COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD

In the Matter of the Initial Petition and Application of Exelon West Medway, LLC and Exelon West Medway II, LLC for a Certificate of Environmental Impact and Public Interest	)	EFSB 17-01

TENTATIVE DECISION

Joan Foster Evans
Donna C. Sharkey
Presiding Officers
July 26, 2017

On the Decision:

Charlene de Boer
Andrew Greene
Barbara Shapiro

APPEARANCES:

John A. DeTore, Esq.
Robert D. Shapiro, Esq.
Lauren A. Liss, Esq.
David C. Fixler, Esq.
Rubin and Rudman LLP
50 Rowes Wharf
Boston, MA 02110
FOR: Exelon West Medway, LLC and Exelon West Medway II, LLC
Petitioner

Jeffrey M. Bernstein, Esq.
Audrey Eidelman, Esq.
Kathryn M. Terrell, Esq.
BCK Law, P.C.
271 Waverley Oaks Road, Suite 203
Waltham, MA 02452
FOR: Town of Medway
Intervenor

Michael W. Dingle, Esq.
Marilyn Levenson, Esq.
Department of Environmental Protection
One Winter Street, 3rd Floor
Boston, MA 02018
FOR: Massachusetts Department of Environmental Protection
Intervenor

David Ismay, Esq.
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
FOR: Conservation Law Foundation
Intervenor

TABLE OF CONTENTS

The Massachusetts Energy Facilities Siting Board ("Siting Board" or "Board") hereby (1) [GRANTS] the Initial Petition; and (2) [GRANTS IN PART AND DENIES IN PART] the Application of Exelon West Medway, LLC and Exelon West Medway II, LLC ("Exelon" or "Company") for a Certificate of Environmental Impact and Public Interest for the construction of a 200 megawatt ("MW") dual fuel, simple-cycle, quick-start generating facility on the site of an existing Exelon generating facility on Summer Street in Medway, Massachusetts.

I. INTRODUCTION

Pursuant to G.L. c. 164, §§ 69K½ - 69O½ (the "Certificate Statute"), Exelon filed with the Siting Board an Initial Petition and Application for a Certificate of Environmental Impact and Public Interest ("Certificate") to construct a 200 MW dual fuel (natural gas and ultra-low sulfur distillate ("ULSD") fuel oil), simple-cycle, quick-start generating facility ("Facility") and ancillary facilities (together "Project") in Medway, Massachusetts. Exelon states that the filing of the Initial Petition and Application for a Certificate was necessitated by the appeal of the Facility's Major Comprehensive Plan Approval ("Air Plan Approval") by the Conservation Law Foundation ("CLF") ("CLF Appeal"). The Certificate, appended to this Decision as Exhibit A, has the effect of granting the final Air Plan Approval for the Project.

A. Summary of the Proceeding

1. Project Description

Exelon proposes to construct a generating facility consisting of two simple-cycle peaking electric combustion turbines (100 MW each), with a combined nominal output of 200 MW (Exh. EX-2, at 27). The Facility would be located on an approximately 13-acre site "Facility site" within a larger 94-acre parcel on Summer Street in Medway ("Summer Street site") (Exhs. EX-1, at 7; EFSB-EX-18). The existing 135 MW Exelon Generating Station peaking facility occupies approximately five acres of the Summer Street site (Exh. EX-2, at 26). The Facility was selected by ISO-New England ("ISO-NE") in Forward Capacity Auction 9 to provide capacity to the Southeastern Massachusetts/Rhode Island ("SEMA/RI") load zone, and is scheduled to commence commercial operation in June 2018 (Exh. EX-2, at 28-29). The Siting Board approved the Company's petition to construct the Project on November 18, 2016. Exelon West Medway, LLC and Exelon West Medway II, LLC, EFSB 15-01/D.P.U. 15-25 (November 18, 2016) ("Exelon

West Medway").[1] On February 24, 2017, Exelon submitted a Notice of Project Change ("Project Change") to the Siting Board regarding changes to the Facility's proposed water supply, and requested a waiver of related conditions imposed by the Board in Exelon West Medway.[2] After notice and hearing, the Siting Board [APPROVED] the Company's Project Change on [DATE]. Exelon West Medway, LLC and Exelon West Medway II, LLC, EFSB 15-1A/D.P.U. 15-25A ([DATE]) ("Project Change Decision").

