEPA Certificate and EFSB Petition to Construct described above, Footprint was required to obtain numerous other major federal, state and local permits in order to build and operate the Facility. Footprint filed for these additional permits on a rolling basis as many required progressively more advanced modeling and analysis to be completed as well as substantially more developed site plans and construction details than those Footprint included in the MEPA certificate application and EFSB petition applications submitted on the date of closing. These permits, listed in the order for which Footprint submitted its applications, include the following:

Major Comprehensive Air Quality Plan: Footprint submitted a Major Comprehensive Air Quality Plan for the Facility to the Massachusetts Department of Environmental Protection on December 21, 2012.

Prevention of Significant Deterioration ("PSD") Permit: As with the Major Comprehensive Air Quality Plan, Footprint submitted an application for this permit to the Massachusetts Department of Environmental Protection on December 21, 2012. Together, the Air Quality Plan and the PSD permit comprise the Facility's air permits.

Massachusetts Chapter 91 Variance: As a prerequisite for applying for this permit, Footprint was required to first obtain a MEPA Certificate. Footprint obtained a MEPA Certificate on May 17, 2013 and applied for a Chapter 91 Variance with the Massachusetts Department of Environmental Protection that same day. A true and correct copy of Footprint's Chapter 91 License is attached hereto as Exhibit 2.

Salem Planning Board Site Review Plan: In order to obtain approval from the Salem Planning Board, Footprint was required to submit near-final details for nearly every aspect of the Facility and Salem Harbor site. Footprint applied for this approval on April 8, 2013.

Salem Zoning Board of Appeal Variance: Even though the new Facility building and stack will be substantially shorter than those of the existing facility, because Footprint's proposed Facility exceeds Salem's maximum zoning height restrictions it was still required to seek a variance from the Salem Zoning Board of Appeal. Footprint applied for this variance on May 29, 2013.

Salem Conservation Commission: Footprint was also required to get approval from the Salem Conservation Commission in order to build the Facility. Footprint filed for this approval on June 13, 2013.

The regulatory process that Footprint faced to obtain all of the above permits was a gauntlet of applications, orders and appeals. A visual chronological demonstration of this process is attached hereto as Exhibit 3.

Q: Did Footprint obtain all of these permits?

A: Yes. Footprint obtained all of the permits it has sought. Each permit that was passed by a multi-member board or commission was granted without a single vote being cast against it.

Q: Were any of Footprint's permit approvals appealed and did the resolution of any such appeals delay Footprint's progress?

A: Yes. A number of these permits were initially appealed by CLF, but those appeals were all resolved as part of Footprint's settlement with CLF. Following

settlement with CLF, however, four individual residents that had originally been allied with CLF continued to object to the Facility and continued to pursue appeals of the requisite permits. With the exception of the PSD permit, these remaining appeals were resolved when Footprint obtained an EFSB Certificate.

Q: <u>What is an EFSB Certificate?</u>

A: A project for which the EFSB has approved a petition to construct may seek an EFSB Certificate if the project is delayed through the denial of any state or local permit or the appeal of any state or local permit. If granted, the EFSB Certificate serves as a composite certificate incorporating all required state and local permits. As a result, a final non-appealable EFSB Certificate resolves any such pending appeals and thus the EFSB Certificate process is sometimes referred to as an override process. In our case, all of the permits had been granted and each of the boards, agencies and commissions whose permits were at issue consented to the incorporation of the permits that they had issued into the EFSB Certificate. Footprint began the process of preparing a Petition to the EFSB for such a certificate immediately after the first appeal of a local Salem permit was filed on July 17, 2013. At that point, the EFSB had voted to approve the Petition to Construct, but had not yet reviewed or approved the written decision evidencing that approval. Although Footprint initially filed a petition for an EFSB Certificate on August 5, 2013, the EFSB determined that it could not consider that petition until after it had issued the written decision approving Footprint's Petition to Construct. Thus, Footprint was not permitted to file its application for an EFSB Certificate until October 11, 2013—the day after the EFSB issued its Final Decision approving Footprint's Petition to

Construct. Footprint's petition for an EFSB Certificate was granted on February 25, 2014. The EFSB Certificate was not appealed, thus rendering all state and local permits final and non-appealable.

Q: <u>Did the EFSB Certificate resolve all potential appeals?</u>

A: No. The EFSB Certificate mooted the then-pending appeals of the Salem Planning Board and Salem Zoning Board of Appeal approvals as well as potential challenges to the state permits issued by the Massachusetts Department of Environmental Protection. Although the Massachusetts Department of Environmental Protection also issued the PSD permit, it did so under authority delegated to it by Region 1 of the U.S. Environmental Protection Agency ("EPA"). As a result, the EFSB concluded that it did not have authority to include this federal permit within the scope of its override Certificate.

Q: <u>Was the PSD permit appealed?</u>

A: Yes. Four individuals appealed the issuance of the PSD permit to the Environmental Appeals Board ("EAB"), an independent adjudicatory body within the EPA. Despite Footprint's best efforts and its request that the EAB expedite its consideration of the appeal, that appeal was not resolved until September 2, 2014 when the EAB dismissed the appellants' petition for review. This PSD permit appeal to the EAB is what ultimately delayed Footprint's ability to complete the Facility prior to its June 1, 2016 capacity commitment commencement. Indeed, absent this final appeal of the PSD Permit, Footprint would have likely met its deadline and a deferral would not have been necessary.

Q: <u>Why did the appeal of the PSD Permit to the EAB delay Footprint?</u>

A: Footprint is a true merchant generator. It is not a subsidized or state-sponsored project and it does not have the support of a large parent utility. Instead Footprint is relying entirely on capacity auction revenue to support the financing necessary to obtain the nearly $1 billion necessary to construct the Facility. Due to the uncertainty associated with the pending appeal of the PSD permit appeal, regardless of its lack of merit, until that appeal was finally resolved it was impossible for Footprint to procure the necessary financing or begin construction. Moreover, the appeal of the PSD permit to the EAB, by statute, stays the effectiveness of the PSD permit. And a project cannot begin construction until it has an effective PSD permit. As a result, even if Footprint had the financial wherewithal to begin construction, it was legally barred from doing so during the pendency of the EAB appeal.

The PSD permit appeal has now been dismissed and the uncertainty has been removed, but the delay associated with resolving that appeal continues to interfere with Footprint's ability to procure the necessary financing. After clearing FCA 7, Footprint elected a five-year lock-in of its capacity payments. As a result of the delays associated with the appeal of the PSD Permit, however, the Facility will not achieve Commercial Operation prior to the commencement of the 2016-2017 capacity commitment period. Thus, for this first year of the five-year lock-in period Footprint may not be entitled to the complete and stable revenue stream that this locked-in capacity payment represented and Footprint may only be able to obtain four (not five) years of complete locked-in capacity payments. Potential investors in merchant energy projects such as the Facility require

some locked-in revenue stream and four years of capacity payments is simply not enough of a stable revenue stream to make financing of a merchant project in New England of the Facility's size feasible. This is particularly true given that no other merchant generator has built a project in New England based solely on Forward Capacity Market revenue. Accordingly, without a deferral of its capacity supply obligation, the delays associated with the PSD permit appeal may provide the appellants with a way to defeat the project regardless of the EAB's determination in September 2014 that the appeal of the PSD permit lacked merit.

Despite the uncertainty caused by the pending PSD permit appeal and the delays associated with resolving those appeals, Footprint has continued to take steps to move the project toward the finish line. Among other things, Footprint shut down the old Salem Harbor station on May 31, 2014 as per its commitment to Dominion and subsequently has begun demolition of the old facility and remediation of the site.

Q: <u>What developmental costs has Footprint incurred in connection with its efforts to build the Facility?</u>

A: Although Footprint is relying substantially on financing to obtain the roughly $1 billion necessary to construct the facility, it has nonetheless expended substantial out-of-pocket development costs in order to develop the Facility. Indeed, even before Footprint had even acquired Salem Harbor it had already incurred approximately $400,000 in development costs, which are limited solely to third-party costs and do not even include the substantial investment in time and money by Footprint's employees. Footprint has continued to invest such development costs in the Facility. By the time it filed its second round of permit applications in December 2012, Footprint had already spent more than $3

million on such non-refundable development costs, with no guarantee that it would even clear in FCA 7. As of June 2014, Footprint has invested approximately $29 million in development costs. All of these costs are third-party, out-of-pocket costs. Not included within these costs are the cost of acquiring the site, demolishing the existing facility, site remediation, or any corporate overhead or salaries. A breakdown and chronological summary of these costs is attached hereto in Exhibit 3.

V. ISO-NE'S RELIABILITY DETERMINATION

Q: Has ISO-NE determined that the Facility is needed for reliability in the 2016-2017 Capacity Commitment Period as well as the subsequent 2017-2018 period?

A: Yes. Pursuant to a letter dated July 8, 2014 Footprint notified ISO-NE that it intended to seek a one-year deferral of its Capacity Supply Obligation pursuant to ISO-NE's proposed deferral process, which was then pending before the Commission pursuant to Docket No. ER14-2440-000. A true and correct copy of Footprint's July 8, 2014 notification to ISO-NE is attached hereto as Exhibit 4. On August 18, 2014 ISO-NE sent Footprint a letter notifying Footprint that there was a reliability need for the Facility. A true and correct copy of ISO-NE's August 18, 2014 letter is attached hereto as Exhibit 5.

VI. CONCLUSION

Q: Does this conclude your testimony?

A: Yes.

Exhibit 1

The Commonwealth of Massachusetts
Executive Office of Energy and Environmental Affairs
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Boston, MA 02114

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GOVERNOR

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LIEUTENANT GOVERNOR

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June 17, 2013

PUBLIC BENEFITS DETERMINATION
OF THE SECRETARY OF ENERGY AND ENVIRONMENTAL AFFAIRS

PROJECT NAME	: Salem Harbor Station Redevelopment
PROJECT MUNICIPALITY	: Salem
PROJECT WATERSHED	: North Coastal
EEA NUMBER	: 14937
PROJECT PROPONENT	: Footprint Power, LLC
DATE NOTICED IN MONITOR	: April 10, 2013

Consistent with the provisions of *An Act Relative to Licensing Requirements for Certain Tidelands*, I hereby determine that the above-referenced project will have a public benefit. A Certificate on the Final Environmental Impact Report (FEIR) was issued on May 17, 2013.

Project Description

As described in the FEIR, the project consists of demolition of an existing coal-fired power plant, remediation of the site, and construction of a new 630 megawatt (MW) nominal electrical generating facility and associated infrastructure and equipment on a 65-acre site in Salem. The facility will be fired by natural gas and include "quick-start" capability (ability to generate 300 MW within 30 minutes of start-up and 630 MW within 60 minutes). Use of duct-firing under summer conditions, will increase capacity by 62 MW for a total of 692 MW. The project will have the capacity to generate 5.1 million megawatt hours (MWh) annually. The facility will be constructed on approximately 20 acres of the northwestern portion of site. The facility stacks will be contained in a common collar with a height of 230 feet.

The project includes construction of several buildings comprising approximately 115,000 square feet (sf) with heights ranging from 25 feet to 125 feet. The 8,188-sf Administration Building will be integrated into a landscaped berm along the western edge of the property. The 10,282-sf Operations Building will be incorporated into the Steam Turbine Generator (STG) Building and will include an

office, maintenance shop and locker rooms. The existing guard house, located adjacent to the access drive, will be retained as a guard house. In addition, an existing building located along the northern access drive will be repurposed as a visitor's center. A continuous landscaped berm is incorporated into the project design. On the western and southern sides of the facility it will rise to 25 feet and will provide a landscaped buffer and acoustic barrier between the street and the facility. On the eastern edge, the berm will have a height of 15 feet and will provide a visual buffer from the ocean side.

The Proponent will operate the existing power plant until its scheduled shut down on June 1, 2014. Construction is proposed to begin in June 2014 and will extend for approximately 23 months. Demolition will include removal of all above-ground features of the existing facility, including power plant buildings and equipment, stacks and precipitators, coal handling equipment, storage tanks and associated appurtenances such as spill prevention berms; and intake screen and pumphouse structures. The facility will include two quick-start natural Gas Turbine Generators (GTG); two STGs; two heat recovery steam generators (HRSG), including pollution control equipment; administrative/ warehouse/shops space; a service bay; an auxiliary bay; a water treatment facility; step-up transformers; an ammonia storage tank; two water tanks; and, air cooled condensers (ACC). The facility is not dual-fueled and, therefore, does not have the potential to use significant amounts of diesel fuel. It will include a diesel-fueled back-up generator.

The design includes a 34,000 gallon above-ground ammonia (NH_3) storage tank to the east of the building structures and shielded from street view. The single-wall construction steel tank will contain 19 percent aqueous (NH_3) used for pollution control processes. The tank, ammonia transfer pumps, valves and piping, will be located within a concrete containment structure (dike). The diked area will be located within another enclosure.

The facility requires an interconnection with the NGRID switchyard located in the northeast corner of the site. The Proponent will construct a new facility switchyard, a 115 KV underground cable connection from each of the step-up transformers to the new facility switchyard, and overhead 115 kV transmission lines between the facility switchyard and the NGRID switchyard on three 95-foot high steel poles or, alternatively, subsurface feeder connections.

Natural gas will be delivered to the site from the HubLine pipeline in Salem Sound. The pipeline will be owned and operated by Spectra Energy. Spectra will conduct the federal, state and local approval and permitting process for the pipeline. A 16-inch pipeline will enter the site in the vicinity of Derby Street and Webb Street and extend to an on-site metering and regulator station in the southeastern corner of the facility, east of GTG #2. The Proponent will install a pipeline from the meter station to the GTGs, HRSG duct burners, and the auxiliary steam boiler.

Vehicular access to the site will be provided via Fort Avenue. The existing access road will be retained for primary access. Secondary access will be provided from the northwest corner of the site. New on-site access roads will be constructed to and around the new facility. This will include more than 2,500 linear feet (lf) of paved roads with widths of 20 feet to 30 feet. Turning radii will be designed to facilitate access by trucks, equipment and emergency vehicles.

The project does not include redevelopment of the remaining 45 acres of the site. Information provided in previous MEPA filings and the FEIR is limited to construction of the new facility and demolition and remediation necessary to support it. The Proponent indicates that redevelopment will be

guided through consultation with the City of Salem and stakeholders. Redevelopment of the site will be addressed in a subsequent Notice of Project Change (NPC).

Project Site

The 65-acre site is located at 24 Fort Avenue in northeast Salem. It is bordered by Fort Avenue and the South Essex Sewerage District (SESD) wastewater treatment plant to the north, Salem Harbor and Cat Cove to the east and northeast, the Blaney Street Ferry terminal and several mixed-use buildings to the southeast, and by Derby Street and Fort Avenue to the west. Residential neighborhoods and the Bentley Elementary School are located west of the site across Fort Avenue and Derby Street. The majority of the site is zoned Industrial and within the Salem Harbor Designated Port Area (DPA). A small area on the northeastern edge of the site is not included in the DPA. Another small area (less than two acres) on the northwest corner of the site is zoned Residential Two-Family.

The site has been used for power generation since 1951. Since 2005, the Salem Harbor power plant was owned and operated by a subsidiary of Dominion Resources, Inc. Units 1 and 2 were removed from service on December 31, 2011. Units 3 and 4 are scheduled to be shut down on June 1, 2014. Major facilities associated with power generation operations include a power house building (including Units 1 through 4, fan house, boiler room and turbine room), an aboveground fuel oil tank farm and associated piping transfer system, a coal storage pile and coal moving equipment, a marine terminal, and a wastewater treatment system. Three small warehouse buildings are located north of the power plant building. West of the power plant building, the site includes a 10-acre easement for a 115 kV switchyard, substation and power lines. The switchyard and power lines are owned by NGRID. Primary access to the site is provided via a driveway from Fort Avenue just north of the Fort Avenue/Memorial Drive intersection.

The facility uses once-through cooling and is permitted to withdraw approximately 119,000,000 gallons per day (gpd) of water from Salem Harbor. Treated effluent is discharged to Salem Harbor, as authorized by the existing National Pollutant Discharge Elimination System (NPDES) Discharge Permit. An additional 100,000 gpd of water is provided from the municipal system for process and potable water needs. Sanitary waste and laboratory drains discharge to the SESD wastewater treatment facility.

The site includes approximately 45 acres of filled tidelands. Wetland resources on-site (or directly adjacent to it) include: DPA, Land Subject to Coastal Storm Flowage (LSCSF), Coastal Bank, and Rocky Intertidal Shores. A portion of the site is located in the City of Salem Flood Hazard Overlay District. The perimeter of the site (primarily the jetty area) is designated as a high hazard area (V-zone) which is subject to wave action.

The site does not contain any historic resources but several Historic Districts and National Historic Landmarks are located within the vicinity, including the Derby Waterfront Historic District, the Salem Willows Historic District, the Winter Island Historic District, the Fort Pickering Historic Landmark, the Fort Lee Historic Landmark, and the House of Seven Gables Historic Landmark.

Permitting/Jurisdiction

The project is undergoing MEPA review and is subject to preparation of a Mandatory EIR pursuant to 301 CMR 11.03 (7)(a)(1) because it requires State Agency Actions and entails the

construction of a new electric generating facility with a Capacity of 100 or more MW. The project requires an Approval to Construct from the Energy Facilities Siting Board (EFSB). It requires a Major Comprehensive Air Plan Approval and Prevention of Significant Deterioration (PSD) Review, an Air Operating Permit, a Chapter 91 (c.91) License, an Underground Injection Control Permit and an Industrial Sewer Use Permit from the Massachusetts Department of Environmental Protection (MassDEP). In addition, it may require a Beneficial Use Determination (BUD) from MassDEP. It requires an Aboveground Storage Tank Permit from the Department of Public Safety. This project is subject to review under the May 2010 MEPA Greenhouse Gas Emission Policy and Protocol (GHG Policy). The project may require Federal Consistency Review by Coastal Zone Management (CZM).

The project will require multiple permits and reviews by the City of Salem, including a Special Permit (Essential Use) and Height Variance from the Salem Zoning Board of Appeals and Site Plan Review and a Special Permit (Wetlands and Flood Hazard Overlay District) from the Salem Planning Board. Also, it will require an Order of Conditions from the Salem Conservation Commission (or a Superseding Order of Conditions (SOC) from MassDEP in the event the Order is appealed).

The project requires a NPDES Construction General Permit and a NPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity from the U.S. Environmental Protection Agency (EPA). It requires a Notice of Proposed Construction or Alteration to the Federal Aviation Administration (FAA).

The project is not seeking Financial Assistance from the Commonwealth. Therefore, MEPA jurisdiction is limited to the subject matter of required State Agency permits. The numerous permits and approvals required, and the broad scope of the EFSB review, confers broad scope jurisdiction and extends to all aspects of the project that have the potential to cause Damage to the Environment, as defined in the MEPA regulations.

Landlocked Tidelands

Consistent with the provisions of *An Act Relative to Licensing Requirements for Certain Tidelands* (2007 Mass. Acts ch. 168, sec.8) (the Act), which was enacted on November 15, 2007, I *must* conduct a Public Benefits Review for projects in tidelands that are required to file an EIR.

The legislation states the following regarding the Public Benefits Determination:

> "In making said public benefit determination, the secretary shall consider the purpose and effect of the development; the impact on abutters and the surrounding community; enhancement to the property; benefits to the public trust rights in tidelands or other associated rights, including, but not limited to, benefits provided through previously obtained municipal permits; community activities on the development site; environmental protection and preservation; public health and safety; and the general welfare; provided further, that the secretary shall also consider the differences between tidelands, landlocked tidelands and great pond lands when assessing the public benefit and shall consider the practical impact of the public benefit on the development."

The following addresses each of the considerations identified in the legislation.

1. *purpose and effect of the development*

As noted above, the project consists of demolition of an existing coal-fired power plant, remediation of the site, and construction of a new 630 megawatt (MW) nominal electrical generating facility and associated infrastructure and equipment on 20 acres of the site. The facility will employ high-efficiency combustion turbines fueled with natural gas and will incorporate advanced pollution control and monitoring equipment. The remaining 45 acres will be available for redevelopment. Redevelopment will be guided through consultation with the City of Salem and stakeholders and will be subject to MEPA review through the filing of a subsequent Notice of Project Change (NPC).

The project will preserve local tax revenue associated with the site for the City of Salem. It will create approximately 320 construction jobs (on average) and 30 – 40 permanent jobs.

2. *impact on abutters and the surrounding community*

The project site is zoned for industrial uses and is located adjacent to other industrial and commercial facilities, including the SESD and the Blaney Street Ferry Terminal. The project will reduce impacts to abutting residential areas, compared to the previous use, and is designed to minimize noise, air pollution, and visual impacts of the new facility. Redevelopment will not be hindered by significant demolition and remediation costs associated with development of the site and the project design will support water-dependent industry, or other appropriate uses. Visual and physical access to the waterfront will be improved by creating walkways and providing a generous set back between the new facility and the Harbor to facilitate access along the entire waterfront edge of the site. Opportunities to expand port access and waterfront facilities have been identified as a priority by the City of Salem.

3. *enhancement to the property*

The project will enhance the project site through demolition of structures associated with the coal-fired power plant and remediation of the entire site. Furthermore, this significant site work will support redevelopment of the remaining 45 acres of the site because it will not be hindered by these significant demolition and remediation costs. In addition, the new facility is limited to 20 acres of the site and designed to provide generous setbacks from the Harbor. Redevelopment of the site has been identified as a priority by the City of Salem and the state legislature. The project is supported by local officials and state legislators.

4. *benefits to the public trust rights in tidelands or other associated rights*

Because the proposed facility is located within filled tidelands and a DPA, development of the site is guided by the Salem Municipal Harbor Plan (MHP) and the Waterways Regulations (310 CMR 9.00). Uses eligible for licensing in the Industrial Port District section of the DPA are water-dependent industry, marine industrial parks, and temporary uses as defined in the waterways regulations. The project requires a variance from Section 9.21 (2)(a)(2) of the Waterways Regulations which prohibits non-water dependent use of filled tidelands in a DPA. CZM and the City of Salem indicated, during review of the FEIR, that the project meets the intent and the substantive provisions of the Plan and the MHP approval.

The FEIR identified the project's consistency with the criteria for a variance, including a

demonstration that the project serves an overriding public interest and provision of adequate mitigation and compensation for impacts to public interests in tidelands. The facility will provide a reliable source of energy within the NEMA zone, it will remediate the site, provide additional opportunities for redevelopment and preserve a critical portion of the City's tax base. The project has been designed to avoid, minimize and mitigate all associated impacts. It is fueled by clean-burning natural gas and includes state-of-the-art control technologies.

The project will result in minimal, if any, detriments to the interests of the public in waterways associated with the Site. Public access is not typically encouraged within a DPA and the site does not currently provide access. To minimize any impacts to tidelands and preserve opportunities for DPA uses, the facility is limited to a 20-acre portion of the Site, is setback from the waterfront and provides opportunities for redevelopment of the wharf area. The project will provide paths within the landscaped berm along Derby Street and a path that extends from Derby Street towards the Harbor. The design will preserve a view corridor from Derby Street to the Harbor. Setbacks between the facility and the waterfront will support future provision of public access along the site's entire waterfront.