2. Relief Requested

On December 19, 2016, the Massachusetts Department of Environmental Protection ("MassDEP") issued a final Air Plan Approval, approving Exelon's Major Comprehensive Air Plan Application and Emission Offset Nonattainment Review Application (together, "CPA Application") (Exh. EX-2, at 1). On January 9, 2017, CLF filed an administrative appeal of the Air Plan Approval with MassDEP pursuant to 310 C.M.R. § 1.01(6) (Exh. EX-2, at 1). Exelon subsequently filed with the Siting Board an Initial Petition and an Application, pursuant to the Certificate Statute.[3] On February 6, 2017, MassDEP's Office of Appeals and Dispute Resolution stayed the CLF Appeal pending the outcome of this Certificate proceeding (Exh. EX-2, at 1).

In its Initial Petition and Application, Exelon originally asked the Siting Board to grant a Certificate representing the equivalent of the final Air Plan Approval and eleven other state and local permits, approvals or authorizations that would otherwise be necessary to construct and operate the Facility (Exh. EX-2, at 8-9). Since the filing of the Initial Petition and Application, the Company has withdrawn its request for three permits and added three additional permits

---

1 On December 16, 2016, CLF filed an appeal of the Board's Decision in Exelon West Medway with the Supreme Judicial Court, which has been docketed as Case No. SJ-2016-0509.

2 Pursuant to G.L. c. 30A, § 8, and 980 C.M.R. § 2.08, on June 8, 2017 Exelon filed in EFSB 15-01/D.P.U. 15-25 a request for an Advisory Ruling relating to certain site-preparation activities. This matter was address by the Siting Board in its Project Change Decision. Given the approval of the Project Change which granted one of the two alternative forms of relief sought in the Request, the Siting Board found that the Request for an Advisory Ruling was moot. See Project Change Decision at 22.

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

(Exh. EX-2, at 8-9; RR-EFSB-17).[4] The twelve approvals Exelon requests from the Board are as follows:

1. An Air Plan Approval, pursuant to G.L. c. 111 §§ 142A – 142M, and 310 C.M.R. § 7.00, ordinarily issued by MassDEP.
2. A State Fire Marshal Above Ground Storage Tank Permit for Construction and Use, pursuant to G.L. c. 148, § 37, and 502 C.M.R. § 5.00, for the above ground ULSD storage tank and the aqueous ammonia tank, ordinarily issued by the Office of the State Fire Marshal, Massachusetts Department of Public Safety.[5]
3. A Combustible Liquids Storage License, pursuant to G.L. c. 148 § 13, and 527 C.M.R. § 1.00 et seq., for the above ground ULSD storage tank and other combustible liquid tanks, ordinarily issued by the Town of Medway Board of Selectmen.
4. A Combustible Liquids Storage Permit, pursuant to 527 C.M.R. § 1.00 et seq., for the above ground ULSD storage tank and other combustible liquids, ordinarily issued by the Town of Medway Fire Department.
5. Multiple Building Permits for all Facility components, buildings, structures, and equipment, including but not limited to the gas interconnection, electric interconnection and switchyard, water connections, and all associated tanks, unloading and lift stations, piping, duct banks, poles, switches, roads, berms, landscaping, stacks, and noise walls/barriers, including any and all foundations, plumbing, electrical and mechanical work, and certificates of occupancy, all pursuant to the State Building Code, 780 C.M.R. § 1.00 et seq., and Article 28 of the Town of Medway General By-laws, ordinarily issued by the Town of Medway Building Commissioner.
6. A Sewer Permit, pursuant to the Town of Medway Water & Sewer Department Rules & Regulations, and Charles River Pollution Control District Wastewater Treatment Facility Regulations, ordinarily issued by the Town of Medway Department of Public Services ("Medway DPS").