Comments from MassDEP on the FEIR indicated that the proposed benefits appear to be generally consistent for the purpose of the PBD (and will be evaluated during permitting for adequacy with variance criteria). The comments specifically highlight the benefits associated with remediation and preparation of the site to support water-dependent industrial uses.

5. *community activities on the development site*

As noted above, public access will include paths within the landscaped berm along Derby Street and a path that extends from Derby Street towards the Harbor. The design will also support a view corridor from Derby Street to the Harbor and future provision of access along the site's waterfront. Comments from the City of Salem on the FEIR identified provision of pedestrian and vehicular access to the remainder of the site as an important goal for redevelopment. A visitor's center will be provided on the site through re-purposing as a visitor's center.

6. *environmental protection and preservation*

The project consists of remediation and redevelopment of an industrial site. It has been designed to avoid, minimize and mitigate associated impacts including GHG emissions, air pollution, traffic generation, and impacts to wetland resource areas. Measures to avoid, minimize and mitigate potential impacts associated with remediation of the site, construction of the facility, and operation of the facility include: location and design of the facility to minimize potential impacts to residential neighborhoods; state-of-the-art combustion technology, emission controls and reporting equipment to minimize air emissions; noise mitigation including siting of equipment to maximize distance between receptors and noise-producing equipment, enclosing equipment where possible, and use of equipment silencers; elimination of once-through cooling and associated water withdrawal; design and construction of a stormwater management system that incorporates Low Impact Development (LID) techniques; demolition and remediation of site; provision of public access; and, measures to reduce construction period impacts. In addition, the project includes measures to avoid, minimize and mitigate GHG emissions, including fuel choice and technology, installation of a solar photovoltaic (PV) array, and incorporation of energy efficiency measures into the design of the

Administration and Operations buildings.

Air Pollution

- use of a high-efficiency advanced turbine combined cycle technology, emission controls and reporting equipment to minimize all pollutants;
- use of natural gas will limit emissions of PM, SO_2 and HAPs compared to other fossil fuels;
- use of DLN turbine combustors in combination with SCR will reduce NO_X emissions;
- 200 tpy of NO_X Emission Reduction Credits (ERC) will be obtained to meet NSR offset requirements;
- advanced combustor design, combustor practices, and use of a catalytic oxidation system in the HRSG will reduce emissions of CO and VOCs; and,
- quick start capability to minimize all pollutants associated with start-up.

GHG Emissions

- use of combined cycle natural gas turbines;
- $4 million in CO_2 allowances for RGGI offsets;
- solar PV array with potential to offset 175 tpy GHG emissions;
- Administrative Building is designed for LEED Certification at the Platinum level and includes a green roof, geothermal heat pumps for heating and cooling, variable volume ventilation fans, increased insulation to minimize heat loss, lighting motion sensors, climate control and building energy management systems, a 10% reduction for LPD (and identifies the potential for larger reductions), and water conserving fixtures that exceed building code requirements; and
- Operations Building includes a high albedo roof, geothermal heat pumps for heating and cooling; increased insulation to minimize heat loss, daylighting, lighting motion sensors; climate control, building energy management systems, a 10% reduction for LPD (and identifies the potential for larger reductions), a high albedo roof, and water conserving fixtures;
- the Proponent will provide a certification to the MEPA Office indicating that all of the measures proposed to mitigate GHG emissions, or measures that will achieve equivalent reductions (e.g. 56.5 tpy reductions, or 29%, from Administrative Building and Operations Building), are included in the project; and,
- commitment to provide a GHG analysis, prepared consistent with the GHG Policy and Protocol, for the subsequent redevelopment of the site (regardless of whether the proposed redevelopment exceeds EIR thresholds) as part of the NPC.

Noise

- siting of facility equipment to maximize distance between receptors and noise-producing equipment;
- acoustical treatment of combustion and steam turbine buildings;
- locating equipment within enclosures or buildings that provide noise attenuation through layers of insulation and siding;
- use of equipment silencers including a gas turbine inlet silencing package; a stack silencing package to reduce sound pressure levels in each flue of the stack structure, silencers on steam system vents and, as permitted by relevant codes, on safety and relief valves that release high pressure steam;

- gas turbines and steam turbines will be fully enclosed;
- steam turbine insulation will be designed to provide thermal and acoustical insulation;
- large pumps in the HRSG enclosure (boiler feed pumps) will be enclosed in additional acoustical structures as necessary;
- location of piping, valving and control systems within enclosures or underground to limit fluid transfer noise;
- larger fans that operate at slower speeds and shielding of fans by cowlings or other acoustical treatments on the ACCs;
- intake filter houses, transformers, fuel gas compressors and boiler feed water pumps will be wrapped in acoustic barriers;
- acoustically designed barrier walls around transformers to shield sensitive receptors from transformer noise;
- gas compressors and gas metering enclosure will be designed with acoustic silencing; and
- construction of a retaining wall and planted berm will be constructed around the western, southern and eastern edges of the facility to deflect sound.

Construction Period

- a minimum reuse/recycling goal of 50 percent, including potential re-use of coated brick and concrete;
- dust suppression methods during demolition will include pre-cleaning of larger surfaces and structural members prior to demolition, water suppression sprays and misting to prevent airborne particulates, and enclosure of areas to prevent the migration of dust;
- dust suppression during earth moving will include use of water trucks to wet ground surface, stabilization of soils, and creation of wind breaks;
- temporary sediment basins and/or sediment traps;
- noise mitigation including construction hour limits, establishment and enforcement of construction site and access road speed limits, mufflers on noise-producing construction equipment and vehicles, siting of noisiest equipment as far as possible from sensitive receptors, and maintenance of engine housing panels in the closed position;
- stabilized construction and exit points;
- stormwater conveyance channels/diversion berms;
- sediment basins/traps;
- storm drain inlet control;
- perimeter stormwater controls consisting of silt fence, fiber roll and/or compost filter socks installed prior to commencing earth disturbing activities;
- concrete washout areas consist of prefabricated or site-built impermeable containment areas sized to hold concrete wastes and wash water;
- prohibition on discharging groundwater or accumulated stormwater;
- installation and maintenance specifications for stormwater controls;
- use of ultra-low sulfur diesel (ULSD) fuel (15 parts per million sulfur) in off-road vehicles;
- anti-idling measures including turning off diesel combustion engines on construction equipment not in active use and limiting idling of dump trucks to five minutes or less;
- vehicles greater than 50 brake horsepower will have engines that meet EPA PM emission standards or emission control technology certified by manufacturers to meet or exceed emissions standards and emission control devices, such as diesel oxidation catalysts

(DOCs) or diesel particulate filters (DPFs), will be installed on the exhaust system side of engine equipment;
- police detail to mitigate traffic impacts; and,
- delivery of large pieces of equipment or material will be by barge to minimize impacts on local roadways.

6. *public health and safety*

Remediation and demolition will promote public health and safety by addressing contamination issues and removing obsolete structures. The project includes provisions to ensure hazardous materials and equipment are managed and stored safely. In addition, the measures noted above to avoid, minimize and mitigate environmental impacts will also protect public health and safety.

Conclusion

Based on the foregoing, I hereby determine that the project will have a positive public benefit. To meet the public publication requirements of the legislation, this Determination will be published in the Environmental Monitor on June 26, 2013.

June 17, 2013
Date

Richard K. Sullivan Jr.

RKS/CDB/cdb

Exhibit 2

Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

One Winter Street Boston, MA 02108 • 617-292-5500

DEVAL L. PATRICK
Governor

RICHARD K. SULLIVAN JR.
Secretary

KENNETH L. KIMMELL
Commissioner

November 1, 2013

In the Matter of:

Footprint Power Salem Harbor Development LP
Salem Harbor Station Redevelopment Project
Salem, Massachusetts

Table of Contents

In the Matter of:

Footprint Power Salem Harbor Development LP
Salem Harbor Station Redevelopment Project
Salem, Massachusetts

RE: Waterways File No. W13-3886-N
Decision on Variance Request and Written Determination

I. Introduction.

Footprint Power Salem Harbor Development LP is a foreign limited partnership, whose principle office is located at 1140 Route 22 East, Ste. 303 in Bridgewater, New Jersey ("the Applicant" or "Footprint"). Footprint submitted to the Department a Chapter 91 License Application, Salem Harbor Station Redevelopment Project, dated May 17, 2013 ("Application") proposing to construct a new, 630 Megawatt, natural gas-fired, quick-start, combined-cycle generating facility ("the Project"), in Salem, Massachusetts. The Project would be situated on approximately 19 acres of filled tidelands, within a portion of Salem Harbor which is a Designated Port Area ("DPA").[1] As explained below, construction in filled tidelands is jurisdictional[2] and subject to licensing requirements administered by the Department of Environmental Protection (the "Department") under Chapter 91 and its implementing regulations.[3] To be eligible for a license in filled tidelands in a DPA, an activity must generally be a water-dependent-industrial use, or an accessory to such use.[4] The Department has classified the Project as a nonwater-dependent-infrastructure facility,[5] however, and in its Application, Footprint seeks a variance[6] from the water-dependent-industrial use requirement and from certain related provisions of the licensing regulations, all as discussed, below.

II. Project Description.

The Applicant describes the Project as follows:[7]

- a new combined-cycle generating ("CCG") facility, including a nominal 630 MW natural gas-fired electric generation facility with "Quick Start" capability that under summer conditions can generate an additional 62 MW, for a total of 692 MW
- CCG facility major components include:
    - two quick-start natural gas combustion turbine generators (CTGs)

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[1] Application at 1-1.
[2] 310 CMR 9.04(2).
[3] MGL c. 91, ss. 14 and 18; 310 CMR 9.05(1).
[4] Other uses may be allowed to a limited extent; see 310 CMR 9.32(1)(b)(1)
[5] 310 CMR 9.12(1).
[6] 310 CMR 9.21.
[7] Application at 2-1.

- two heat recovery steam generators (HRSGs) including pollution control equipment
- two steam turbine generators (STGs)
- an administrative building with warehouse/shops space
- a service bay
- an Operations Building
- Air Cooled Condenser Mechanical Buildings
- the Main Power Distribution Center Building
- a water treatment facility
- transformers
- an ammonia storage tank
- two water tanks
- air-cooled condensers
- a facility switchyard
- other structures and infrastructure

These components would be situated wholly or partly within Chapter 91 jurisdiction. The Project is proposed to be primarily located in the Salem Harbor DPA, which is reserved primarily for water-dependent-industrial use. The generating facility, including the associated landscaped berm, is proposed to occupy approximately 20 acres, including 19 acres of filled tidelands, entirely within the DPA[8]. The Project also includes the demolition and removal of the existing power plant and associated facilities, including fuel tanks, coal pile, lined water treatment basins, and buildings. The proponent plans to remediate the soil where necessary in connection with the redevelopment of the remainder of the site not occupied by the proposed generating facility.

Draft license plans showing the proposed Project are appended to this Variance Decision and Written Determination at Attachment D.

The Project is intended to "ensure a reliable supply of electricity in the Independent System Operator ("ISO") New England grid as it provides needed new capacity in the Northeast Massachusetts ("NEMA")/Boston load zone."[9] The CCG facility uses efficient, state-of-the art equipment that will have significantly fewer environmental impacts than older power plants. As a result of the way electricity is introduced into the grid, the CCG facility would displace less efficiently-generated electricity by other facilities and thereby reduce annual regional emissions of CO2 by 1.3%, NOx by 10%, SOx by 8%, and mercury by 6%.[10] The Application also cites the Massachusetts Clean Energy and Climate Action Plan for 2020 as the source for its contention that the displacement of the existing Salem Harbor and Somerset Station power plants by gas-fired plants will result in a 1.2 metric net reduction of CO2 in 2020.[11] The Project's quick-start capability allows for generation of electricity with very short start times and short minimum run times. This feature facilitates the integration of renewable energy sources into the

[8] Application at Figure 2-1.
[9] Application at 2-1. *See also* discussion, below.
[10] Application at 2-6.
[11] *Id.*

grid because it can compensate for a drop in generation (due for example to weather-related low wind speed) within a short time period. The alternative to achieve this same benefit would be for a generating facility to run above demand in order to maintain reliability for times when the renewable generation declines temporarily.

III. Site History.

The Project site covers an area of approximately 65 acres, including approximately 62.45 acres of land and 2.4 acres of watersheet (primarily associated with the discharge channel) on Salem Harbor. The Project site is occupied entirely by the existing Salem Harbor Station generating facility and associated buildings, oil tanks, coal storage areas, detention basins, marine terminal, parking areas and associated structures, as well as the National Grid switchyard. *See* Figure 2-1 of the Application.

A. Jurisdictional Lines. Mapping of Salem Harbor performed by the United States Coast Survey in the mid-1800's serves as the basis for determining the extent of Chapter 91 jurisdiction at the site[12]. These maps show that most of the site was historically tidal flats, with a peninsula of upland extending into the location of the existing power plant. A soundings map from this period establishes the historic low water mark along the seaward edge of the Project site. According to an overlay of the historic high and low water marks onto a current map of the site, the majority of the existing generating station is not within Chapter 91 jurisdiction, although the marine terminal and oil and coal storage areas are located almost entirely on filled tidelands (predominately filled private tidelands). Based on these jurisdictional lines, nearly 46 acres of the Project site are within Chapter 91 jurisdiction, including approximately 2.4 acres of flowed tidelands and approximately 43.3 acres of filled tidelands.

B. Licensing History and Historic Use. The Chapter 91 license application provides a thorough review of the history of filling of the site and the applicable legislative authorizations and licenses. At least three authorizations for construction of wharves were granted prior to the establishment of the Chapter 91 licensing process in 1866. Since then, 29 licenses were issued for fill and structures at the site.

A recent report concerning redevelopment of the site provides a brief site history.[13] The site has had a long maritime history beginning with construction of wharves in 1800. Railways were extended to the site in the 1850s to transport goods inland from the docks. Coal became a significant product shipped to the site in the late 1800's/early 1900's until coal imports shifted to different cities, after which the site became dormant. Additional filling of mudflats occurred

[12] The following maps were used: U.S. Coast Survey Topographical Survey No. 303, completed in 1849-1850 and U.S. Coast Survey Hydrographic Survey No. 284, completed in 1850-1851. In addition, a reconstructed shoreline, from a map prepared by Sidney Perley in 1933, was used to estimate Phillips Wharf, which existed prior to the Coast Survey mapping.

[13] Salem Harbor Revitalization Task Force. "Pathway to Renewal: A Review of Site Remediation and Redevelopment Options for Salem Harbor Power Station," June 15, 2013 ("Task Force Report"). This report was issued pursuant to Section 42 of An Act relative to competitively priced electricity in the Commonwealth, signed into law by Governor Deval Patrick on August 3, 2012.

prior to the eventual construction of the first coal-fired generation unit on the site, in 1948. Operation of the generating facility began in 1951, with two additional units becoming operational in 1952 and 1958, respectively. In 1969, the generating units were converted from coal to oil. In 1978, a fourth generating unit was added. During the oil embargo of the early 1970's, the first three units were converted back to coal.

With all four of its generating units operating, the facility generated 745 MW of electricity; however, two of the units were decommissioned in December 2011, leaving the current generating capacity with the two remaining units at approximately 580 MW.[14] In October 2010, the previous owner of the facility, Dominion Energy Salem Harbor, LLC ("Dominion"), notified ISO New England ("ISO-NE") that it would retire the remaining units in June 2014. Dominion had also entered into a consent order with Conservation Law Foundation ("CLF") to shut down the facility according to this schedule.[15] The site also includes an existing National Grid switchyard and electric transmission lines that are owned and operated independent of the generating facility but that serve to transmit electricity generated by the plant.

C. Designated Port Area. All but approximately 2.4 acres of the site are located within the Salem Harbor DPA. DPAs were designated by the Massachusetts Office of Coastal Zone Management ("CZM") in 1978 to "ensure that coastal development by water-dependent industry could be accommodated on a sustainable basis."[16] There are currently eleven DPAs in the State, and they share attributes common to industrial port areas, including the necessary waterfront and backland infrastructure, as well as sufficient land area to accommodate industrial activity.[17] In 1979, DEP developed regulations consistent with the CZM policy goals. When originally established, only the flowed tidelands portions of DPAs were subject to Chapter 91 licensing requirements; however the regulatory requirements for DPAs were extended onto filled tidelands when jurisdiction was extended onto filled tidelands in the wake of the Boston Waterfront decision.[18]

D. Municipal Harbor Plan. The Project site is also subject to a Municipal Harbor Plan/DPA Master Plan ("MHP/DPA Master Plan") approved by the Secretary of the Executive Office of Energy and Environmental Affairs in 2008, for a 10 year period. The MHP/DPA Master Plan provides the Department with guidance and alternative requirements for use in licensing projects within a planning area.[19]

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[14] Task Force Report at 14-16.

[15] Comment letter submitted on July 8, 2013 by Shanna Cleveland, Senior Attorney, CLF on behalf of CLF, Healthlink, and Clean Water Action.

[16] Introduction to the 1994 Designation of Port Areas regulations at 301 CMR 25.00.

[17] CZM, web site at http://www.mass.gov/eea/agencies/czm/program-areas/port-and-harbor-planning/designated-port-areas/).

[18] *Boston Waterfront Dev. Corp. v. Commonwealth*, 378 Mass. 629 (1979)

[19] A municipal harbor plan may be voluntarily prepared by a community to further its waterfront planning goals. The municipal harbor planning process, including a DPA master plan component when appropriate, is managed by CZM on behalf of the EEA Secretary, who must formally approve each plan. Once approved, the Department must issue permits and licenses that are consistent with the MHP. 310 CMR 9.34(2)

IV. Regulatory Compliance Analysis and Related Findings.

A. Project Compliance with Standards of the Waterways Regulations. This section reviews the applicable regulatory standards at 310 CMR 9.00, and whether the proposed Project would comply or would require a variance from those standards. This review concludes that a variance is necessary due to the prohibition on new fill and structures for a nonwater-dependent use in a DPA pursuant to 310 CMR 9.32(1)(b), discussed below. However, the proposed Project otherwise complies with all relevant performance standards of the Waterways Regulations. These include the standards to protect water related public rights and water dependent uses (310 CMR 9.35 to 9.36), design and construction-related standards (310 CMR 9.37 and 9.40), and the standards for nonwater-dependent use projects consisting of infrastructure facilities on tidelands (310 CMR 9.55).

1. Conformance with Municipal Zoning and Harbor Plans. The Application[20] reviews the consistency of the Project with the Salem MHP/DPA Master Plan. As noted in the Application, the MHP/DPA Master Plan envisions the ongoing energy production use of the existing power plant, and supports the goal of reducing the environmental impacts of the existing plant, including reduced wastewater discharges to the harbor, improvements in combustion technology, and consideration of alternative fuels, including natural gas, to reduce air emissions. The Application also notes that CZM, in its letter regarding the Final Environmental Impact Report ("FEIR"), states that "the proposed project meets the intent and the substantive provisions of the Plan and the Secretary's approval and does not require an amendment to the Plan." Similarly, the City of Salem noted in its comments on the FEIR that the Project is consistent with the MHP/DPA Master Plan. While concluding that the Project is consistent with the MHP/DPA Master Plan, the Application also states, "To the extent that there is any lack of clarity regarding the Facility's consistency with the Harbor Plan, the Applicant requests a variance from the provisions of 310 CMR 9.34(2)."

The Waterways Regulations at 310 CMR 9.34(2)(a) require that the Department determine that a project in an area subject to a municipal harbor plan conforms to the plan to the degree applicable under the plan approval standards implemented by CZM under 301 CMR 23.00. Furthermore,

> In making this determination the Department shall take into account all relevant information in the public record, and shall act in accordance with the following provisions:
>
> 1. the Department shall consult with the planning board or other municipal body with lead responsibility for plan implementation, as appropriate and in accordance with the provisions of 310 CMR 9.11(1). In the event a written recommendation as to plan conformance is submitted by such board or other body, the Department shall presume that the requirement is met or not met in accordance with said

[20] Application at 4-7 to 4-8.

> recommendation, except upon a clear showing to the contrary and except as otherwise provided in 310 CMR 9.34(2)(a)2.;
>
> 2. the Department shall not find the requirement has been met if the project requires a variance or similar form of exemption from the substantive provisions of the municipal harbor plan, unless the Department determines the deviation to be de minimus or unrelated to the purposes of M.G.L. c. 91 or [3]10 CMR 9.00....[21] [Correction to erroneous citation in the original.]

Pursuant to 310 CMR 9.34(2)(a), the Department consulted[22] with the Salem Department of Planning and Community Development (DPCD), the agency identified in the MHP as being responsible for its implementation . DPCD responded:

> It is the City's position that Footprint Power's proposed natural gas facility does meet the intent and substantive provision of the Salem Municipal Harbor Plan and the Secretary's Decision. In the Secretary's Decision, dated June 24, 2008, it states that "any proposed new use(s) for the site beyond energy production, marine industry, and temporary uses as defined in 310 CMR 9.02 will require a renewal or amendment to this Harbor Plan." Clearly, Footprint Power's proposal is an energy production use and therefore is consistent with our Harbor Plan.[23]

Based on the DPCD's written recommendation and CZM's concurrence with DPCD's written recommendation, the Department presumes that the Project is consistent with the MHP/DPA Master Plan, under 310 CMR 9.34 (2)(a)(1). Accordingly, the Department has determined that the Project conforms with the MHP/DPA Master Plan. and need not consider Applicant's conditional request for a variance from 310 CMR 9.34(2).

2. Protection of water related public rights and water-dependent uses. Since the Project does not involve new fill or structures in flowed tidelands, 310 CMR 9.35 is not applicable, except for 310 CMR 9.35(5), which specifies requirements related to public access facilities. The Project will provide appropriate public access from Derby Street along the landscaped berm surrounding the generating facility. Pursuant to 310 CMR 9.35(5), the proposed license conditions attached hereto will specify hours of public access, appropriate signage, and any restrictions on public access that may be allowed.

310 CMR 9.36 protects water-dependent uses at or near the Project site. Due to the proposed location of the generating facility on filled tidelands, and its location generally in the center of the property, it will not interfere with private access to littoral or riparian property and will not disrupt any water-dependent use at an off-site location in the vicinity of the Project site, in accordance with 310 CMR 9.36(1) and (2), respectively. 310 CMR 9.36(4) does not apply to the

[21] 310 CMR 9.34(2)

[22] Letter from Alex Strysky, DEP to Lynn Goonin Duncan and Frank Taormina, Salem Department of Planning and Community Development, dated May 21, 2013.

[23] Letter from Lynn G. Duncan, Salem Department of Planning and Community Development to Alex Strysky, DEP, dated May 22, 2013.

Project, since the existing water-dependent use will be discontinued by the user, per 310 CMR 9.36(4)(b).

310 CMR 9.36(5)(a) does not apply to the Project, since the Department did not receive a notice of interest from a competing party pursuant to 310 CMR 9.36(5)(a). The Project, as conditioned herein, will also include reasonable arrangements to prevent commitments of space that would discourage water-dependent industrial activity on the site or elsewhere in the DPA. Pursuant to 310 CMR 9.36(5)(b)(1), the license will include a condition requiring removal of the structures associated with the proposed generating facility that cannot be converted to water-dependent industrial use. The Project also does not include nonwater-dependent uses within the water-dependent use zone ("WDUZ"), which for this Project extends 100 feet landward from the present mean high water mark within the discharge channel. The generating facility itself is sited well outside the WDUZ. Only a portion of the seaward half of the berm, measuring approximately 12,900 s.f., is located within the WDUZ. The purpose of this berm is to serve as shore protection and to mitigate sea-level rise and, therefore, is water-dependent pursuant to 310 CMR 9.12(2)(a). The remaining provisions of 310 CMR 9.36 are concerned with marine industrial parks and supporting DPA uses, and are therefore not applicable to the Project.

3. Construction and dredging standards. Prior to license issuance, the proponent will be required to submit license plans signed and stamped by a Registered Professional engineer, along with other necessary certification, to document that the structures are structurally sound and comply with Massachusetts Building Code requirements for structures in a floodplain. The first floor of all buildings has been designed to be six feet above the existing 100 year flood zone to withstand a 100-year storm event and to incorporate sea level rise[24]. Therefore, the Project complies with 310 CMR 9.37(1) and (2). In addition, the berm is located approximately 80 feet from the high water mark in the discharge channel and does not abut similar structures. The license includes a condition requiring modification or removal of the berm if the Department determines the berm has an adverse effect on the Project site or adjacent sites, per 310 CMR 9.37(3)(e). For these reasons, the Project complies with the requirements of 310 CMR 9.37(3).

4. Consistency with Coastal Zone Management Policies. While requesting a variance from 310 CMR 9.54 in the event one is necessary, the Application[25] states that the Project complies generally with CZM policies, since it conforms with the Municipal Harbor Plan, and includes analysis of the Project's conformance with each of the relevant CZM Program Policies.

The Waterways Regulations at 310 CMR 9.54 require that all nonwater-dependent use projects in the coastal zone be consistent with CZM Program Policies. 310 CMR 9.54(2) provides, however, that "If the project is within an area covered by a municipal harbor plan, the Department shall presume this standard is met, in accordance with the provisions of 310 CMR 9.34(2)(b)3." The relevant provision, in turn, states:

(b) If the project conforms to the municipal harbor plan the Department shall:

[24] For further detail, see the DEIR Certificate at 9, Section 3.4 of the FEIR, and the FEIR Certificate at 12.
[25] Application at 4-9 to 4-18.

3. determine that the requirement of 310 CMR 9.54, governing consistency with CZM policies, has been met, if applicable, except upon a written showing by CZM for a project identified in 310 CMR 9.13(2)(a) for CZM participation that the project conflicts with CZM policy in effect when the license application was completed, in a manner that was not reasonably foreseeable at the time of plan approval.

Based on the Department's finding that the Project is consistent with the approved MHP/DPA Master Plan, the Department finds that the Project is consistent with CZM Program Policies pursuant to 310 CMR 9.54(2). The Department notes that CZM's letter on the FEIR, cited above, also expressed its view that the Project is consistent with the MHP/DPA Master Plan, and CZM has provided no written showing or otherwise expressed to the Department any opinion to the contrary. Accordingly, the Department need not consider Applicant's conditional request for a variance from 310 CMR 9.54.

5. Standards for Nonwater-dependent Infrastructure Facilities. The performance standards at 310 CMR 9.55 are intended to apply to infrastructure projects that provide electric and other infrastructure services directly to the public. The regulations recognize the industrial nature of such projects and therefore require public access, wherever appropriate, in a manner that is consistent with the operation of the infrastructure facility. The performance standards require each project to include mitigation measures to ensure that all feasible measures are taken to avoid, minimize and mitigate the project's detrimental effects on water-related interests of the public, listed at 310 CMR 9.55(1)(a-f):

a. the protection of maritime commerce, industry, recreation and associated public access;
b. the protection, restoration, and enhancement of living marine resources;
c. the attainment of water quality goals;
d. the reduction of flood and erosion-related hazards on lands subject to the 100-year storm event or to sea-level rise, especially those in damage-prone or natural buffer areas;
e. the protection and enhancement of public views and visual quality in the natural and built environment of the shoreline; and
f. the preservation of historic sites and districts, archeological sites, and other significant cultural resources near waterways.

As described in the variance analysis below, the Project includes measures to attract water-dependent industrial uses to the available portions of the Project site and will provide, for the first time, an appropriate level of public access to the site in light of the industrial uses planned at the site. A public pathway, starting at a planned public information kiosk at the site entrance, will be constructed on the berm and will provide views from an elevated perspective. The Department notes that currently, there is no public access allowed at the site, and that the planned pathway could be extended to other parts of the site if designed in a manner compatible with the future uses in the DPA.

The proposed Project will have no direct impact to living marine resources since it does not propose to continue the intake/discharge of cooling water that is required of the existing power plant. The Project has been designed to minimize its stormwater and water quality impacts. As the Project site is a coastal site located in Land Subject to Coastal Storm Flowage, it is not required to provide compensatory flood storage, but it will be required to comply with the Order of Conditions issued by the Salem Conservation Commission. The first floor of the proposed buildings has been elevated to six feet above the 100-year flood level and will also be protected from hazards related to sea level rise. The Application reviewed possible flooding scenarios related to ocean storm surge and flooding caused by wind- and wave- action and found that the Project would not have a negative effect on adjacent properties.

According to the proponent, the layout of the structures, landscaping, and the size and location of the berm, were designed to provide visual screening for the benefit of the residential neighborhood. The Application provided a set of visualizations of the proposed generating facility from various vantage points to illustrate the visual effect of the proposed facility and the screening measures compared to existing conditions.

No historical or cultural resources are located at the Project site. The Department has not received any correspondence from the Massachusetts Historical Commission regarding this site.

Based on the above analysis, the Department determines that he Project complies with the standards for nonwater-dependent infrastructure facilities at 310 CMR 9.55.

B. Need for a Variance. In its Application,[26] Footprint requests a variance from the provisions of 310 CMR 9.32, which prohibit certain non-water-dependent uses in a DPA. Any project to be licensed under the Waterways regulations must: a) be among the listed permittable uses of fill and structures found at 310 CMR 9.32; and b) meet all applicable performance standards in the Waterways regulations. Since the Project is proposed on filled tidelands in a DPA, it must be among the allowable uses listed at 310 CMR 9.32(1)(b). The only nonwater-dependent uses that may be licensed in a DPA are those listed at 310 CMR 9.32(1)(b)(4): a use to be licensed as part of a marine industrial park, a Supporting DPA Use, or a temporary use. The Project, however, would not meet any of these regulatory definitions.[27] The Project is best considered a nonwater-dependent infrastructure facility. While special provisions are made for the siting and mitigation requirements of these facilities in the Waterways Regulations at 310 CMR 9.55, they are not among the permitted uses in a DPA. Therefore, the Department has determined that the Project requires a variance.

C. Conclusion. While the Project requires a variance because it is categorically prohibited by 310 CMR 9.32, the Department has determined that the Project meets all other applicable standards, including those for nonwater-dependent use projects consisting of infrastructure facilities on tidelands, at 310 CMR 9.55.

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[26] Application at 5-5.
[27] These terms are defined at 310 CMR 9.02.

V. Variance Analysis.

Pursuant to 310 CMR 9.21(1), the Commissioner may grant a variance for a project only upon finding following a public hearing[28] that:

a) there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 9.00;
b) the project includes mitigation measures to minimize interference with the public interests in waterways and that incorporates measures designed to compensate the public for any remaining detriment to such interests; and
c) the variance is necessary:
1. to accommodate an overriding municipal, regional, state or federal interest; or
2. to avoid such restriction on the use of private property as to constitute unconstitutional taking without compensation; or
3. to avoid substantial hardship for the continuation of a use or structure existing as of October 4, 1990, and for which no substantial change in use or substantial structural alteration has occurred since that date.

In the following paragraphs, the Department considers each of the above factors relevant to Footprint's request for a variance from 310 CMR 9.32.[29]

A. Alternatives Analysis. Because the need for a variance was considered in the FEIR, the Department must presume that the FEIR's description of alternatives satisfactorily describes alternative designs, locations, or construction methods which would achieve the purpose of the Project without the need for a variance, in accordance with 310 CMR 9.21(2)(a)2.[30] As stated in the FEIR, the purpose of the Project is to supply electricity to the NEMA/Boston grid in 2016, by redeveloping old, fossil-fuel powered plants that have the necessary transmission infrastructure in place to accommodate the 2016 time frame for generating electricity required by ISO-NE[31]. Using these criteria, the FEIR considered three alternative sites to the proposed Salem site.

Two of the alternative sites, Somerset Station and Brayton Point Station, both in Somerset, MA, are located in Designated Port Areas and would similarly require a variance from the Waterways Regulations. While the Brayton Point site meets many of the criteria for the Project, significant environmental improvements were recently completed at the generating facility, and the site is not considered a candidate for redevelopment[32]. In addition, Brayton Point is not located in the NEMA/Boston load zone and therefore has offered less market opportunity. Nor was the Somerset Station site considered feasible, both because it is not near a gas pipeline, and because

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[28] On June 12, 2013, the Department held a public hearing on this matter at the Bentley Elementary School in Salem.
[29] The factors at 310 CMR 9.21(1)(c)2. and 3. are not relevant to Footprint's request.
[30] The presumption is required by 310 CMR 9.21(2)(c), provided, however, that "the Commissioner may require any modification of the project reasonably within the scope of an alternative within the final EIR."
[31] Add citation here
[32] Subsequent to the issuance of the FEIR Certificate, it was reported in a Reuters, October 8, 2013 article that Brayton Point facility will be closed as of May, 2017 (after the ISO/NE deadline of June 2016 for energy production from the Footprint Power facility).

it did not appear to have the support of the community for redevelopment into another generating facility. The third alternative site, the Mt. Tom Station in Holyoke, MA, was also considered infeasible, because it is not near a gas pipeline and would require considerable improvements to the transmission infrastructure to accommodate the proposed facility. In addition, it, too, recently completed environmental improvements and would be an unlikely candidate for redevelopment. Furthermore, all three sites are located outside of the NEMA/Boston load zone and, therefore, are not well-suited for the purpose of supplying electricity to the load zone.[33]

The FEIR[34] also considered alternative site layouts and facility designs, but these were considered infeasible. On-site alternatives that would not require a variance include: locating the Project on the portion of the Project site that does not contain filled tidelands (and would therefore not require a Chapter 91 authorization); using a cooling method that requires large volumes of water to be withdrawn and discharged to a waterway; or receiving fuel by marine transportation. Pursuant to 310 CMR 9.12(2)(c), the latter two alternatives would be presumed to be water-dependent if the proposed location was approved by the Energy Facilities Siting Board ("EFSB").[35] These three on-site alternatives are reviewed in more detail, below.

1. Alternative on-site locations outside of Chapter 91 jurisdiction. The Project site includes an area of approximately 19 acres that lies landward of the historic high water mark and is outside of Chapter 91 jurisdiction. The proposed generating facility occupies approximately 2.4 acres of this non-jurisdictional area. Were the proposed generating facility to be constructed entirely in this area, it would not require a variance (or even a Chapter 91 license). However, all but 7.5 acres of this upland area are already occupied and will remain so during the time period in which the Project must be constructed to meet the ISO-NE June, 2016 deadline for becoming operational.

Currently, this area is occupied by the existing power plant, switchyard, and parking areas. The switchyard is operated by National Grid, which holds easements over the switchyard and subsurface and overhead transmission line within this area. Because the existing power plant must remain in operation until June, 2014, followed by a period of demolition in preparation for future construction of the new facility, insufficient time would remain to construct the new plant in the locus of the existing facility in time to begin generating electricity by the ISO-NE June, 2016 deadline. Therefore, construction of the Project on the non-tidelands portion of the site is not a feasible option.

2. Continued use of a wet-cooling system.

a. Repowering of the existing plant using once-through cooling. The Applicant considered reusing the existing generating facility, but switching from oil and coal as the fuel source, to gas. There are two options for doing so: existing boilers at the power plant could be refueled to burn

[33] FEIR at 6-3 – 6-5
[34] FEIR at 6-6
[35] 3210 CMR 9.12(2)(c).

natural gas rather than oil or, in addition to the refueling of the boilers, the existing steam turbines could be used with new gas turbines to create a combined cycle unit. Such a facility could continue to employ once-through cooling, as the current power plant does, which requires large volumes of water to be withdrawn from the harbor and discharged at elevated temperatures into the discharge channel. Reuse of the existing power plant in this way would not require a variance because a) it is entirely located outside of Chapter 91 jurisdiction, and b) the facility and any ancillary structures and uses within jurisdiction would be presumed to be water-dependent industrial if the facility received any necessary approvals from the EFSB.

The Applicant explained that neither option would be an efficient means of generating electricity, according to industry standards, and would not provide the environmental benefits of the proposed plant. In particular, the impacts to Salem Harbor associated with the intake and discharge of large volumes of water would continue. In addition to the thermal pollution of the discharge, the intake involves impacts to marine organisms due to impingement and entrainment. Finally, the existing building with its tall stacks would remain as a visual impact.[36]

b. Use of water-cooling technology at new facility. The Project could continue the exclusive use of water-cooling, as the current facility does, and continue the existing significant impact to Salem Harbor that an air-cooled facility would avoid. The Applicant considered two options that involve the use of water for cooling the generators in the proposed facility. The first option is once-through cooling, discussed above. Once-through cooling would require large volumes of water to be withdrawn from a water body and could make the facility water-dependent if approved by the EFSB.[37] The significant impacts to the Harbor would remain with this option and, according to the Applicant, the permitting complexity of a new intake/discharge would affect the Project's ability to meet the 2016 ISO-NE capacity requirement.[38]

The second option would include the use of wet evaporative cooling, which employs cooling towers that would be filled with water drawn from either the City of Salem water supply or treated wastewater from the adjacent South Essex Sewerage District ("SESD") treatment facility. Evaporative cooling does not involve a discharge as once-through cooling does; instead, according to the Applicant, approximately 2,663,200 gallons of water per day would be drawn from one of the water sources and evaporated during the cooling process. While this process eliminates the thermal discharge into Salem Harbor, as well as the impingement and entrainment impacts associated with the intake of cooling water, the use of this method would not make the project water-dependent, since it would not require withdrawal of large volumes of water from a water body.[39]

3. Water-borne fuel delivery. 310 CMR 9.12(2)(c) also provides that a generating facility could be presumed to be water-dependent if it is dependent on marine transportation (and if the facility is approved by the EFSB). In the case of the proposed facility, this would require that the power plant continue to receive fuel deliveries by water-borne vessels. But this alternative would

[36] Letter from Lauren Liss, counsel for the Applicant, to Alex Strysky, DEP, dated July 1, 2013
[37] 310 CMR 9.12(2)(c).
[38] FEIR at 6-6.
[39] 310 CMR 9.12(2).

involve the delivery by vessel of liquefied natural gas ("LNG") to the site. However, according to the Applicant, apart from community opposition to the delivery of LNG to the site, the necessary storage and gasification infrastructure would potentially double the area devoted to the power plant, making the remainder of the site unavailable for redevelopment for other water-dependent industrial uses, and would significantly increase the cost of the Project.

B. Mitigation Measures Analysis. As noted, proponents of projects seeking a variance must include "mitigation measures to minimize interference with the public interests in waterways" and incorporate "measures designed to compensate the public for any remaining detriment to such interests."[40] The Project is located on filled private and Commonwealth tidelands in a DPA. In such areas, the primary public interest is for fill or structures to be used for water-dependent industrial purposes or accessory uses.[41] In addition, this public interest includes uses to provide public pedestrian access and uses for certain other limited purposes.[42,43] The primary impact of the Project is the reduction of the area within the DPA that is available for water-dependent industrial use. Mitigation measures can include both design measures undertaken by the proponent to minimize interference by limiting the area of the nonconforming use and associated impacts, as well as measures undertaken by the Applicant to facilitate future water-dependent industrial use of the site.

The primary form of mitigation offered by the Project involves the preparation of the unaffected part of the site for future water-dependent industrial uses within the same timeframe as the development of the proposed Project. The Department anticipates these substantial actions will enhance the site's potential for water-dependent industrial use. This mitigation includes:

- demolition of all structures rendered obsolete by the shutdown of the existing power plant—which occupy nearly all of the tidelands in the DPA—approximately two to three years sooner than could be required by regulation;
- demolition and remediation of the obsolete power plant—which is located outside of Chapter 91 jurisdiction—in the same time frame as the accelerated demolition of structures located within Chapter 91 jurisdiction.
- remediation of contaminated soil at the Project to a level that will enable permissible water-dependent industrial uses allowed in the DPA.
- provision and long-term maintenance of an engineered concrete platform suitable for use by mobile cranes and as a roll-on, roll-off facility for use by future water-dependent industrial facilities;
- a commitment to continue working cooperatively with the City as a co-applicant in the City's Notice of Project Change #14234/#14937("NPC") port redevelopment effort in order to reach a wharfing agreement giving the City long-term access to an existing dock on the Project site.

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[40] 310 CMR 9.21.
[41] 310 CMR 9.32(1)(b)(1)
[42] 310 CMR 9.32(1)(b)(3)
[43] The Department has generally limited public access in DPAs to appropriately designed and located pedestrian walkways and related facilities that do not conflict with current or future industrial use of the site.

During its review of the license application and variance request, the Department identified additional mitigation measures that the Applicant will be required to undertake to enhance further the site's potential for water-dependent industrial use. These additional mitigation measures include:

- a commitment to construct or provide funding of up to $180,000 for improvements to the run-off pond revetment, as identified in the City of Salem's Notice of Project Change #14234/#14937("NPC");
- marketing of the site to attract new water-dependent industrial uses
- Prior to commencement of construction of the facility, the Licensee, at its sole cost and expense, subject to the Department's prior approval, shall grant an irrevocable restriction to the City of Salem prohibiting any use of approximately nine (9) acres of non-jurisdictional land, including all the waterfront land in the non-tidelands portion of the site, other than those uses expressly allowed under the Salem Municipal Harbor Plan's DPA Master Plan, as it may be amended. Said restriction shall run with the land for a term of years equal to the length of the Chapter 91 license term, including any renewals or other extensions of the license term. Provided, however, that if the maximum term for such restriction allowable under law is less than the required term herein, then Licensee shall establish the required restriction for the maximum term allowable under law and it shall be a further condition of this license that Licensee renew the required restriction prior to its expiration as necessary in order achieve the required term herein. The Licensee shall submit a proposed restriction for the Department's review and approval no later than sixty (60) days after the effective date of this license, and shall implement said restrictions only after written approval from the Department in accordance with any conditions contained therein.

1. Minimizing impact by constructing a facility with a smaller footprint on tidelands. The Applicant provided a rationale for the design and layout of the various components of the facility relative to one another. The proposed layout reflects efforts to minimize noise and visual impacts to the surrounding neighborhood, maintain a compact footprint that minimizes the footprint of the Project on tidelands in the DPA, and achieve the Project purpose.

The Applicant reviewed alternative Project layouts that, while not eliminating the need for a variance, would reduce the footprint of the facility on filled tidelands in the DPA. Options for reducing the footprint on filled tidelands include moving a portion of the plant into the area of the site where there are no filled tidelands, building a more compact facility on tidelands, or building a smaller plant. As described below, the location and orientation of the facility as proposed by the Applicant sought to minimize adverse effects of the facility while still achieving the Project purpose.

One option for minimizing the area of tidelands occupied by the proposed facility would involve moving its layout toward the northern part of the site. The National Grid switchyard and subsurface transmission lines are located in this part of the site and provide important existing transmission infrastructure that is needed in connection with both the existing and proposed

generating facilities. Reuse of such existing infrastructure was a primary reason for selecting the proposed site.[44] The required ongoing presence of this existing infrastructure means that insufficient space exists in this area to construct the Project. Nor is physically splitting the facility, so that elements of the plant are located on either side of the National Grid easements, a feasible alternative, according to the Applicant, for construction and operational reasons. In particular, the design of the facility has been planned for optimal interaction of its components and to lessen visual and noise impacts of the facility. Furthermore, splitting the facility in this way would require the use of part of the site currently being used by the existing power plant, and that area of the site would not be ready for construction within the timeframe necessary for the new facility to be generating electricity by the ISO-NE June, 2016 deadline[45].

The Applicant also contends that a smaller power plant is not feasible for several reasons.[46] First, while a smaller output may meet the minimum needed generating capacity forecasted by ISO-NE, the Applicant began planning for the facility prior to the ISO-NE FCA-7 auction where its bid for the entire output was accepted, even though it exceeded the minimum. The Applicant believes that additional capacity will eventually be needed when other facilities retire, and the power generated at this site will be available to meet that demand. The Applicant also notes that smaller plants tend to be "peaker" plants that generate electricity only when necessary. According to the Applicant, a peaker plant at this site would be too small to justify a new gas pipeline, so it would rely on oil as the fuel source, which would have fewer air quality benefits. In addition, peaker plants produce electricity at a higher cost, which is passed along to ratepayers.

2. Site redevelopment/demolition and remediation. The Applicant proposes to demolish nearly all of the buildings on site and assess/remediate areas of soil contamination, consistent with the Massachusetts Contingency Plan ("MCP"), to make the site suitable for Designated Port Area redevelopment. The timing of this demolition and clean up and the extent to which the property owner would be required to do so regardless of the current Project proposal was addressed in detail by the Task Force and raised in a comment letter received by the Department during the comment period for this Application.

According to the Waterways Regulations, licenses expire if the fill or structures are abandoned for five consecutive years or more.[47] Upon expiration, revocation or nullification of a license, and upon written notice to and at the direction of the Department, the licensee must remove all structures authorized in the license above the high water mark, if the Department determines that continued existence would have a significant adverse effect on the public interests served by Chapter 91.[48] All of the structures associated with the existing plant are located above the high water mark. To date, the Department has yet to exercise this provision to require structures to be removed. So, while the Department could in theory exercise this regulation to require the removal of existing structures on filled tidelands, the timeframe in which to do so would likely

[44] FEIR at 6-2.
[45] Add cite
[46] Letter from Lauren Liss, counsel for the Applicant, to Alex Strysky, DEP, dated July 1, 2013
[47] 310 CMR 9.25.
[48] 310 CMR 9.27

be substantially greater than the Applicant proposes,[49] and in any event would not include existing structures on the upland portion of the site. Significantly, the upland area includes the existing power plant. The proposed Project, however, would remove all of the oil tanks not needed to maintain the operability of the existing facility until its closure in June 2014, in order to make room for the proposed plant and to provide a staging area for construction. The Applicant will also be required to demolish any remaining oil tanks and the existing power plant by December 31, 2016.

The Applicant intends to remediate the site to appropriate MCP standards, and represented at the Chapter 91 public hearing that it will do so by December 31, 2016. The Department will require the proponent to complete necessary remediation and file a Response Action Outcome or other appropriate closure document with the Department's Bureau of Waste Site Cleanup by December 31, 2016.

3. Construction/repair/maintenance of WDI Infrastructure. During the Department's review of the license Application, the Applicant confirmed that an approximately $3,000,000 engineered concrete platform, suitable for use by mobile cranes and as a roll-on, roll-off facility, will be installed for use by future water-dependent industrial uses occupying the site. The Department will require the Applicant to ensure that, upon completion of the Project, the engineered concrete platform, suitable for use by mobile cranes and as a roll-on, roll-off facility will be in good working order for future DPA users on the Project site. The Applicant shall maintain the crane during the license term.