---

[4] Exelon is no longer requesting a Pumping Permit, a Transportation of Combustible Liquids Permit, or an Order of Conditions for the gas pipeline interconnection, because these permits are either not required for Project construction or will be sought by entities other than the Company (Exhs. EFSB-EX- 5; EFSB-TM-23; EFSB-TM-24; Tr. 1, at 136). The Company added requests for a Trench Permit, a Combustible Liquids Storage License, and a Combustible Liquids Storage Permit, all ordinarily issued by the Town of Medway (Exhs. EFSB-TM-24; TM-EX-8; RR-EFSB-17).

[5] The Office of the State Fire Marshal ordinarily issues construction and use permits separately (Exh. EFSB-EX-6). In this Decision, we address these tank permits together as a single permit.

7. A Water Permit, pursuant to the Town of Medway Water & Sewer Department Rules & Regulations, and Charles River Pollution Control District Wastewater Treatment Facility Regulations, ordinarily issued by the Medway DPS.

8. Life Safety Systems Permit(s) pursuant to 527 C.M.R. § 1.00 et seq., for equipment, including but not limited to sprinklers, fire alarms, carbon dioxide systems, fire extinguishers, and hydrants, and for hot work permits, as well as any other fire safety permits, ordinarily issued by the Town of Medway Fire Department.

9. A Street Opening Permit/Roadway Access Permit, pursuant to Section 12.9 of the Town of Medway General By-laws, for excavation associated with new sewer and water connections, ordinarily issued by the Medway DPS.

10. Approval to abandon a septic system, pursuant to G.L. c. 21A, § 13 and 310 C.M.R. § 15.354, ordinarily issued by the Town of Medway Board of Health.

11. An Earth Removal Special Permit, pursuant to Section 9.2 of the Town of Medway General By-laws, ordinarily issued by the Town of Medway Board of Selectmen.

12. A Trench Permit, pursuant to G.L. c. 82A, §§ 2-5, ordinarily issued by the Medway DPS.

(RR-EFSB-17; Company Brief at 52-53).

B. Jurisdiction

Exelon filed its Initial Petition and Application for a Certificate under G.L. c. 164, §§ 69K½ - 69O½ and 980 C.M.R. § 6.00 et seq. Pursuant to the Certificate Statute, any applicant that proposes to construct or operate an approved generating facility in Massachusetts may seek a Certificate from the Siting Board if the applicant is prevented or delayed from building the facility because of an adverse state or local agency permitting decision, undue agency delay, or the appeal by a third party of a state or local agency permitting decision. See G.L. c. 164, § 69K½; see also, Footprint Power Salem Harbor Development, LP, EFSB 13-1 at 4 (2014) ("Footprint Power"). The Certificate, if granted, has the legal effect of granting the permit in question, and may grant additional project permits as well. The Siting Board makes a decision on a Certificate Application for a generating facility in accordance with: (1) G.L. c. 164, § 69L½ (which requires that an Application contain certain information and representations); (2) G.L. c. 164, § 69O½ (which requires the Siting Board to include three specific findings and opinions in its decision on an Application); and (3) G.L. c. 164, § 69H (which requires the Siting Board to implement the energy policies in its statute to provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost).