The Applicant will construct or provide funding, separate from the provision of the engineered concrete platform described above, of up to $180,000 for improvements to the run-off pond revetment, as identified in the City of Salem's NPC#14234/#14937. In addition, the Department will require that the Applicant construct for future DPA users a vehicular access way of sufficient width in good condition on the site to allow access from either Fort Avenue or Derby Street to the waterfront portion of the site and its future laydown areas. The Applicant will be required to maintain the vehicular access way in good working order for the term of the License. The Department believes that ensuring that this type of infrastructure is present and available for future uses will attract water-dependent industrial uses to the site.

4. Marketing. In addition to the demolition and remediation activities to be performed to prepare the site, the Applicant will be required to actively market the site for water-dependent industrial use. This will include the development of a pro-forma available to prospective tenants/owners and advertising the availability of the site in local and regional media, as well as trade journals of wide circulation.

5. Dedication of non-tidelands areas to DPA–compatible use. Approximately 20 acres of the Project site in the DPA, including the location of the present power plant, are not within Chapter

[49] Most structures on filled tidelands at the site, except for structures to be reused by the new facility or those necessary for the continued operation of the existing plant, will be demolished by the Applicant as part of the preparation of the site for the construction of the new generating facility.

91 jurisdiction. Without the requirements for authorizing structures through Chapter 91 licensing, uses that are incompatible with the DPA could be sited in this location. Conflicts between water-dependent industrial uses and adjacent or nearby incompatible uses, such as housing, could create pressure on the maritime use to change its operations to reduce the impact on the incompatible use. The Department notes that, historically, this type of pressure makes it more difficult for a water-dependent industrial use to maintain its unfettered operational needs and frequently undermines the ability of marine industries to stay in business. The Applicant shall, at its sole cost and expense, subject to the Department's prior approval, provide an irrevocable restriction to the City of Salem prohibiting any use of approximately nine (9) acres of non-jurisdictional land, including all the waterfront land in the non-tidelands portion of the site, other than those uses expressly allowed under the Salem Municipal Harbor Plan's DPA Master Plan, as it may be amended. Said restriction shall run with the land for a term of years equal to the length of the Chapter 91 license term, including any renewals or other extensions of the license term. Provided, however, that if the maximum term for such restriction allowable under law is less than the required term herein, then Licensee shall establish the required restriction for the maximum term allowable under law and it shall be a further condition of this License that Licensee renew the required restriction prior to its expiration as necessary in order achieve the required term herein. The Licensee shall submit a proposed restriction for the Department's review and approval no later than sixty (60) days after the effective date of this license, and shall implement said restrictions only after written approval from the Department in accordance with any conditions contained therein.

C. Necessity for a Variance/Overriding Municipal, Regional, State, Federal Interest Analysis. The overriding public interest in this case involves the reuse of the existing power plant site by a new generating facility that will provide a reliable source for the needed electricity to the NEMA/Boston load zone, and that also meets the intent of the legislation to redevelop the site so that an important economic use of the site is maintained once the existing power plant ceases operations in June 2014. In addition, the Department believes that the Project will attract new water-dependent industrial uses to this DPA which has been used exclusively until recent years by the existing power plant.

1. Legislature identified a public interest in redevelopment of site. On August 3, 2012, Governor Patrick signed into law Chapter 209 of the Acts of 2012, *An Act relative to competitively priced electricity in the Commonwealth* (the Act). Two sections of the Act are of particular relevance in establishing the public interest served by this project. Section 40 of the Act required the Massachusetts Department of Public Utilities ("DPU") to "investigate the need for additional capacity in the NEMA region within the next 10 years" and furthermore stated that "Such a demonstration shall be conclusive proof of the need for additional electric generating capacity in the NEMA load zone." Section 42 of the Act established a task force, discussed below, to develop a plan for the revitalization of the site in recognition, in part, of its ongoing importance in maintaining existing jobs and municipal tax revenue.

Section 42 of the Act specifically addressed the upcoming decommissioning of the existing power plant by establishing a "Plant Revitalization Task Force" ("Task Force") that is to "implement a plan, adopt rules and regulations and recommend necessary legislative action to

ensure the full deconstruction, remediation, and redevelopment or repowering of the Salem Harbor Power Station by December 31, 2016." The plan of action was to include "(i) the full deconstruction of the existing facility, including financing, if necessary, of such deconstruction; (ii) remediation of environmental issues on the site; (iii) maintenance of jobs and preexisting municipal tax revenue associated with the site; (iv) ensuring the responsible parties are held liable for costs of environmental remediation; and (v) additional mitigation efforts necessary for the redevelopment or repowering of the site."

The Task Force identified and considered a range of options, including the proposal by Footprint Power, for meeting the stated goals of the legislation, and issued its report on June 15, 2013. Most of the recommendations offered by the Task Force are directly related to the implementation of the Project as a way of revitalizing the site and achieving the redevelopment and other economic goals of the legislation. Among its recommendations, Recommendation #7 of the Task Force states: "Without formally endorsing the present owner's plans, the Task Force supports repowering the Salem Harbor Power Station with a new generating facility as the best means to ensure full demolition and remediation of the site by December 31, 2016."

2. Project will help reestablish WDI use of the DPA. As discussed above, the site has been used for energy generation almost exclusively since the DPA was designated as such in 1978. The proposed Project maintains that historical use while facilitating the use of the remainder of the DPA for water-dependent industrial uses. The situation at this site is unique in that the retirement of the existing power plant in June 2014 will result in the cessation of almost all industrial activity within the DPA and render approximately 95% of the land area within the DPA inactive. Other than approximately 3 acres located within the DPA that contain the Salem Wharf property (recently purchased by the City from a prior power plant owner), residences along Blaney Street, and a portion of a marina, the entire DPA land area is in use by the power plant and has been since the DPA was established.

Redevelopment of the DPA for water-dependent industrial uses faces challenges and constraints that are outlined in a recent Site Assessment Study that examined the feasibility of various reuse options for the project site.[50] Among the conclusions of the Site Assessment Study are that the site remediation costs are a burden to the redevelopment of the site; the limited rail and road access to the site are barriers to redevelopment by water-dependent industrial uses and other uses; market analysis suggests that a phased approach to redevelopment is more realistic than a single substantial development; and that the existing infrastructure at the site makes it particularly suited to a new generating facility.[51]

As contemplated by the Site Assessment Study, the proposed Project can serve as a catalyst for redevelopment of the site. The Department also believes that the redevelopment of the Project site, consistent with the goals of the legislature, will be accomplished primarily by water-dependent industrial uses that are appropriately sited in the DPA.

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[50] "A Site Assessment Study on Potential land Use Options at the Salem Harbor Power Station Site" dated January, 2012. Prepared for the City of Salem by Jacobs, Sasaki Associates, LaCapra Associates, and Robert Charles Lesser Co.
[51] Site Assessment Study at pp.101-102.

3. Project will provide electricity determined to be necessary for grid reliability in NEMA. The 1997 Restructuring Act left electricity generation to market forces. Footprint's bid to supply electricity was accepted by ISO-NE, a private non-profit entity which is responsible for managing the electricity grid in this region and ensuring its reliability. The primary means by which ISO ensures reliability is through the Forward Capacity Market ("FCM") and annual auctions ("Forward Capacity Auction" or "FCA") through which ISO purchases capacity resources projected to be necessary in a three year forward time frame.[52,53] In its most recent FCA, ISO accepted Footprint's bid and closed the auction.[54] Subsequently, ISO stated that without the generating capacity associated with the proposed generating facility, "there would be a shortage of capacity in the NEMA/Boston capacity zone for the 2016 through 2017 commitment period. In other words, without Footprint, the NEMA/Boston capacity zone would not meet reliability standards...."[55] ISO also noted that although there are "backstop actions that the ISO can take, if available, if the Forward Capacity Market does not produce sufficient resources," reliance on these tools in the first instance "distorts market signals and would produce a less secure system in the future."[56]

Chapter 209 of the Acts of 2012 required DPU to determine whether additional future capacity is needed in NEMA/Boston. On March 15, 2013, DPU issued order 12-77 which concluded that "absent Footprint, there is a need in NEMA/Boston for additional capacity resources beginning in the 2016/2017 capacity year.

Furthermore, as described above, the generating facility will be constructed to have quick-start capability, facilitating the integration of renewable energy generation by solar and wind energy facilities.

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[52] Letter dated August 9, 2013, from Raymond W. Hepper and Kevin W. Flynn of ISO New England, Inc., to Alex Strysky of DEP, p.2.

[53] According to ISO's 2012 Markets Report, Section 3.4 (page 77), "The Forward Capacity Market is a long-term market designed to procure the resources needed to meet the region's local and systemwide resource adequacy requirements. It does this by compensating generation and demand resources for fixed capacity costs not covered through the other markets. The FCM is designed to send price signals to attract new capacity resources (e.g., generation, imports, and demand resources) and maintain existing resources to meet the region's resource adequacy standard. To allow enough time to construct new capacity resources, Forward Capacity Auctions (FCAs) are held each year 40 months in advance of when the capacity resources must provide service, called the capacity commitment period (CCP). Both new and existing capacity resources that qualify for an FCA can participate in the auction." ISO's 2012 Markets Report is available at http://www.iso-ne.com/markets/mkt_anlys_rpts/annl_mkt_rpts/2012/amr12_final_051513.pdf

[54] Massachusetts Department of Public Utilities, Order issued for D.P.U. 12-77 on March 15, 2013

[55] Letter dated August 9, 2013, from Raymond W. Hepper and Kevin W. Flynn of ISO New England, Inc., to Alex Strysky of DEP, p.4.

[56] Letter dated August 9, 2013, from Raymond W. Hepper and Kevin W. Flynn of ISO New England, Inc., to Alex Strysky of DEP, p.5.

D. Variance Findings.

1. Finding Relative to Alternatives Analysis. When the need for a variance is addressed in a final EIR, the Commissioner must presume that the description of alternatives contained in the final EIR satisfies the regulatory requirement to describe "alternative designs, locations, or construction methods which would achieve the purpose of the project without the need for a variance...."[57, 58] The scope of alternatives contained in the EIR was appropriate given the Project purpose and included consideration of an off-site and several on-site alternatives that would not require a variance, but were deemed infeasible. With respect to alternatives relying on continuing marine delivery of oil or coal as fuel, or wet-cooling of the generating facility, these alternatives lack the environmental benefits of the proposed facility. Therefore, the Department finds that there are no reasonable conditions or alternatives that would allow the Project to proceed in compliance with 310 CMR 9.00.

2. Finding Relative to Mitigation Measures Analysis. The Project will provide significant mitigation to ensure that the remaining DPA area will be used for water-dependent industrial uses. This is particularly important with the pending closure of the existing facility, which represents the predominant, current water-dependent industrial use of the DPA. The Department finds that the Project includes mitigation measures adequate to minimize interference with the public interests in waterways and incorporates measures designed to compensate the public for any remaining potential detriment to such interests. These include significant measures to prepare the site for redevelopment by water-dependent industrial uses, attract such uses to the site, and maintain most of the DPA land area for water-dependent industrial use.

3. Finding Relative to Necessity/Overriding Interest Analysis. The Project serves an important public purpose, as reflected by the Legislature's recognition of the importance of the site and by helping to ensure a reliable energy supply in the NEMA/Boston region. The redevelopment Project, while not water-dependent, is an industrial use compatible with typical DPA uses and will facilitate the redevelopment of the remainder of the DPA from the historical energy production use to new forms of water-dependent industry appropriate for the site. Therefore, the Department finds that the Project is necessary to accommodate an overriding public interest.

VI. Decision.

Based on the discussion above, the Department finds that the Applicant has satisfied the requirements for obtaining a variance pursuant to 310 CMR 9.21. Therefore, the Department hereby varies the requirements of 310 CMR 9.32 to allow a new nonwater-dependent use on filled tidelands within a Designated Port Area, in accordance with the terms and conditions of this decision.

[57] 310 CMR 9.21(2)(c)
[58] 310 CMR 9.21(2)(a)(2)

VII. Findings.

1. The Department determines that the use of private tidelands for a gas-fired generating facility is a nonwater-dependent use pursuant to 9.12(4). Given that the project does not consist entirely of water-dependent uses, the Department has processed the application as a nonwater-dependent use project in accordance with 310 CMR 9.12(1).

2. The Department determines that relevant documentation regarding compliance with the Massachusetts Environmental Policy Act (EEA No.14937), planning board receipt of application, and zoning certificate, have been provided.

3. The Department determines that the required public notice was published by the Applicant on May 22, 2013 in the Environmental Monitor and on May 24, 2013 in the Salem News. A public hearing was held at Bentley Elementary School in Salem on June 12, 2013. Public comments at the hearing were generally favorable to the Project. Concerns about the effect of sea level rise were raised, and the proponent responded that the ground floor of the buildings has been elevated to six feet above the 100 year flood elevation. The Department received letters of support for the project from the Representative Keenan and Senator Lovely, who represent Salem in the Legislature, and the City of Salem. Several letters were received from Salem residents who do not believe a nonwater-dependent use should be allowed in the DPA. A letter submitted by the Conservation Law Foundation, also on behalf of Clean Water Action, Healthlink, and group of Salem residents, questioned whether the Project qualifies for a variance. The CLF letter contended that the Project does not serve an overriding public interest, is an inappropriate use for the DPA, and that there are reasonable alternative sites for the facility. The CLF letter also stated that the Project is inconsistent with the MHP/DPA Master Plan and the state's Greenhouse Gas policy goals.

4. The Department incorporates by reference the findings in Section VI above, and determines that the Project, as conditioned, complies with all other applicable standards of the Waterways Regulations, including the special standards for nonwater-dependent infrastructure facilities at 310 CMR 9.55. Furthermore, no overriding detriment to a public interest has been identified to overcome the presumption that the Project serves a proper public purpose in accordance with 310 CMR 9.31(3). Therefore, the Department determines that the proposed Project serves a proper public purpose that provides greater public benefit than detriment to the public's rights in said tidelands.

VIII. Section 61 Findings.

These Findings for the Salem Harbor Station Redevelopment Project (EEA # 14937) have been prepared in accordance with the provisions of M.G.L. c. 30, Section 61 and 301 CMR 11.00. On May 17, 2013 the Secretary of the Executive Office of Energy and Environmental Affairs issued a Final EIR Certificate stating that the Project's Final Environmental Impact Report , dated April 1, 2013, complied with the MEPA statute and regulations.

Construction of the proposed gas-fired generating facility has the potential to impact the use of the Salem Harbor Designated Port Area DPA for water-dependent industrial use.

The Department has reviewed the MEPA documents and the documents submitted in connection with the application for a license. The Applicant performed an alternatives analysis to minimize impacts of the Project and has proposed mitigation to prepare the remainder of the site for reuse by water-dependent industrial use, provide and maintain infrastructure for water-dependent industrial use, and to take measures to attract such uses to the site. The Project will also dedicate non-jurisdictional areas to water-dependent industrial use, partly compensating for the use of tidelands in the DPA for nonwater-dependent use. Based upon its review, the Department finds that implementation of the terms and conditions of this proposed license constitute all feasible measures to avoid damage to the environment and will minimize and mitigate such damage to the maximum extent practicable. In making this finding, the Department has considered reasonably foreseeable climate change impacts, including additional greenhouse gas emissions, and effects, such as predicted sea level rise. As listed in the Certificate on the FEIR, implementation of the mitigation measures with respect to greenhouse gas emissions includes use of combined cycle natural gas turbines; $4 million in CO2 allowances for RGGI offsets; solar PV array to offset 175 tpy GHG emissions; design of the Administrative Building for LEED Certification at the Platinum level; and designing the Operations Building to include the use of a high albedo roof, geothermal heat pumps, increased insulation, climate control, and water conserving fixtures.. In addition, as noted in the FEIR Certificate, GHG commitments will also include a commitment to analyze GHG emissions associated with future redevelopment of the site and to provide a Certification to the MEPA Office indicating that all of the measures proposed to mitigate GHG emissions, or measures that will achieve equivalent reductions, are included in the Project.[59]

IX. Conclusion.

On the basis of the foregoing analysis, the Department will approve the proposed structures and uses described herein, as shown on the plans submitted with the application, and attached hereto at Attachment D, and as shall be modified and delineated on the final license plans in accordance with the terms of this Decision on Variance Request and Written Determination. This Decision on Variance Request and Written Determination is subject to the attached Special Conditions and General Conditions, set forth in Attachment A and Attachment B, respectively, to be carried out by the Applicant. These Special Conditions will be included, in substantially the same form, along with the standard conditions, with the final Chapter 91 Waterways license to be issued pursuant hereto. This Decision on Variance Request and Written Determination, including the attached Special Conditions, is subject to appeal as described in more detail in Attachment C, on pages 33-34. The Department will grant a Chapter 91 Waterways license, pursuant to the

[59] Additional detail is set forth in Applicant's "Revised Draft Section 61 Findings," an attachment to correspondence from Lauren A. Liss, on behalf of Applicant, to Richard K. Sullivan, Secretary, EOEEA, dated June 10, 2013 and filed with the MEPA Office.

procedure outlined herein, if no appeal is filed within 21 days of the issuance of this Decision on Variance Request and Written Determination. Please contact Ben Lynch at (617) 292-5615 if you have any questions.

THIS DETERMINATION IS ISSUED BY THE DEPARTMENT OF ENVIRONMENTAL PROTECTION ON THE 1st DAY OF NOVEMBER, 2013.

Kenneth L. Kimmell
Commissioner

Cc: Representative Keenan
Senator Lovely
Mayor Kimberley Driscoll, City of Salem
Salem City Council
Salem Conservation Commission
Salem Planning Board
Salem Harbormaster
Karen Adams, U.S. Army Corps of Engineers
Bruce Carlisle, CZM
Bob Boeri, CZM
Shanna Cleveland, CLF
Jeffrey Brooks, 14 Webb St., Salem 01970
Linda Haley, 43 Turner Street, Salem, MA 01970\
Andrea Maubourquette, 14 Webb St Salem MA 01970

Attachment A

WRITTEN DETERMINATION AND CONDITIONS

Footprint Power Salem Harbor Development LP

of – Bridgewater --, in the State of – New Jersey--, has applied to the Department of Environmental Protection to – construct and maintain a generating facility and ancillary structures and fill, including a landscaped berm; to perform soil remediation; to construct and maintain public access walkways; and install and maintain water-dependent industrial infrastructure including, but not limited to, an engineered concrete platform, suitable for use by mobile cranes and as a roll-on, roll-off facility--------

and has submitted plans of the same; and whereas due notice of said application, and of the time and place fixed for a hearing thereon, has been given, as required by law, to the –Mayor-- of the -- City-- of –- Salem. ----------

NOW, said Department, having heard all parties desiring to be heard, and having fully considered said application, hereby, subject to the approval of the Governor, authorizes and licenses the said ----------

---- Footprint Power Salem Harbor Development LP----, subject to the provisions of the ninety-first chapter of the General Laws, and of all laws which are or may be in force applicable thereto, to – construct and maintain a generating facility and ancillary structures and fill, including a landscaped berm; to perform soil remediation; to construct and maintain public access walkways; and install and maintain water-dependent industrial infrastructure including, but not limited to, an engineered concrete platform, suitable for use by mobile cranes and as a roll-on, roll-off facility--------

in and over filled tidelands of –Salem Harbor -- in the -- City -- of – Salem-- and in accordance with the locations shown and details indicated on the accompanying draft DEP License Plan No. (to be assigned) dated October 31, 2013 (15 sheets).

The uses of structures and fill authorized hereby shall be limited to the following: nonwater-dependent infrastructure facilities for the production of electricity for the public; water-dependent industrial infrastructure, and public pedestrian access.

Existing fill and structures on the site were authorized by the Waterways authorizations listed in Attachment 1.

This License is valid for a term of thirty (30) years from the date of issuance. By written request of the Licensee for a new amendment, the Department may grant a renewal for the term of years not to exceed that authorized in this License.

Special Conditions

1. This License is issued pursuant to the Variance and Written Determination issued by the Commissioner of DEP on November 1, 2013.

2. The Licensee shall demolish the existing structures shown in Figure 4 of the Applicant's Request for Approval for Removal of Obsolete Structures, dated August 2013, on file with the Department. Upon demolition of structures, the Licensee shall remove all demolition debris from the site and disposeof the same in accordance with all applicable laws, and shall prepare the site for soil remediation in accordance with Special Condition 3. The Licensee shall complete demolition and removal of debris no later than close of business on December 31, 2016.

3. The Licensee, in addition to assessing and remediating the soil in connection with site preparation and construction of the Project (including the associated berm) as necessary and in accordance with the MCP, shall remediate the soil of all parts of the site outside the footprint of the proposed generating facility, its associated berm, and the National Grid Switchyard as necessary, in accordance with the MCP and to an extent sufficient to allow water-dependent industrial use at those parts of the site. The Licensee shall complete remediation and file a Response Action Outcome, or other appropriate document, with DEP's Bureau of Waste Site Cleanup no later than close of business on December 31, 2016.

4. The Licensee shall construct and maintain for the term of the License an engineered concrete platform, suitable for use by mobile cranes and as a roll-on, roll-off facility, for use by future water-dependent industrial uses occupying the site. The crane platform shall be maintained in good working order by the Licensee for the referenced activities necessary for said DPA users.

5. The Licensee shall construct or provide funding, separate from the provision of the engineered concrete platform described above, of up to $180,000 for improvements to the run-off pond revetment, as identified in the City of Salem's Notice of Project Change #14234/#14937("NPC"). Said commitment shall be exclusive of the provision and maintenance of the engineered concrete platform in Special Condition #4. The Licensee shall provide documentation to the Department that said funding has been provided to the City pursuant to this proposed Port Development project within six (6) months of said transaction. In the event for any reason that said construction commitment or funds are not fully performed or expended, respectively, prior to the completion of the proposed power facility or December 31, 2016, whichever is later, the Licensee shall notify the Department and include a proposal for alternative mitigation of equal or greater value of the remainder of the unperformed construction

or unspent funds, as the case may be, to facilitate water-dependent industrial use on the Project site.

6. The Licensee shall provide and maintain in good condition an interior service access way of sufficient width from either Fort Avenue or Derby Street to the waterfront portion of the site to allow future site access to future water-dependent industrial users of the site. Said interior service access way shall be completed no later than five (5) years from the date of License issuance. In the event that said interior service access way is not completed within this time frame, the Licensee may request a one-year extension from the Department. The Licensee shall show good cause for said request. The Department may extend said term without public hearing or notice. The Licensee shall submit plans for the interior service access way lay-out to the Department for its prior review and approval.

7. Prior to commencement of construction of the facility, the Licensee, at its sole cost and expense, subject to the Department's prior approval, shall grant an irrevocable restriction to the City of Salem prohibiting any use of approximately nine (9) acres of non-jurisdictional land, including all the waterfront land in the non-tidelands portion of the site, other than those uses expressly allowed under the Salem Municipal Harbor Plan's DPA Master Plan, as it may be amended. Said restriction shall run with the land for a term of years equal to the length of the Chapter 91 License term, including any renewals or other extensions of the License term. Provided, however, that if the maximum term for such restriction allowable under law is less than the required term herein, then Licensee shall establish the required restriction for the maximum term allowable under law and it shall be a further condition of this License that Licensee renew the required restriction prior to its expiration as necessary in order achieve the required term herein. The Licensee shall submit a proposed restriction for the Department's review and approval no later than sixty (60) days after the effective date of this License, and shall implement said restrictions only after written approval from the Department in accordance with any conditions contained therein.

8. Six (6) months prior to completion of the generating facility, the Licensee shall provide to the Department, for its review and approval, a Marketing Plan describing measures to be undertaken by the Licensee to attract water-dependent industrial uses to the site. Upon approval, the Licensee shall implement the approved actions in the Plan. Said plan shall include a list of the types of businesses which will be directly solicited and the means by which the site will be advertised, including local newspapers and maritime or other trade journals. Marketing of the site shall commence within 3 months of the Department's approval of said plan. The Licensee shall submit to the Department updated Marketing Plans every three (3) years from the anniversary of the first Plan, including any revised or updated information included in the original Plan, as well as an accounting of the water-dependent industrial uses so located and operating on the Project Site at the time of the revised Plan.

9. The Licensee shall construct and maintain the public pedestrian pathway network on the site, as shown on the license plans. The publicly accessible facilities authorized in this License shall be available to the general public, free of charge, from dawn to dusk on a year round basis. The Licensee shall remove ice and snow as necessary, and ensure that said pathways remain in an

unobstructed condition. The Licensee may adopt reasonable rules for use of these publicly accessible facilities, subject to prior review and written approval by the Department, as are necessary for the protection of public health and safety and private property, and to ensure public use and enjoyment by minimizing conflicts between user groups. No amendment to said rules shall be made without prior written approval by the Department. The exercise by the public of free on-foot passage in accordance with this condition shall be considered a permitted use to which the limited liability provisions of M.G.L. c. 21, section 17(c) shall apply.

10. All activities for which a license has been issued shall be completed within five (5) years of the date of issuance of the license or permit, unless otherwise specified herein. This period may be extended upon written request to MassDEP at least sixty (60) days in advance of the deadline specified herein.

11. Pursuant to 310 CMR 9.22, Licensees may undertake minor project modifications upon written notice to, and written prior approval by, MassDEP.

12. The Licensee shall allow agents of MassDEP at all times to enter the Project site to verify compliance with the conditions of this License.

13. Within 60 days of the completion of the Project, but in no event later than five years from the date of License issuance, the Licensee shall request in writing that MassDEP issue a Certificate of Compliance in accordance with 310 CMR 9.19, for each license issued.

14. The Licensee shall maintain in good repair all fill, structures, facilities, and landscaping to be licensed hereunder for the term of the license, including any renewal. With the prior written approval of the Department, the Licensee may assign the obligation to maintain all or portions of such fill, structures, and facilities to another responsible party following license issuance. A written legal agreement between the parties requesting a transfer of said maintenance responsibility shall be submitted to the Department clearly identifying the area to be maintained and the associated Waterways License number, and stating that the maintenance responsibility shall run with the term of the license, that failure to maintain said area will result in a violation of the Waterways License, and any structural alterations or changes in use to said area are subject to prior review and approval by the Department.

15. The Licensee shall ensure that passive recreational use by the general public of the facilities required herein is fully and safely allowed on the site pursuant to any Activity and Use Limitations ("AULs") that may be adopted in full compliance with the Massachusetts Contingency Plan, 310 CMR 40.0000. Such passive recreational use shall include that associated with public open space use involving more than casual contact with the ground, including, but not limited to, walking, strolling, bicycling, picnicking, and sitting. The Licensee shall ensure that the on-site areas specified in this License as publicly accessible open spaces, are fully remediated to levels that will not impede or prohibit the public use of open space, including passive recreational use. Any AUL adopted by the Licensee shall fully allow for such public open space and passive recreational uses. Any interpretation regarding what uses are allowed under an AUL shall be decided by the Department's Bureau of Waste Site Cleanup in MassDEP's Northeast Regional Office.

16. The Licensee shall submit to MassDEP, prior to License issuance, final mylar plans drawn in accordance with MassDEP's plan specifications which meet the terms of this Written Determination, which conform to all relevant engineering and construction standards at 310 CMR 9.37, and which show all required information pursuant to 310 CMR 9.11. Pursuant to 310 CMR 9.37(1), a Registered Professional Engineer shall certify that all fill and structures shall be designed and constructed to be structurally sound, comply with State Building Code requirements for construction in flood plains, and will not pose an unreasonable threat to navigation, public health or safety, or adjacent buildings or structures if damaged or destroyed in a storm.

17. This Written Determination shall remain valid until the license is issued or for up to one year after the Written Determination is issued, whichever is sooner. Said term may be extended for one or more one year periods, provided that the Licensee submits to MassDEP, thirty (30) days prior to the expiration of said term, a written request to extend the term and provides an adequate justification for said extension.

Please see page 31 for additional conditions to this license. ----------

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Duplicate of said draft plan, number (to be assigned) (15 sheets) on file in the office of said Department, and original of said plan accompanies this License, and is to be referred to as a part hereof.

Attachment B

STANDARD WATERWAYS LICENSE CONDITIONS

1. Acceptance of this Waterways License shall constitute an agreement by the Licensee to conform with all terms and conditions stated herein.

2. This License is granted upon the express condition that any and all other applicable authorizations necessitated due to the provisions hereof shall be secured by the Licensee prior to the commencement of any activity or use authorized pursuant to this License.

3. Any change in use or any substantial structural alteration of any structure or fill authorized herein shall require the issuance by MassDEP of a new Waterways License in accordance with the provisions and procedures established in Chapter 91 of the Massachusetts General Laws. Any unauthorized substantial change in use or unauthorized substantial structural alteration of any structure or fill authorized herein shall render this Waterways License void.

4. This Waterways License shall be revocable by MassDEP for noncompliance with the terms and conditions set forth herein. This License may be revoked after MassDEP has given written notice of the alleged noncompliance to the Licensee and those persons who have filed a written request for such notice with MassDEP and afforded them a reasonable opportunity to correct said noncompliance. Failure to correct said noncompliance after the issuance of a written notice by MassDEP shall render this Waterways License void and the Commonwealth may proceed to remove or cause removal of any structure or fill authorized herein at the expense of the Licensee, its successors and assigns as an unauthorized and unlawful structure and/or fill.

5. The structures and/or fill authorized herein shall be maintained in good repair and in accordance with the terms and conditions stated herein and the details indicated on the accompanying license plans.

6. Nothing in this Waterways License shall be construed as authorizing encroachment in, on or over property not owned or controlled by the Licensee, except with the written consent of the owner or owners thereof.

7. This Waterways License is granted subject to all applicable Federal, State, County, and Municipal laws, ordinances and regulations including but not limited to a valid final Order of Conditions issued pursuant to the Wetlands Protection Act, G.L. Chapter 131, s.40.

8. This Waterways License is granted upon the express condition that the use of the structures and/or fill authorized hereby shall be in strict conformance with all applicable requirements and authorizations of the DEP.

This License authorizes structure(s) and/or fill on:

X Private Tidelands. In accordance with the public easement that exists by law on private tidelands, the Licensee shall allow the public to use and to pass freely upon the area of the subject property lying between the high and low water marks, for the purposes of fishing, fowling, navigation, and the natural derivatives thereof.

X Commonwealth Tidelands. Except as provided by M.G.L. c. 90 sec. 61, the Licensee shall not restrict the public's right to use and to pass freely, for any lawful purpose, upon lands lying seaward of the low water mark. Said lands are held in trust by the Commonwealth for the benefit of the public.

_ a Great Pond of the Commonwealth. The Licensee shall not restrict the public's right to use and to pass freely upon lands lying seaward of the high water mark for any lawful purpose.

No restriction on the exercise of these public rights shall be imposed unless otherwise expressly provided in this License.

The amount of tidewater displaced by the work hereby authorized has been ascertained by said Department, and compensation thereof has been made by the said – Footprint Power Salem Harbor Development LP-- by paying into the treasury of the Commonwealth – N/A-- for each cubic yard so displaced, being the amount hereby assessed by said Department.

Nothing in this License shall be so construed as to impair the legal rights of any person. This License shall be void unless the same and the accompanying plan are recorded within 60 days from the date hereof, in the Registry of Deeds for the County of --Essex--.

IN WITNESS WHEREAS, said Department of Environmental Protection have hereunto set their hands this day of in the year two thousand and thirteen.

Program Chief _____

Department of Environmental Protection

Program Director _____

Commissioner _____

THE COMMONWEALTH OF MASSACHUSETTS

This license is approved in consideration of the payment into the treasury of the Commonwealth by the said –Footprint Power Salem Harbor Development LP--

-- the further sum of -- N/A --

the amount determined by the Governor as a just and equitable charge for rights and privileges hereby granted in the land of the Commonwealth.

BOSTON,

Approved by the Governor.

_____
Governor

Attachment C

STATEMENT REGARDING APPEAL RIGHTS

1. Who has the right to appeal?

The following persons shall have the right to an adjudicatory hearing concerning this decision by the Department to grant or deny a license or permit, in accordance with 310 CMR 9.17(1): (a) an applicant who has demonstrated property rights in the lands in question, or which is a public agency; (b) any person aggrieved by the decision of the Department to grant a license or permit who has submitted written comments within the public comment period; (c) ten (10) residents of the Commonwealth who, pursuant to M.G.L. c. 30A, § 10A, have submitted comments within the public comment period with at least 5 of the 10 residents residing in the municipality(s) in which the license or permitted activity is located. The appeal shall clearly and specifically state the facts and grounds for the appeal and the relief sought, and each appealing resident shall file an affidavit stating the intent to be part of the group and to be represented by its authorized representative; (d) the municipal official in the affected municipality who has submitted written comments within the public comment period; and (e) CZM, for any project identified in 310 CMR 9.13(2) (a) for CZM participation or, in an Ocean Sanctuary, if it has filed a notice of participation within the public comment period.

2. How can I request an adjudicatory hearing?

A person requesting an adjudicatory hearing must submit a "Notice of Claim" to the Department, with a copy of the MassDEP Transmittal Form and including the detail specified below, within twenty-one (21) days of the date of issuance of this decision. The MassDEP Fee Transmittal Form is available at the following website: http://www.mass.gov/dep/service/adr/adjherfm.doc. The Notice of Claim must be made in writing and sent by certified mail or hand delivery to:

Case Administrator, Office of Appeals and Dispute Resolution
MassDEP
One Winter Street, 2nd Floor
Boston, MA 02108

A copy of the complete Notice of Claim must be sent at the same time by certified mail or hand delivery to: (1) the applicant, (2) the municipal official of the city or town where the project is located, and (3) the issuing office of the MassDEP, which in this case is located at:

MassDEP Waterways Regulation Program
One Winter Street, 5th Floor
Boston, MA 02108

The MassDEP Fee Transmittal Form and a valid check payable to the Commonwealth of Massachusetts in the amount of one hundred dollars ($100) must be mailed to:

Mass. Department of Environmental Protection

Commonwealth Master Lockbox
P.O. Box 4062
Boston, Massachusetts 02211

3. What information must be included in the hearing request?

Pursuant to 310 CMR 9.17(3), any Notice of Claim requesting an adjudicatory hearing must include the following information:

(a) the MassDEP Waterways Application File Number;
(b) the complete name, address, fax number and telephone number of the applicant;
(c) the address of the project;
(d) the complete name, address, fax number, and telephone number of the party filing the request and, if represented by counsel, the name, address, fax number, and phone number of the attorney;
(e) if claiming to be a person aggrieved, the specific facts that demonstrate that the party satisfies the definition of "aggrieved person" found in 310 CMR 9.02;
(f) a clear statement that a formal adjudicatory hearing is being requested;
(g) a clear statement of the facts which are the grounds for the proceedings, the specific objections to the MassDEP's written decision, and the relief sought through the adjudicatory hearing, including specifically the changes desired in the final written decision; and
(h) a statement that a copy of the request has been sent to: the applicant and the municipal official of the city or town where the project is located.

Dismissal of request

The request for appeal will be dismissed if the filing fee is not paid, unless the appellant is exempt or is granted a waiver. The filing fee is not required if the appellant is a city or town (or municipal agency), county, or district of the Commonwealth of Massachusetts, or a municipal housing authority. The Department may waive the adjudicatory hearing filing fee pursuant to 310 CMR 4.06(2) for a person who shows that paying the fee will create an undue financial hardship. A person seeking a waiver must file an affidavit setting forth the facts believed to support the claim of undue financial hardship together with the hearing request as provided above.

Attachment D

DRAFT LICENSE PLANS

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS.

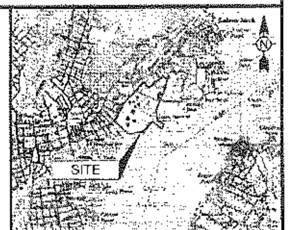
COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI CIVIL NO. 46279
REGISTERED PROFESSIONAL ENGINEER

10/31/13

REGISTERED PROFESSIONAL ENGINEER — DATE

NOTES:

1. HISTORIC HIGH WATER FROM "PART OF SALEM IN 1700, FROM THE RESEARCHES OF SIDNEY PERLEY" AND "MAP OF SALEM HARBOR INCLUDING THE CITY AND ISLANDS U.S. COAST SURVEY, 1849 AND 1850, REG. NO. 303B"
2. FEMA FLOOD INFORMATION-FIRM ESSEX COUNTY, MASSACHUSETTS Panel 25009C0419F (July 3, 2012).
3. VERTICAL DATUM IS NAVD88
4. HORIZONTAL DATUM IS NAD83
5. MEAN LOW WATER = -5.2'
6. MEAN HIGH WATER = 4.1'
7. SEE LICENSE PLANS 10066 FOR AUTHORIZATION OF FILL
8. SELECT STRUCTURES SHOWN HEREIN ARE TO BE DEMOLISHED AS APPROVED BY THE DEPARTMENT IN A LETTER DATED SEPTEMBER 23, 2013 "APPROVAL TO DEMOLISH AND REMOVE OBSELETE STRUCTURES"



LOCUS MAP

SALEM HARBOR STATION REDEVELOPMENT PROJECT

IN THE CITY OF SALEM

ESSEX COUNTY

INDEX OF DRAWINGS

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI CIVIL NO. 46279
REGISTERED PROFESSIONAL ENGINEER

10/31/13

SHEET 1 OF 15

PLANS ACCOMPANYING THE PETITION OF FOOTPRINT POWER SALEM HARBOR DEVELOPMENT LP TO CONSTRUCT A NATURAL GAS FIRED POWER PLANT ON FILLED TIDELANDS ADJACENT TO SALEM HARBOR IN SALEM MASSACHUSETTS IN ESSEX COUNTY

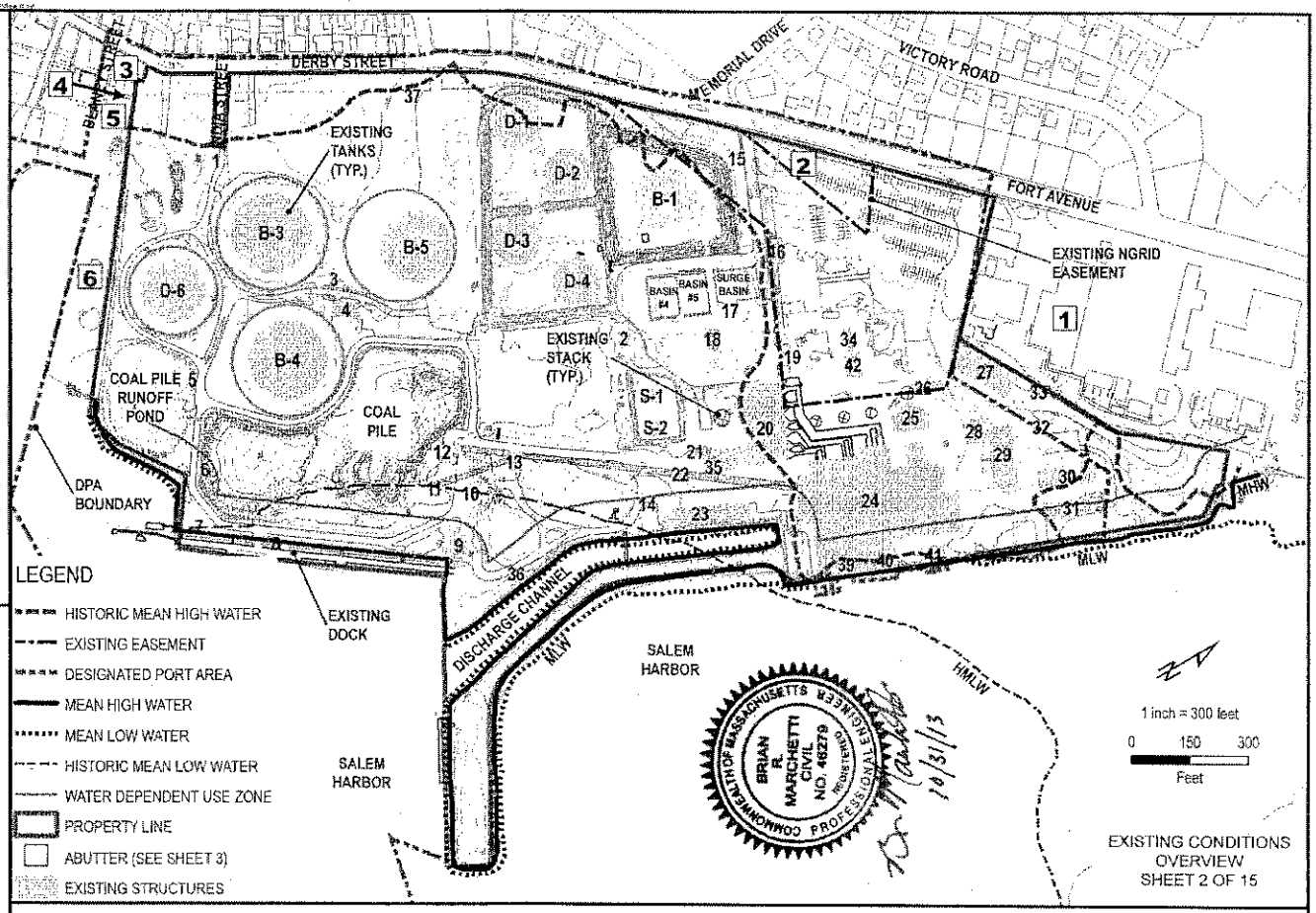
OCTOBER 2013

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED PROFESSIONAL ENGINEER

10/31/13
DATE

REGISTERED PROFESSIONAL ENGINEER



COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED PROFESSIONAL ENGINEER

10/31/13

EXISTING CONDITIONS OVERVIEW
SHEET 2 OF 15

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS.

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED
PROFESSIONAL ENGINEER

10/31/13

REGISTERED PROFESSIONAL ENGINEER — DATE

EXISTING BUILDINGS KEY

ID	NAME
1	INDIA ST WATER METERING BLDG.
2	WASTEWATER TREATMENT PUMP HOUSE
3	HEAT TRACE BLDG.
4	OIL TRANS. PUMP HOUSE
5	COAL PILE RUNOFF POND PUMP HOUSE
6	COAL TUNNEL BLDG.
7	S. DOCK MOTOR CONTROL CENT. BLDG.
8	DOCK OFFICE
9	BOAT STORAGE & MACHINE SHOP
10	GARAGE/STORAGE HOUSE
11	JUNC. HOUSE T-U
12	YARD OFFICE
13	BREAKER HOUSE
14	CO2 STORAGE BLDG. & HYDROGEN STORAGE SLAB
15	GATE HOUSE
16	SECURITY. BLDG.
17	ASH SLUICE PUMP HOUSE
18	HYDROBINS
19	SWITCHGEAR BLDG.
20	FANS/ELEC./PRECIP/ BLDG.
21	GARAGE
22	SUB-STATION BLDG.

ID	NAME
23	TRAINING CENTER & WAREHOUSE
24	POWER PLANT
25	FAN HOUSE
26	F.A.R. BLDG.
27	WAREHOUSE
28	FLY-ASH SILO BLDG.
29	WAREHOUSE
30	CHANGE HOUSE
31	WAREHOUSE
32	STORAGE
33	STORAGE
34	NGRID RELAY HOUSE
35	OIL PUMP HOUSE
36	CHLORINE ANALYZER BLDG.
37	DERBY ST WATER METERING BLDG.
38	N DOCK MOTOR CONTROL CENTER BLDG.
39	SCREEN HOUSE UNIT 1 AND 2
40	SCREEN HOUSE UNIT 3
41	SCREEN HOUSE UNIT 4
42	NGRID PUMP HOUSE

Project Abutters

Plan ID	Assessor's Parcel ID	Parcel Address	Parcel Owner	Owner's Mailing Address
1	42-0098	26-34 Fort Avenue Salem, MA 01970	South Essex Sewerage Board	50 Fort Avenue Salem, MA 01970
2	41-0321	2 Block House Square Salem, MA 01970	City of Salem	Salem City Hall 93 Washington Street Salem, MA 01970
3	41-0275	81 Derby Street Salem, MA 01970	Jean Pierre Draczuk	5 Rue Du Mont 93800 Epinay Sur Seine France
4	41-0276	83-85 Derby Street Salem, MA 01970	Richard E. Savickey	36 Dearborn Street Salem, MA 01970
5	41-0277	5 Blaney Street Salem, MA 01970	H D E T Realty Trust Daniel J. Mackey, Trustee	PO Box 366 Salem, MA 01970
6	41-0278	10 Blaney Street Salem, MA 01970	City of Salem	Salem City Hall 93 Washington Street Salem, MA 01970