C. Procedural History

This proceeding commenced with the filing by Exelon of an Initial Petition for a Certificate with the Siting Board on January 12, 2017, pursuant to G.L. c. 164, § 69K½ (Exh. EX-1). On January 19, 2017, pursuant to 980 C.M.R. § 6.02(4), the Chairman of the Siting Board deferred the Board's decision on the Initial Petition until after the Company filed an Application for a Certificate, at which time the Board would consider the merits of the Initial Petition concurrently with the Application (see Determination on Initial Petition). On January 20, 2017, Exelon filed a letter with the Siting Board requesting a waiver to exclude from its Application certain information required by 980 C.M.R. § 6.03(3), to the extent that such information is not applicable to generating facilities and conflicts with G.L. c. 164, § 69L½, which was granted on February 6, 2017.[6] The Company then filed its Application for a Certificate on February 16, 2017, pursuant to G.L. c. 164, § 69L½ (Exh. EX-2). The Initial Petition and Application were consolidated for review. Exelon provided public notice of the adjudication of its filings at the direction of the Board. Timely petitions to intervene were submitted to the Board by the Town of Medway ("Town of Medway" or "Town"), MassDEP, and CLF. On March 23, 2017, the Presiding Officer granted those petitions.

During the discovery phase of the proceeding, Siting Board staff issued two sets of information requests to Exelon and the Office of the State Fire Marshal, and one set each to MassDEP and the Town of Medway. In addition, Exelon responded to discovery from the Town and CLF.

In accordance with the procedural schedule, Exelon presented the prefiled direct testimony of one witness, Tammy Sanford, Principal Environmental Project Manager for Exelon. MassDEP submitted prefiled direct testimony of three witnesses: Roseanna Stanley, Air Permit Chief for MassDEP's Central Regional Office; Marc Wolman, Branch Chief of MassDEP's Air and Climate Program; and William Lamkin, Environmental Engineer and Manager of MassDEP's Climate

[6] Exelon requested and was granted an exemption from provisions of certain provisions of 980 C.M.R. § 6.03 which do not apply to generating facilities and provisions duplicative of materials already included in the record of Exelon West Medway, EFSB 15-01/D.P.U. 15-25.

Strategies Group.[7] The Town of Medway submitted prefiled direct testimony of Michael E. Boynton, Town Administrator for the Town of Medway. CLF submitted prefiled direct testimony of Christopher Stix, a financial analyst for CLF.

The Board conducted three days of evidentiary hearings on April 28, May 4 and May 8, 2017. Parties submitted initial briefs on May 30, 2017, and reply briefs on June 13, 2017.

Siting Board staff prepared a Tentative Decision and distributed it to the Siting Board members and all parties for review and comment on [DATE]. The parties were given until [DATE] to file written comments. The Siting Board received written comments from _____. The Board conducted a public meeting to consider the Tentative Decision on [DATE], at which the parties were invited to present oral comments. Counsel for _____ presented oral comments. After deliberation, the Board directed staff to prepare a Final Decision [APPROVING] the Petition and Application in part as set forth below.

II. INITIAL PETITION

A. Standard of Review

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

B. Positions of the Parties

Exelon filed its Initial Petition based on G.L. c. 164, § 69K½ (vi), which provides that the Siting Board shall grant an Initial Petition if it finds that "the facility cannot be constructed because of delays caused by the appeal of any approval, consent, permit, or certificate."[8] As noted

---

[7] Along with the MassDEP witnesses who submitted prefiled testimony, MassDEP attorney MacDara Fallon also testified at the evidentiary hearings (Tr. 3, at 470).

[8] In the alternative, Exelon asserts that it meets the second ground set forth in G.L. c. 164, § 69K½ because the CLF Appeal triggers extensive adjudicatory proceedings at MassDEP, which will operate to unduly delay the effectiveness of the final Air Plan

above, the CLF Appeal was filed with MassDEP on January 9, 2016 (Exh. EX-1, at 12). Exelon states that with the filing of the appeal, CLF initiated an extensive adjudicatory process, for which there are no mandated timelines; and that because the CLF Appeal precludes Facility construction until the appeal is resolved, Project construction will be substantially delayed (Exh. EX-1, at 14-15; Company Brief at 22).

Exelon asserts that it is essential for construction of the Project to proceed without delay in order for Exelon to: (1) help meet the demonstrated need for capacity in the SEMA/RI load zone by 2018; and (2) satisfy the Company's obligation to ISO-NE that the Facility be online by June 1, 2018 (Exh. EX-1, at 16). Exelon indicated that if the Company fails to meet its June 2018 in-service date, potential consequences include: termination of the capacity supply obligation ("CSO") by the ISO-NE, forfeit of financial assurances provided by Exelon to ISO-NE of approximately $14 million, and/or performance penalties should Exelon be unable to cover its CSO through transactions with other suppliers (Exh. EFSB-EX-8; Tr. 1, at 193).

According to the Company, in order meet the June 2018 in-service date for the Project, Exelon needed to: (1) pay for and release the natural gas compressor associated with the Project by January 31, 2017; (2) commit over $25 million to General Electric to ensure the turbines for the Facility would be delivered on time; and (3) begin Project construction, including site mobilization and clearing, on February 1, 2017 (Exhs. EX-1, at 16; EFSB-EX-9). Exelon further stated that it would be unreasonable for the Board to expect the Company to make the financial commitments described above during the pendency of the CLF Appeal, and as such the Company had suspended work by its Engineering Procurement and Construction ("EPC") contractor (Exh. EX-1, at 16; Tr. 1, at 95, 146).

During cross examination, Exelon clarified that the Company had initially suspended its EPC contractor in August 2016 because it had not yet received a decision from the Board in the underlying petition to construct proceeding, or a draft or final Air Plan Approval from MassDEP (Tr. 1, at 175-176). Exelon stated that the EPC contractor remained suspended following the

---

Approval, without which Exelon cannot begin Project construction (Exh. EX-1, at 14, n.16). Because the Siting Board finds in Section II.C, below, that Exelon has demonstrated that the Facility cannot be constructed due to delay caused by the CLF Appeal, within the meaning of G.L. c. 164, § 69K½ (vi), the Siting Board makes no determination regarding this second potential ground.

issuance of these decisions in November and December of 2016 due the "significant threat" of a CLF appeal (Tr. 1, at 176).[9] Exelon argues that, if not for the CLF Appeal, the Company would have released its EPC contractor (i.e., given its EPC contractor permission to proceed with final design work) in late 2016, with sufficient lead time to ensure the Company could begin construction as early as February 1, 2017 (Company Reply Brief at 1, 5, citing Tr. 1, at 176-177).[10] Accordingly, Exelon argues that the pendency of the CLF Appeal causes a delay in the construction of the Facility, and precludes Exelon from completing the Facility on a schedule that would allow for the required 2018 in-service date (Exh. EX-1, at 16; Company Reply Brief at 6-7).

MassDEP confirms that Exelon cannot begin construction of the Facility during the pendency of the CLF Appeal of the Air Plan Approval (Exh. EFSB-DEP-2). MassDEP also confirmed the Company's position that there are no statutory or regulatory requirements governing the time for MassDEP to resolve appeals of air plan approvals, and stated that appeals of complex air plan approvals (like the Exelon Air Plan Approval) generally take 12 to 18 months to resolve (Exh. EFSB-DEP-2; Tr. 3, at 481-483). MassDEP further stated that the longest appeal of this kind, the Brockton Power appeal, is more than five and a half years old and remains unresolved (Tr. 3, at 477).

Contrary to the Company's position, CLF urges the Siting Board to reject the Initial Petition because Exelon's Petition fails to meet the threshold requirements of G.L. c. 164, § 69K½ (vi) (CLF Brief at 2-3). CLF asserts that construction of the Facility has been delayed solely by Exelon's private business choices, and is not the result of any appeal of an approval,

---

9 Subsequent to the filing of the Initial Petition and Application, Exelon released its EPC contractor to complete final engineering and design for the Project on April 26, 2017, notwithstanding the Company's argument that it is unreasonable to expect the Company to begin work without knowing the outcome of permitting efforts (Tr. 1, at 25-26, 94-97). Exelon stated that the Company made this business decision in order to mitigate the duration of construction delays caused by the CLF Appeal (id.). Exelon indicated that this decision involved significant financial risk to the Company, and argues that such mitigation efforts are not required under the Certificate Statute (id.; Company Brief at 23-24).