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED
PROFESSIONAL ENGINEER

10/31/13

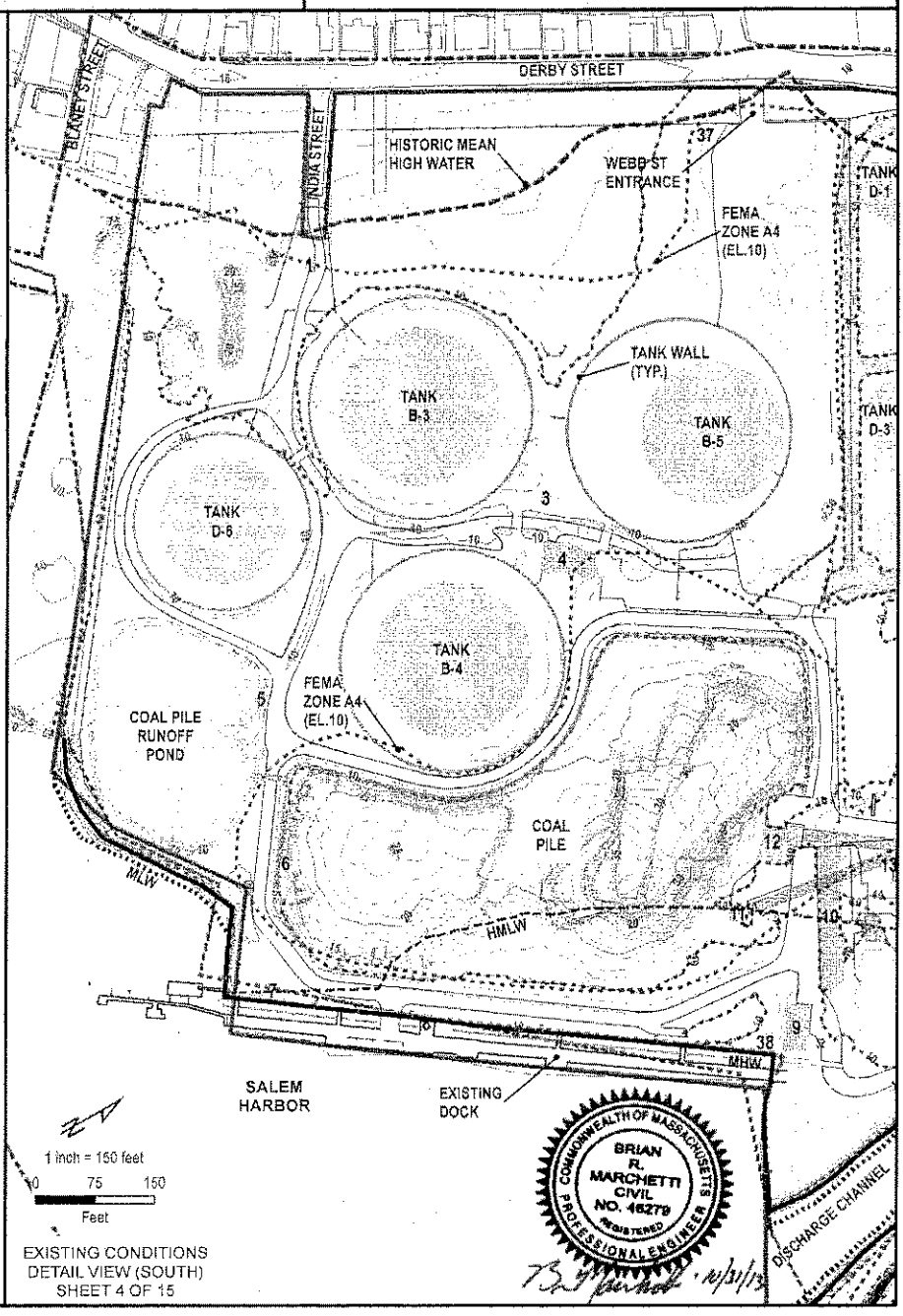
EXISTING CONDITIONS
BUILDING KEY AND NOTES
SHEET 3 OF 15

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED PROFESSIONAL ENGINEER

10/31/13

REGISTERED PROFESSIONAL ENGINEER — DATE



EXISTING CONDITIONS
DETAIL VIEW (SOUTH)
SHEET 4 OF 15

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED PROFESSIONAL ENGINEER

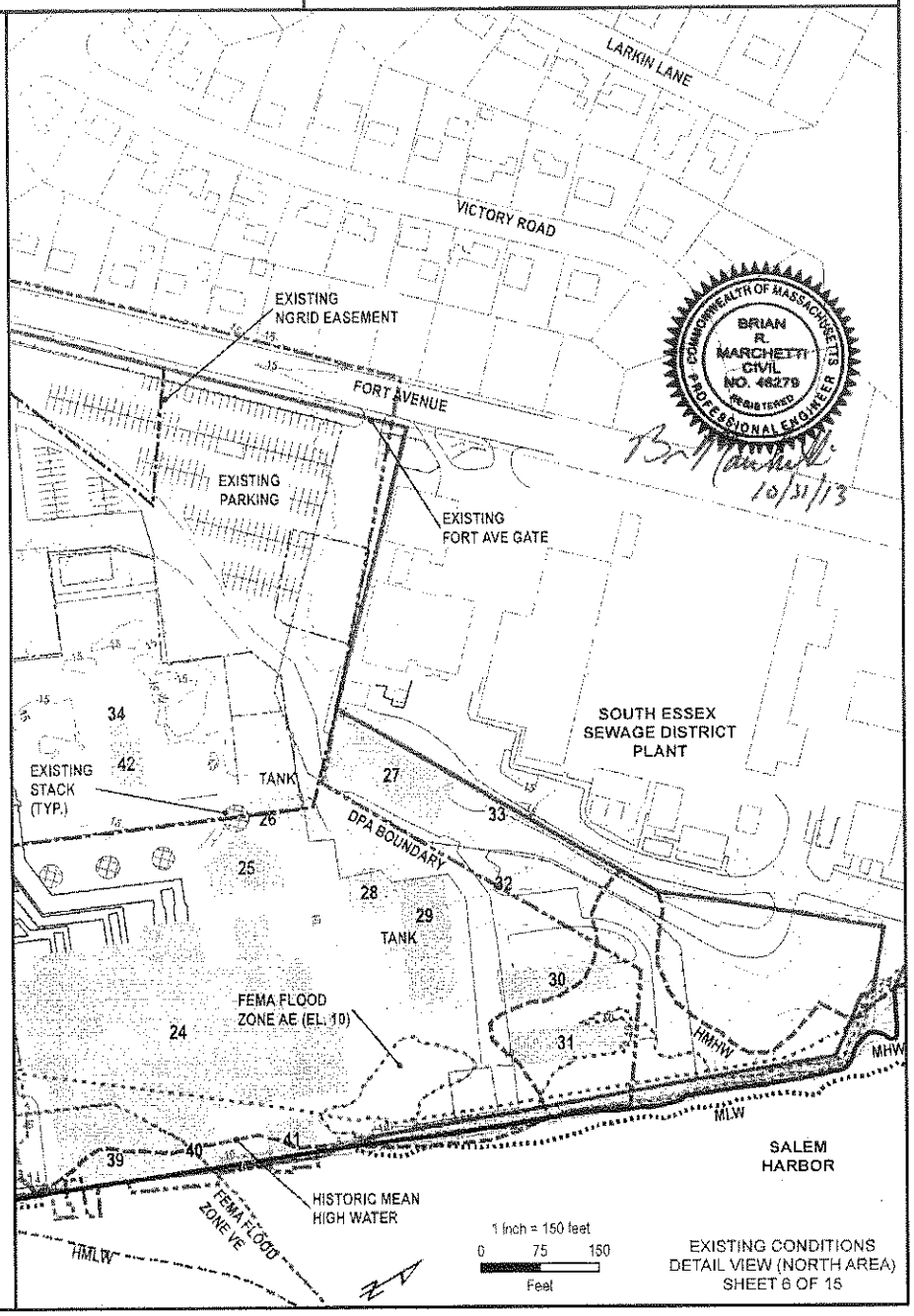
10/31/13

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED
PROFESSIONAL ENGINEER

10/31/13

REGISTERED PROFESSIONAL ENGINEER — DATE



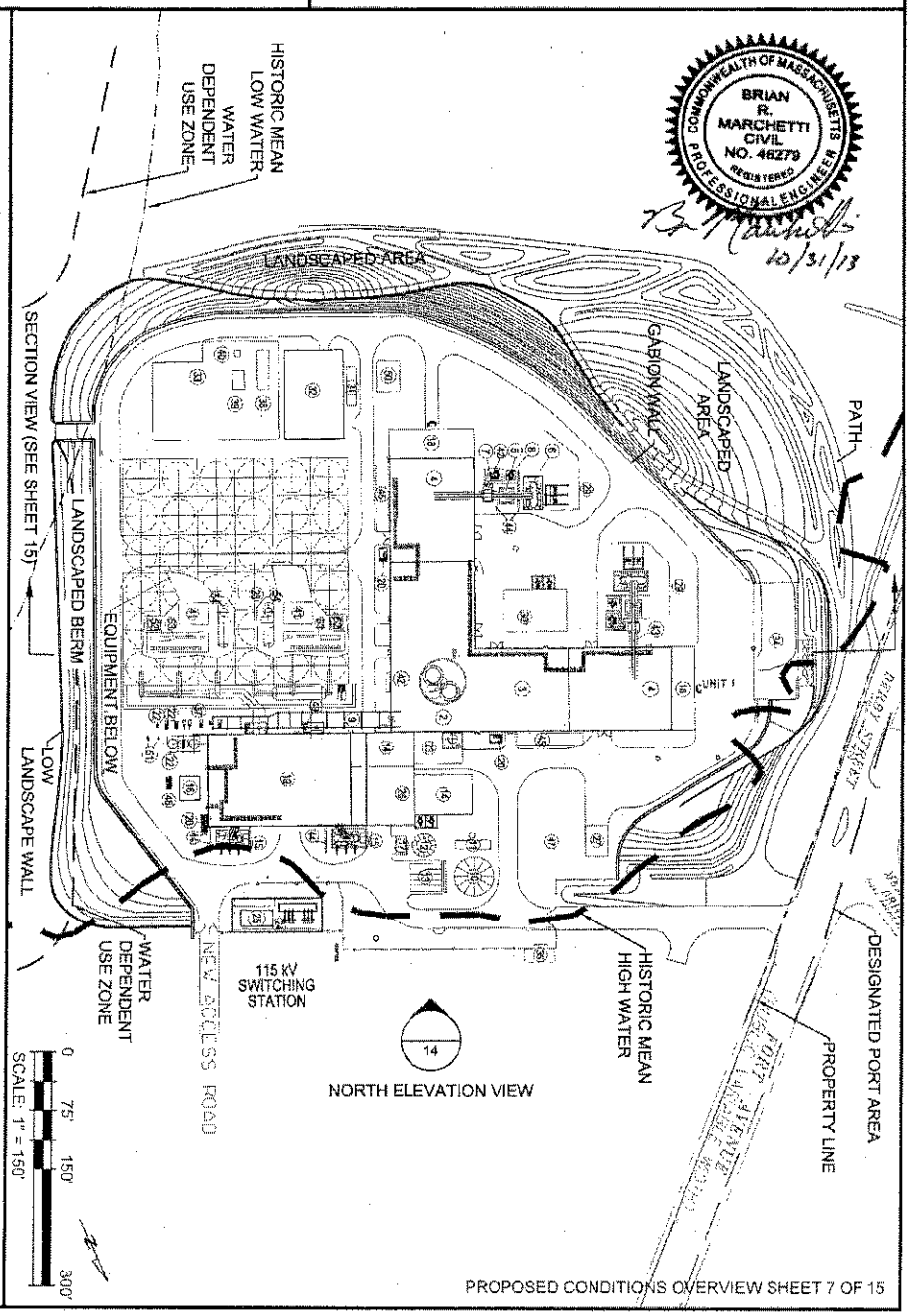
EXISTING CONDITIONS
DETAIL VIEW (NORTH AREA)
SHEET 6 OF 15

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS.

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED PROFESSIONAL ENGINEER

B R Marchetti 10/31/13

REGISTERED PROFESSIONAL ENGINEER DATE



PROPOSED CONDITIONS OVERVIEW SHEET 7 OF 15

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS.

COMMONWEALTH OF MASSACHUSETTS BRIAN R. MARCHETTI CIVIL NO. 46279 REGISTERED PROFESSIONAL ENGINEER

10/31/13

REGISTERED PROFESSIONAL ENGINEER DATE

Label	Structure
1	STACK
2	FLUE
3	HEAT RECOVERY STEAM GENERATOR BUILDING
4	COMBUSTION TURBINE GENERATOR BUILDING (CTG)
5	AUXILIARY TRANSFORMER
6	CTG STEP-UP TRANSFORMER
7	STATIC START ISOLATION TRANSFORMER
8	EXCITATION TRANSFORMER
9	RACK
10	COMBINED FIRE PROTECTION WATER/SERVICE WATER STORAGE TANK
11	FIRE PUMP/SERVICE WATER PUMPS ENCLOSURE
12	DEMINERALIZED WATER STORAGE TANK
13	DEMINERALIZED WATER TRAILER PARKING
14	STG ELECTRICAL SWITCHGEAR/MCC PDC & AUXILIARY BOILER BUILDING
15	STG GSU TRANSFORMER
16	DRAIN SUMP PIT
17	DEMINERALIZED WATER PUMPS ENCLOSURE
18	CTG AIR INLET PLENUM
19	STG BUILDING
20	FUEL GAS FILTER/SEPARATOR DRAIN TANK
21	DIESEL GENERATOR
22	AUX COOLING SYSTEM COOLING TOWER/CHEM FEED
23	19% AQUEOUS AMMONIA STORAGE TANK/UNLOADING AREA
24	115 KV GIS SWITCHING STATION
25	GIS CENTRAL BUILDING
26	OPERATIONS BUILDING
27	H2 TRAILER
28	AIR COOLER CONDENSER (ACC)
29	SOUND WALL
30	MAIN POWER DISTRIBUTION CENTER (PDC)
31	GAS COMPRESSORS POWER DISTRIBUTION CENTER (PDC)
32	GAS REGULATION AND METERING STATION
33	UTILITY GAS METERING STATION
34	ADMINISTRATION / CONTROL BUILDING
35	GATE HOUSE (EXISTING)
36	CTG REMOVAL HATCH (ON CTG BLDG ROOF)
37	CCW PLATE AND FRAME HEAT EXCHANGERS / PUMPS
38	METERING BUILDING
39	GAS REGULATION BUILDING
40	GAS FILTER
41	VACUUM PUMPS HOUSE
42	CTG GENERATOR CIRCUIT BREAKER
43	ISO PHASE BUS DUCT
44	FIRE WALL
45	FUEL GAS TREATMENT AREA
46	N2 MANIFOLD
47	ROOF RAIN WATER UNDERGROUND CISTERN (30,000 CUBIC-FOOT)
48	INHIBITOR DOSING OPEN COOLING SYSTEM
49	DRAIN POT AND DRAIN PUMS
50	N2/CO2 TRAILER
51	GASKET FILTERS
52	ACC TRANSFORMER
53	ACC ELECTRICAL PDC
54	CONDENSATE RECEIVER

COMMONWEALTH OF MASSACHUSETTS BRIAN R. MARCHETTI CIVIL NO. 46279 REGISTERED PROFESSIONAL ENGINEER

10/31/13

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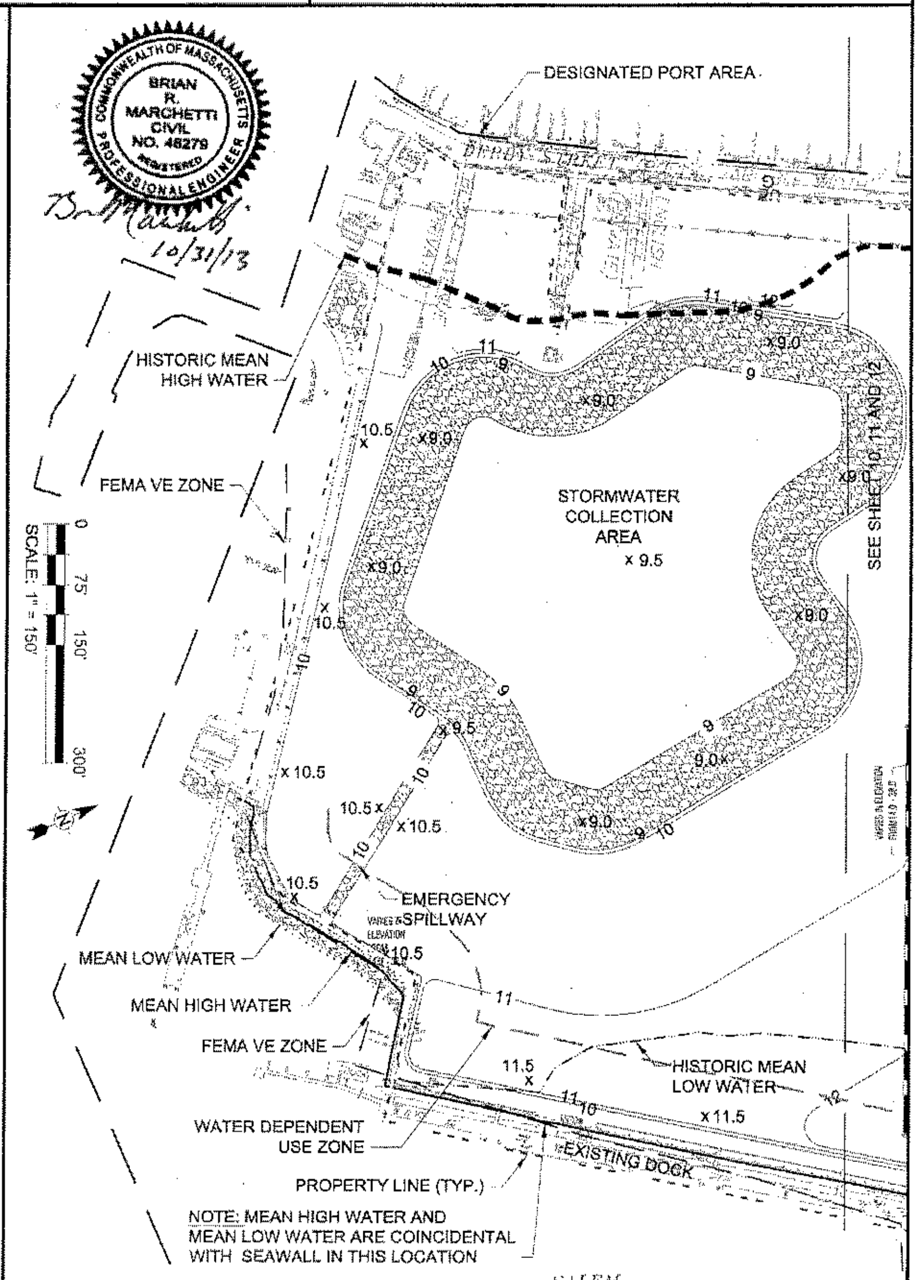
COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED
PROFESSIONAL ENGINEER

B. Marchetti 10/31/13

REGISTERED PROFESSIONAL ENGINEER — DATE



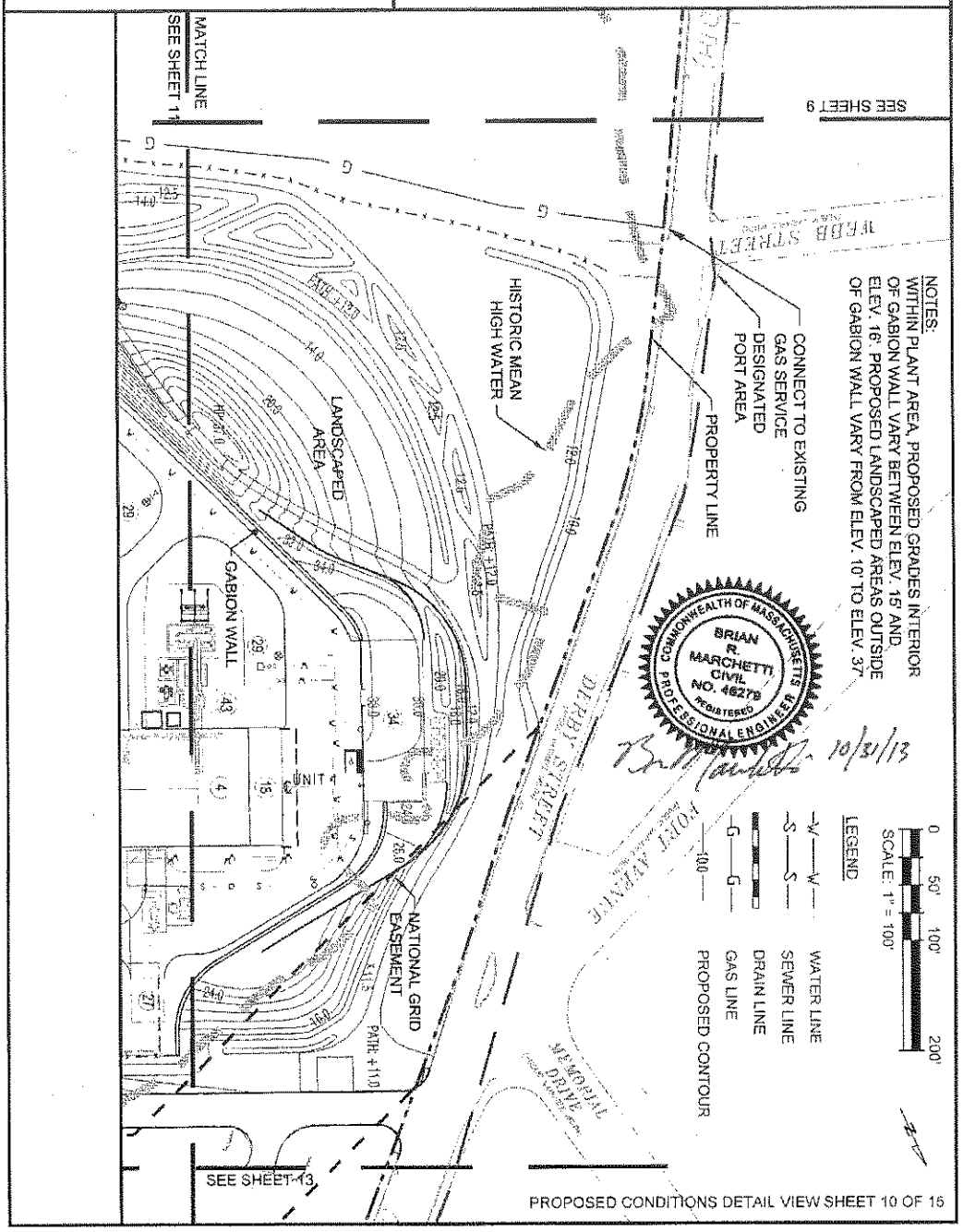
PROPOSED CONDITIONS DETAIL VIEW (SOUTH) SHEET 9 OF 15

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS.

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED PROFESSIONAL ENGINEER

B R Marchetti 10/31/13

REGISTERED PROFESSIONAL ENGINEER DATE



COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED PROFESSIONAL ENGINEER

B R Marchetti 10/31/13

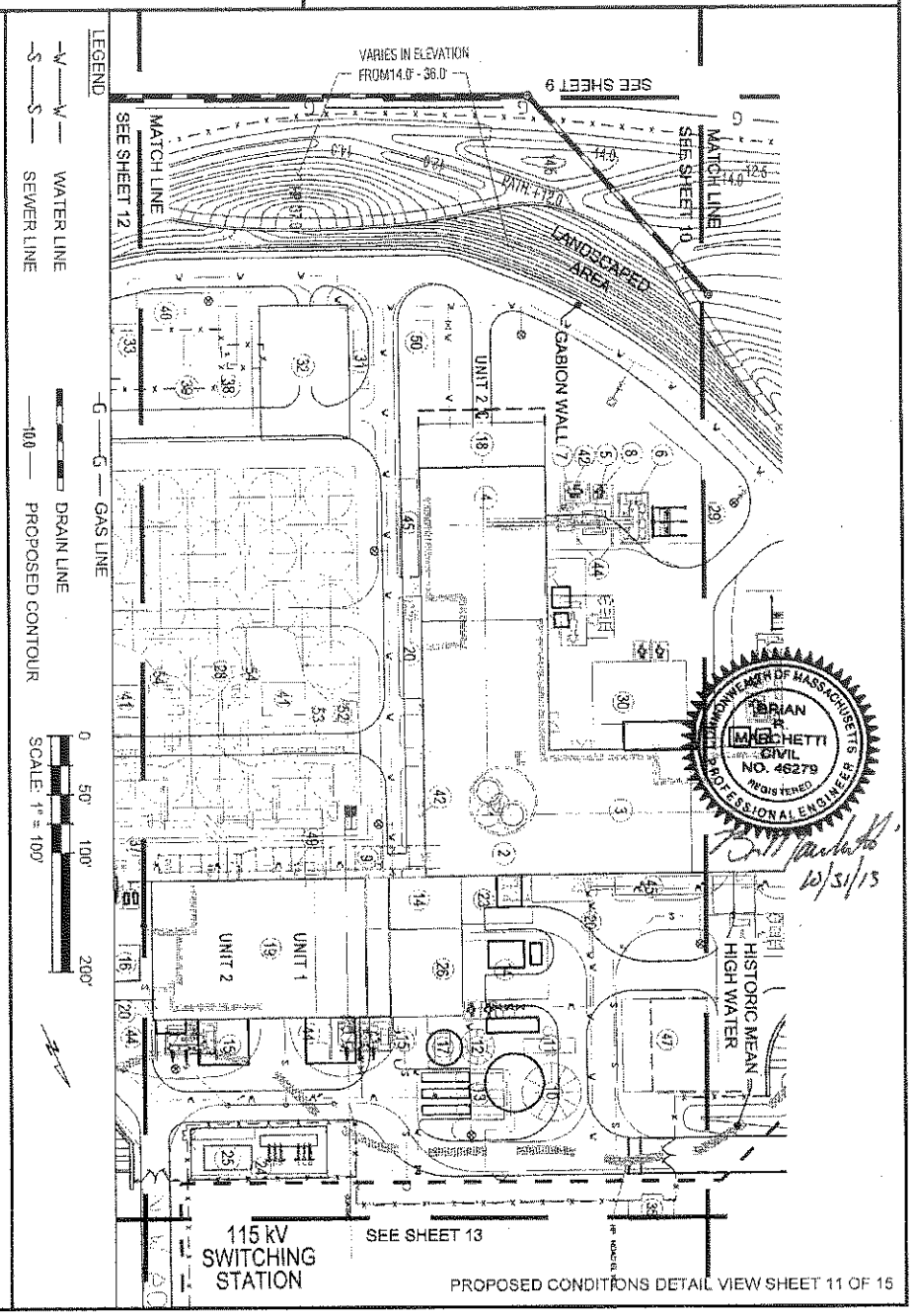
PROPOSED CONDITIONS DETAIL VIEW SHEET 10 OF 15

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS.

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED
PROFESSIONAL ENGINEER

B. Marchetti 10/31/13

REGISTERED PROFESSIONAL ENGINEER DATE



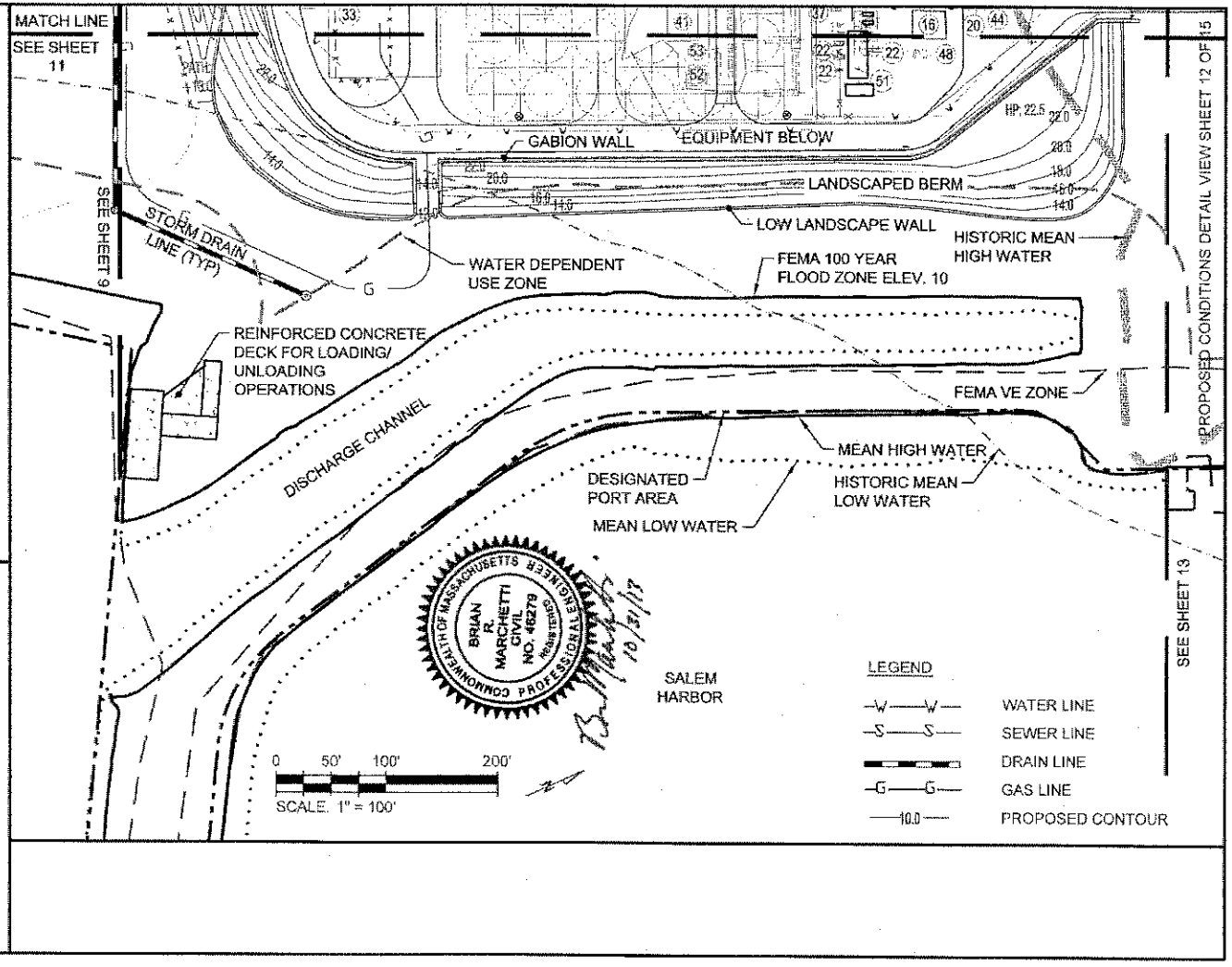
PROPOSED CONDITIONS DETAIL VIEW SHEET 11 OF 15

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS.

COMMONWEALTH OF MASSACHUSETTS — BRIAN R. MARCHETTI — CIVIL — NO. 46279 — REGISTERED PROFESSIONAL ENGINEER

10/31/13
DATE

REGISTERED PROFESSIONAL ENGINEER

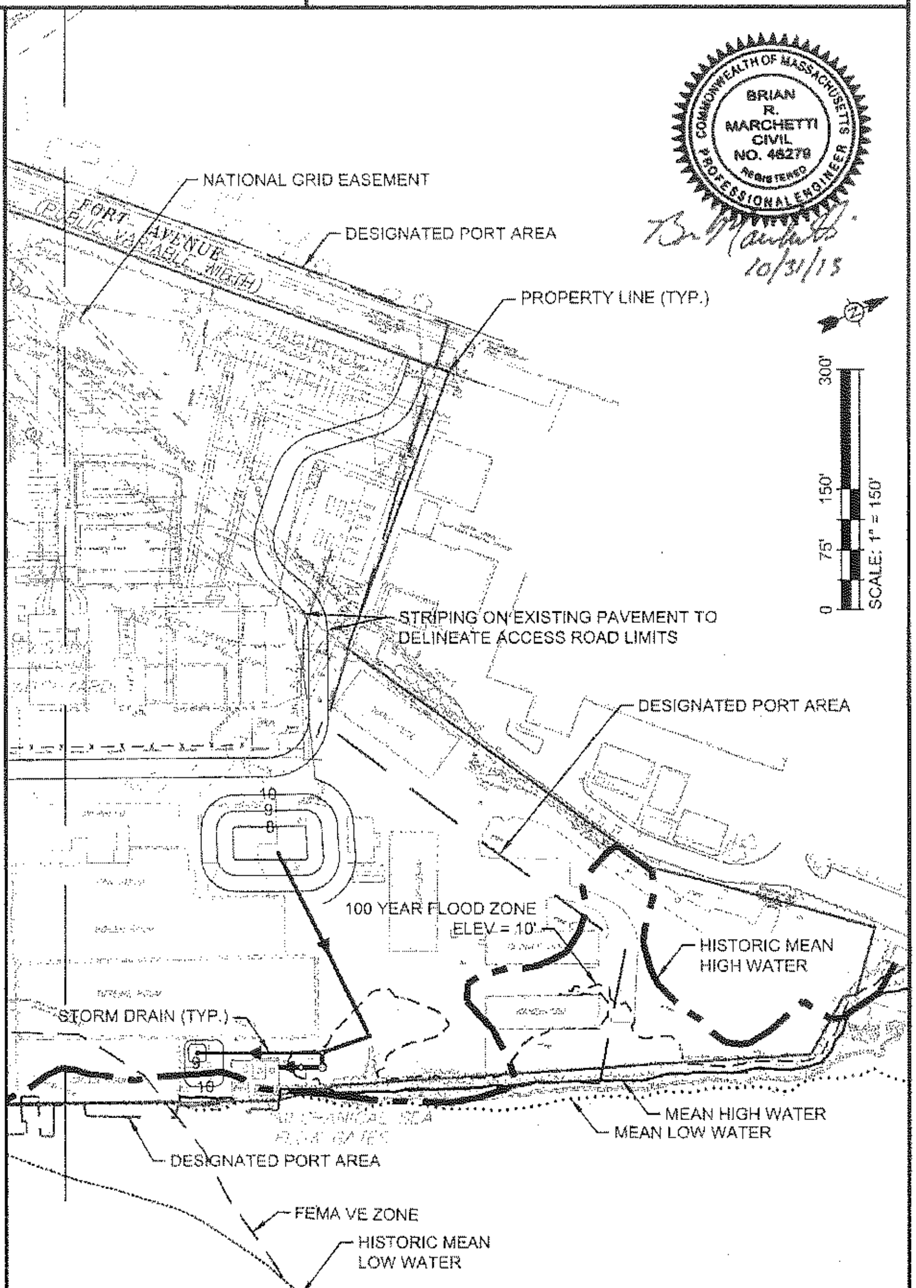


I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS.

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI CIVIL NO. 46279
REGISTERED PROFESSIONAL ENGINEER

10/31/13

REGISTERED PROFESSIONAL ENGINEER DATE



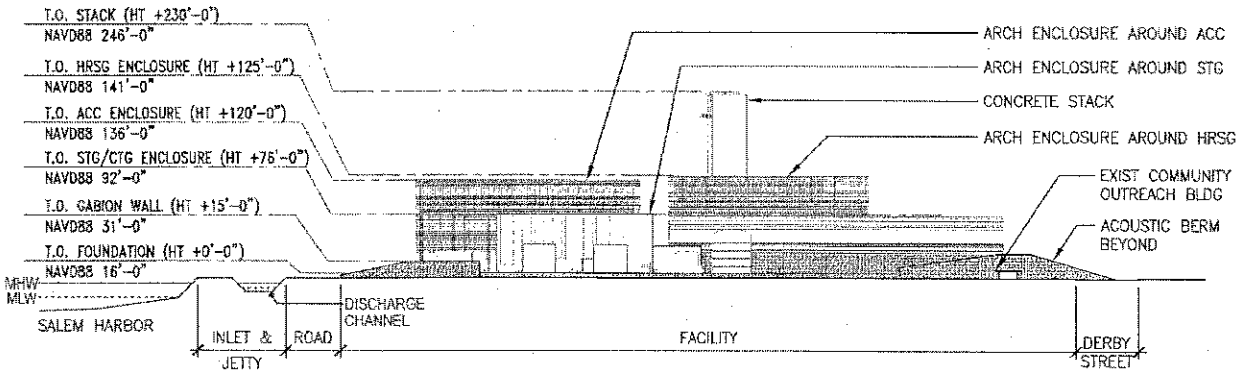
PROPOSED CONDITIONS DETAIL VIEW (NORTH) SHEET 13 OF 15

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS.

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 48279
REGISTERED PROFESSIONAL ENGINEER

10/31/13
DATE

REGISTERED PROFESSIONAL ENGINEER



NORTH ELEVATION

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 48279
REGISTERED PROFESSIONAL ENGINEER

10/31/13

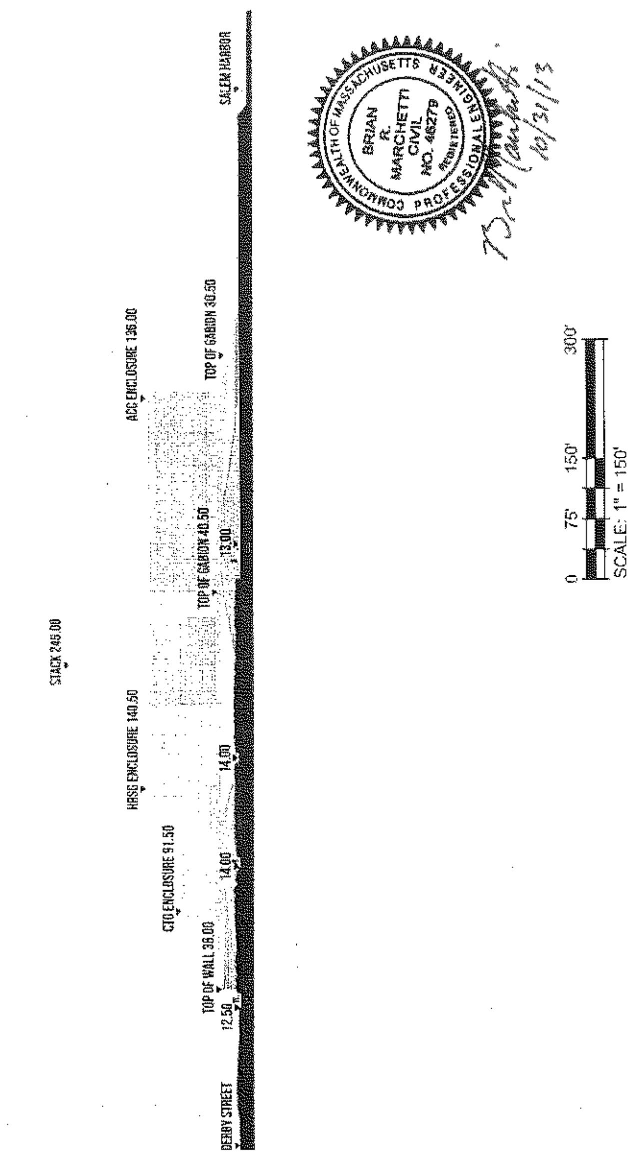
0" 75' 150' 300'
1/150"=1'-0"

NORTH ELEVATION
VIEW
SHEET 14 OF 15

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS.

COMMONWEALTH OF MASSACHUSETTS
BRIAN
R.
MARCHETTI
CIVIL
NO. 46279
REGISTERED
PROFESSIONAL ENGINEER

REGISTERED PROFESSIONAL ENGINEER — 10/31/13 DATE



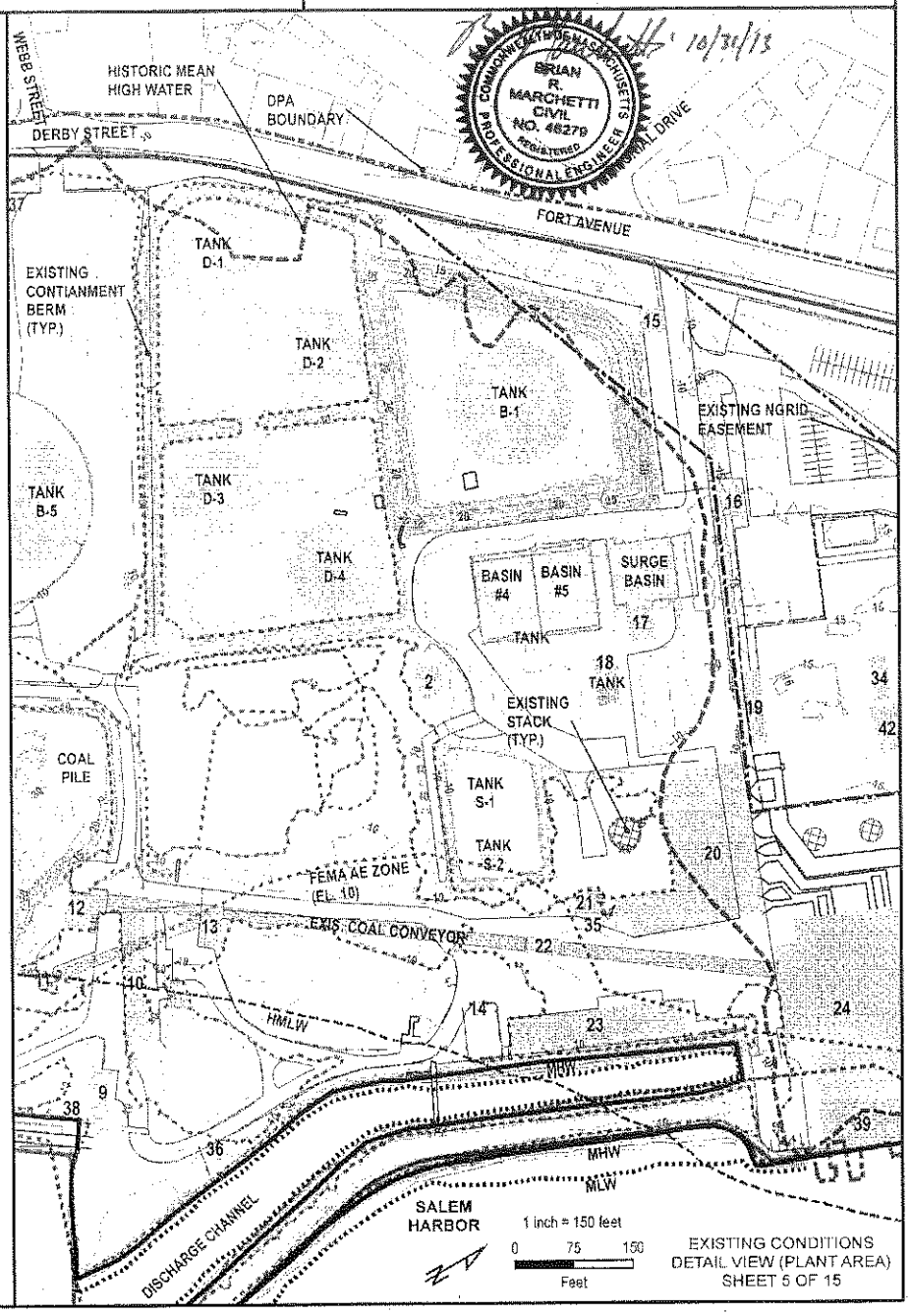
SECTION VIEW SHEET 15 OF 15

I CERTIFY THAT THIS PLAN, AS PREPARED, CONFORMS TO THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS
BRIAN R. MARCHETTI
CIVIL
NO. 46279
REGISTERED
PROFESSIONAL ENGINEER

B. Marchetti 10/31/13

REGISTERED PROFESSIONAL ENGINEER DATE

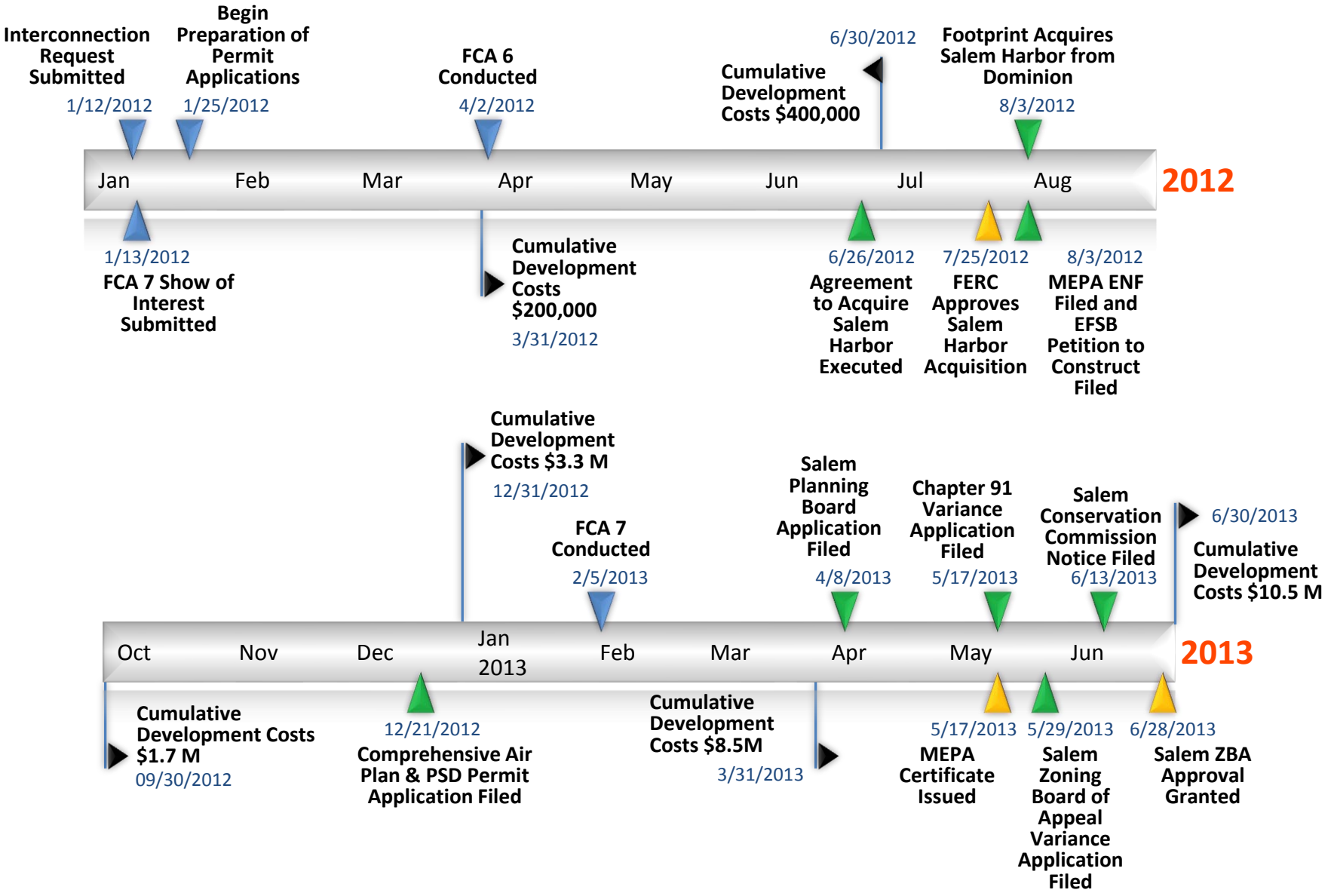


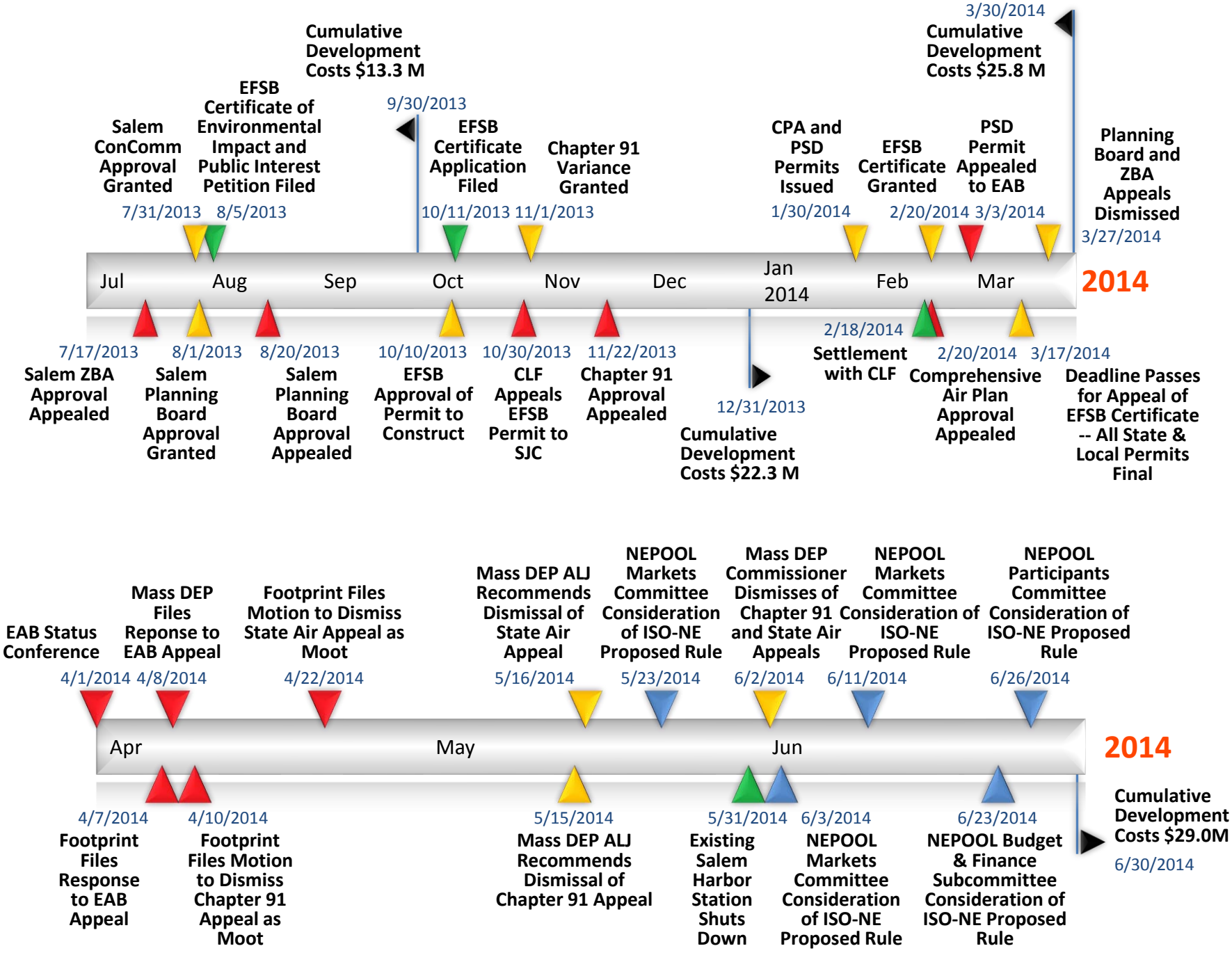
EXISTING CONDITIONS
DETAIL VIEW (PLANT AREA)
SHEET 6 OF 15

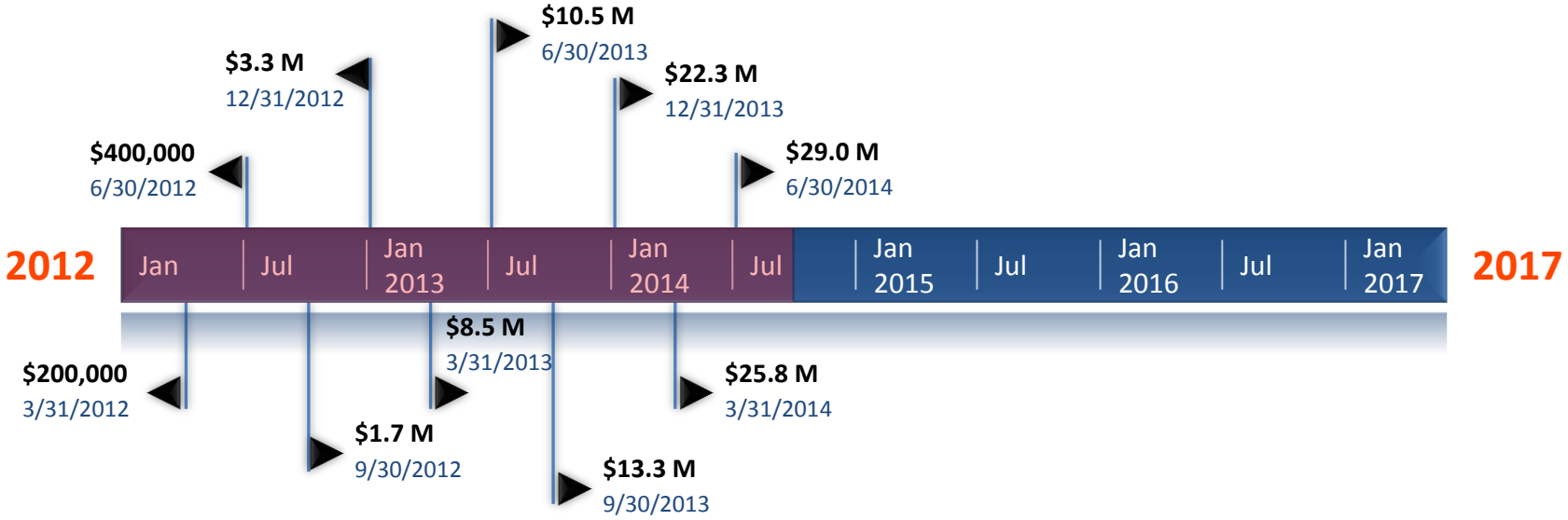
Exhibit 3

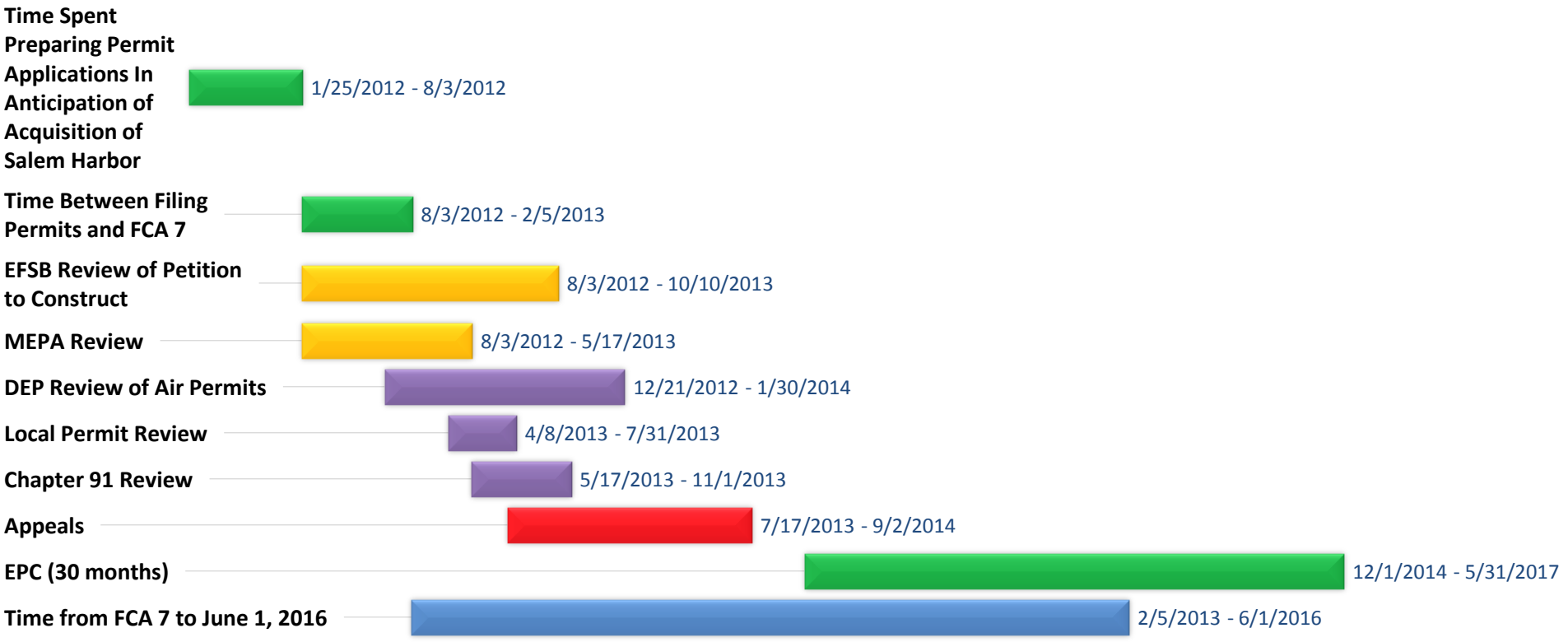
Salem Harbor Development Timeline

Footprint Power®
Reducing Carbon Emissions One Step at a Time




3/30/2014
Cumulative Development Costs $25.8 M
Cumulative Development Costs $13.3 M
9/30/2013
EFSB Certificate of Environmental Impact and Public Interest Petition Filed
Salem ConComm Approval Granted
EFSB Certificate Application Filed
Chapter 91 Variance Granted
CPA and PSD Permits Issued
EFSB Certificate Granted
PSD Permit Appealed to EAB
Planning Board and ZBA Appeals Dismissed
7/31/2013
8/5/2013
10/11/2013
11/1/2013
1/30/2014
2/20/2014
3/3/2014
3/27/2014
Jul
Aug
Sep
Oct
Nov
Dec
Jan 2014
Feb
Mar
2014
7/17/2013
Salem ZBA Approval Appealed
8/1/2013
Salem Planning Board Approval Granted
8/20/2013
Salem Planning Board Approval Appealed
10/10/2013
EFSB Approval of Permit to Construct
10/30/2013
CLF Appeals EFSB Permit to SJC
11/22/2013
Chapter 91 Approval Appealed
12/31/2013
Cumulative Development Costs $22.3 M
2/18/2014
Settlement with CLF
2/20/2014
Comprehensive Air Plan Approval Appealed
3/17/2014
Deadline Passes for Appeal of EFSB Certificate -- All State & Local Permits Final
EAB Status Conference
Mass DEP Files Reponse to EAB Appeal
Footprint Files Motion to Dismiss State Air Appeal as Moot
Mass DEP ALJ Recommends Dismissal of State Air Appeal
NEPOOL Markets Committee Consideration of ISO-NE Proposed Rule
Mass DEP Commissioner Dismisses of Chapter 91 and State Air Appeals
NEPOOL Markets Committee Consideration of ISO-NE Proposed Rule
NEPOOL Participants Committee Consideration of ISO-NE Proposed Rule
4/1/2014
4/8/2014
4/22/2014
5/16/2014
5/23/2014
6/2/2014
6/11/2014
6/26/2014
Apr
May
Jun
2014
4/7/2014
Footprint Files Response to EAB Appeal
4/10/2014
Footprint Files Motion to Dismiss Chapter 91 Appeal as Moot
5/15/2014
Mass DEP ALJ Recommends Dismissal of Chapter 91 Appeal
5/31/2014
Existing Salem Harbor Station Shuts Down
6/3/2014
NEPOOL Markets Committee Consideration of ISO-NE Proposed Rule
6/23/2014
NEPOOL Budget & Finance Subcommittee Consideration of ISO-NE Proposed Rule
Cumulative Development Costs $29.0M
6/30/2014


$10.5 M
6/30/2013
$3.3 M
12/31/2012
$22.3 M
12/31/2013
$400,000
6/30/2012
$29.0 M
6/30/2014
2012
Jan
Jul
Jan 2013
Jul
Jan 2014
Jul
Jan 2015
Jul
Jan 2016
Jul
Jan 2017
2017
$8.5 M
3/31/2013
$200,000
3/31/2012
$25.8 M
3/31/2014
$1.7 M
9/30/2012
$13.3 M
9/30/2013


Time Spent Preparing Permit Applications In Anticipation of Acquisition of Salem Harbor
1/25/2012 - 8/3/2012
Time Between Filing Permits and FCA 7
8/3/2012 - 2/5/2013
EFSB Review of Petition to Construct
8/3/2012 - 10/10/2013
MEPA Review
8/3/2012 - 5/17/2013
DEP Review of Air Permits
12/21/2012 - 1/30/2014
Local Permit Review
4/8/2013 - 7/31/2013
Chapter 91 Review
5/17/2013 - 11/1/2013
Appeals
7/17/2013 - 9/2/2014
EPC (30 months)
12/1/2014 - 5/31/2017
Time from FCA 7 to June 1, 2016
2/5/2013 - 6/1/2016

Footprint Power Salem Harbor Development LP
Development Costs Through June 30, 2014

		Cumulative Total
Third Party Costs		
Permitting - Legal and Consultants	$	5.3
Permitting - Fees and Ancillary		0.5
Engineering		1.7
Architecture		1.0
Project Manager		0.3
Regulatory and Market - Legal and Consultants		1.0
Interconnection		0.4
Gas Pipeline		0.3
Geotechnical and EMF Studies		0.2
Surveys		0.1
Community and Public Relations		0.2
Travel and Other		0.3
Other Legal and Consulting		0.2
Total Third Party Costs		11.6
Financial Assurance		
FCA 7 CSO		7.7
Gas Pipeline		5.4
Total Financial Assurance		13.1
LNTP Payments		
GE Power Island Equipment Supply		4.3
Total LNTP Payments		4.3
Total Development Costs	$	29.0

Exhibit 4

Footprint Power®

July 8, 2014

Mr. Stephen J. Rourke
Vice President, System Planning
ISO New England Inc.
One Sullivan Road
Holyoke, MA 01040-2841

RE: Deferral of CSO

Dear Mr. Rourke:

This letter is provided pursuant to the rule change that ISO New England, Inc. ("ISO-NE") presented to the NEPOOL Participant's Committee on June 26, 2014 under agenda item 12, proposed changes to Market Rule 1, sections III.13.3.4 and 13.3.7 related to the treatment of non-commerical units. This letter presumes that ISO-NE will file the proposed rule changes with the Federal Energy Regulatory Commission ("FERC") and that such proposal will be approved. To the extent that FERC does not approve the rules as presented to the Participant's Committee, Footprint Power Salem Harbor Development LP ("Footprint") shall not be bound by the statements herein.

As you know, Footprint's redevelopment of Salem Harbor Station has been delayed due to circumstances beyond our control, most notably the appeal of the project's federal Prevention of Significant Deterioration Permit ("PSD Appeal") to the Environmental Appeals Board of the Environmental Protection Agency ("EAB"). The filing of this administrative appeal by statute stays the effectiveness of the previously granted PSD Permit and prevents the commencement of construction of the facility. Accordingly, pursuant to ISO-NE's proposed changes to section III.13.3.7, Footprint hereby seeks to defer the applicability of its entire Capacity Supply Obligation by one year. As such, Footprint hereby requests that ISO-NE perform the reliability review provided for in the proposed rule and provide us with a written determination within 30 days of the date of this letter.

Footprint Power®

Should you have any questions or require any additional information regarding this request, please contact me at (908) 864-4905 or Bob Stein at (802) 236-4139. Thank you for your attention to this matter.

Very truly yours,
FOOTPRINT POWER SALEM HARBOR DEVELOPMENT LP

Scott G. Silverstein
President & COO
Footprint Power SH DevCo GP LLC, General Partner

cc: Raymond Hepper, Esq.
Carissa Sedlacek
Bob Stein

Exhibit 5

Stephen J. Rourke
Vice President, System Planning

August 18, 2014

Scott G. Silverstein
President & Chief Operating Officer
Footprint Power LLC
1140 Route 22 East, Suite 303
Bridgewater, NJ 08807

Dear Mr. Silverstein:

On July 17, 2014, Footprint Power Salem Harbor Development LP submitted a notification to ISO New England Inc. ("ISO-NE"), pursuant to Section III.13.3.7 of the ISO-NE Transmission, Markets and Service Tariff ("ISO Tariff"), [1] requesting a reliability determination for the following resource:

Resource ID	Resource Name
38089	Footprint Combined Cycle

ISO-NE has reviewed this notification pursuant to Section III.13.3.7 and has determined that there is a reliability need for this resource.

This finding was reviewed with the Reliability Committee on August 15, 2014.

In accordance with Section III.13.3.7 of the ISO Tariff, you may file a request with the Federal Energy Regulatory Commission by no later than November 2, 2015 to defer the applicability of the Capacity Supply Obligation by one year for the resource identified above. Any such filing must include this written determination.

If you have any questions, please contact ISO-NE's Customer Support at (413) 540-4220 or custserv@iso-ne.com.

Sincerely,

Stephen J. Rourke
Vice President, System Planning

cc: Carissa Sedlacek, ISO-NE
Peter Bernard, ISO-NE
Alan McBride, ISO-NE
Brent Oberlin, ISO-NE
Chad Nelson, ISO-NE
John Norden, ISO-NE
Theodore Paradise, ISO-NE
Reliability Committee

[1] The Forward Capacity Market rules regarding a Capacity Supply Obligation Deferral allow, under specific circumstances, a new resource that has cleared in a Forward Capacity Auction to request a one-year deferral of its Capacity Supply Obligation. These rules were filed with the Commission on July 16, 2014 and are yet to be approved. ISO-NE requested effective date of July 17, 2014. Therefore, this Capacity Supply Obligation Deferral analysis is being performed under the assumption the rules will be approved.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Footprint Power Salem Harbor Development LP	))	Docket No. ER15-____-000

VERIFICATION OF
SCOTT G. SILVERSTEIN

State of New Jersey)
) ss
County of Somerset)

I, Scott G. Silverstein, being duly sworn, depose and state that the contents of the foregoing Testimony on behalf of Footprint Power Salem Harbor Development LP is true, correct, accurate and complete to the best of my knowledge, information and belief.

Date: 9-30-14

Scott G. Silverstein

SUBSCRIBED AND SWORN to before me this 30th day of September, 2014.

(Notary Public)

My commission expires:

MARIA VERONICA SEGOVIA
Notary Public
State of New Jersey
My Commission Expires Oct. 27, 2016
I.D.# 2414019

Attachment B

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Footprint Power Salem Harbor Development LP	))	Docket No. ER15-____-000

TESTIMONY OF ROSS WARNER
ON BEHALF OF FOOTPRINT POWER SALEM HARBOR DEVELOPMENT LP

I. WITNESS IDENTIFICATION

Q: Please state your name, position and business address.

A: My name is Ross Warner. I am Senior Vice President at Macquarie Capital (USA) Inc. ("Macquarie"). My business address is 125 W. 55th Street, New York, NY 10019. I am an investment banker with over 12 years of experience in the energy sector.

Q: Please describe your involvement with Footprint Power Salem Harbor Development LP.

A: Macquarie was retained in approximately August 2013 by Footprint Power Salem Harbor Development LP ("Footprint") as a financial advisor to assist Footprint in, among other things, identifying, attracting, and procuring potential lenders and equity investors. I have been and continue to be one of the lead Macquarie team members advising and assisting Footprint.

Q: What is the purpose of your testimony?

A: I am providing this testimony in order to present information about Footprint's efforts to obtain financing for its development of a new generating facility in Salem Harbor, Massachusetts (the "Facility"). My testimony will show that thus far investors have not been willing to provide Footprint the long-term financing it needs to begin construction of the Facility. Investors have been unwilling to proceed to the required financing commitments while there is material uncertainty about (i) the potential for the

Facility to obtain all necessary permits and (ii) Footprint's right to a stable stream of revenue for the full term of the capacity award.

Q: Please describe how the Facility will be financed.

A: It is anticipated that the financing for the Facility will be completed through a traditional project financing, where the revenues from the project, in this case largely through the project's Forward Capacity Award, will support the required non-recourse debt and a market equity return.

Q: Can you please provide the breakdown of total project costs and the split between debt and equity?

A: The total cost of the project, including financing costs and interest during construction, is expected to be approximately $1 billion. Based on our discussions with debt and equity providers, we expect the project to issue debt for roughly 60 percent of the total construction costs ($600 million) with equity investments totaling approximately 40 percent ($400 million).

Q: Please describe Footprint's efforts to procure financing for the Facility.

A: In coordination with Footprint, my group at Macquarie has contacted numerous potential equity and debt providers. On the equity side, we provided limited, non-confidential information to a significant number of potential equity investors. Thirty-five equity investors entered into Non-Disclosure Agreements with Footprint, were provided detailed financial information regarding the project, and engaged in more detailed due diligence on the project. A subset of these equity investors proceeded to the stage where they provided preliminary indications of interest with respect to the provision of some or all of the construction equity to the project. These indications of interest were predicated

on, among other things, a fully permitted plant, and certainty around capacity related cash flows. On the debt side, Macquarie's debt capital markets group solicited interest from a number of financial institutions, ultimately compiling interest from a group of prospective lenders which would have been capable of providing sufficient debt financing for the construction of the Facility, with Lender interest being contingent on, among other things, completed permits, certainty around capacity-related cash flows, and acceptable equity sponsorship.

Q: <u>Has Footprint procured financing for the Facility?</u>

A: No. Despite interest from equity and debt providers, none of these parties were willing or able to close financing before (1) all permit appeals had been resolved and (2) there was certainty regarding the impact of the permit delays on the project's Forward Capacity Market revenues.

Q: <u>Is Footprint now in a position to procure financing necessary to construct the Facility?</u>

A: While there are no guarantees until the financing actually closes, two critical factors have emerged to put Footprint in a position to secure financing for the Facility. *First*, on September 2, 2014, the EAB dismissed the appeal that had stayed the project's federal air permit, preventing construction from beginning. *Second*, the Commission approved the ISO-NE Deferral Process and paved the way for Footprint to file its application in this proceeding. Upon FERC's approval of this application I believe that Footprint will have the key ingredients in place to move forward in its negotiations with equity providers and lenders towards financial close.

Q: <u>Does that mean that Footprint will not be able to secure financing if the application is not approved?</u>

A: There are no guarantees, but my experience in discussing this project with potential investors over the course of the past year has indicated that potential lenders and equity providers remain unwilling to provide financing due to concerns that Footprint may not be entitled to five full years of stable revenue as a result of the delays associated with the permit appeals. It is my understanding that potential lenders and equity investors will not agree to lend to or invest in a facility of this size, type, and location unless the developers can show that the Facility has a stable stream of revenue and the required effective permits. Footprint has been able to show that it should be entitled to at least four years of locked-in capacity payments, but this has not satisfied potential lenders and equity providers thus far given the size of the required capital commitment.

Q: <u>Does this conclude your testimony?</u>

A: Yes.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Footprint Power Salem Harbor Development LP	)	Docket No. ER15-____-000

VERIFICATION OF
ROSS WARNER

State of New York)
) ss
County of New York)

I, Ross Warner, being duly sworn, depose and state that the contents of the foregoing Testimony on behalf of Footprint Power Salem Harbor Development LP is true, correct, accurate and complete to the best of my knowledge, information and belief.

Ross Warner

SUBSCRIBED AND SWORN to before me this 6th day of October, 2014.

TAMMY H. LEE
Notary Public, State of New York
No. 01LE6263879
Qualified in Queens County
Commission Expires 06/11/2016