10 Exelon acknowledges that there are certain water-related conditions included in the Board's Exelon West Medway Decision that must be resolved before the commencement of construction (Company Brief at 16, n.13). These conditions are the subject of the Company's February 24, 2017 Notice of Project Change, which Exelon asserted would have been filed earlier if a Certificate application had not been necessary (Tr. 1, at 38-43).

consent, permit, or certificate (CLF Brief at 2-4, citing RR-CLF-2). Specifically, CLF argues that Exelon's decision to suspend its EPC contractor in August 2016 resulted in a construction start date of mid-June 2017, at the earliest, rather than the February 1, 2017, start date alleged by the Company (CLF Brief at 2-3, citing Exhs. CLF-2(1); CLF-1-2(S)(1); RR-EFSB-2(1)). CLF points to the testimony of Exelon's project manager that the Company was reluctant to release payments of approximately $10.9 million otherwise due as the reason that Exelon suspended its EPC contractor (CLF Reply Brief at 5, citing Tr. 1, at 175).

CLF asserts that this self-imposed delay ensured the Facility could not be constructed in time to meet the Company's June 1, 2018, CSO (CLF Brief at 3). Furthermore, CLF argues that even if it were to drop the CLF Appeal today, the Facility could not become operational until late-January 2019 (CLF Reply Brief at 7). Finally, CLF submits that Exelon has failed to demonstrate any causal connection between an actual delay in the commencement of construction and the pendency of the CLF Appeal (CLF Reply Brief at 10).[11] CLF maintains that until Exelon is ready to commence construction, the CLF Appeal cannot "cause a delay" within the meaning of G.L. c. 164, § 69K½ (vi) because the sole reason of its inability to meet the June 2018 date is the Company's choice to delay EPC contractor activities (CLF Reply Brief at 9-10).

C. Analysis and Findings on Delay

The Siting Board has previously addressed the question of what an applicant must assert to demonstrate that a facility "cannot be constructed" due to delays caused by the appeal of a project permit within the meaning of G.L. c. 164, § 69K½ (vi). In two prior generating facility decisions, Footprint Power and IDC Bellingham LLC, EFSB 01-1 (2001) ("IDC Bellingham"), the Board determined that G.L. c. 164, § 69K½ (vi) was satisfied when an appeal of zoning permits caused a delay in construction of a generating facility. See Footprint Power at 8-9; IDC Bellingham at 11-13.

In Footprint Power, Footprint asserted that an appeal of the City of Salem's Zoning Board of Appeal approval for a Special Permit prevented timely construction of the facility. In that instance, Footprint noted that the Superior Court, the venue in which the appeal was initially filed,

---

[11] CLF asserts that the EPC contractor suspension decision is the proximate cause of the delay in construction and defines proximate cause as the direct cause of the delay, not necessarily the sole cause or the "but for" cause (CLF Reply Brief at 7, n.15).

estimated that it would require approximately 22 months to issue a decision on the appeal with potential additional delay in the event of further appeals. See Footprint Power at 7. In its Decision granting the Certificate, the Siting Board found that the pendency of the appeal could prevent Footprint from completing the project in time to meet its CSO, and this showing was sufficient to demonstrate a statutory basis for the Initial Petition. Footprint Power at 9.

In IDC Bellingham, IDC Bellingham asserted that an appeal of five special permits issued for the facility with the Land Court prevented construction of the facility. See IDC Bellingham at 7. Although the Siting Board concluded it could not determine when the Land Court would decide the zoning appeal, the Board noted that the appeal had been pending for nine months and had not yet been decided. Id. at 12-13. The Board also noted that further delay was possible because parties to the Land Court proceeding could appeal the Land Court decision. Id. at 12. In its Decision granting the Certificate, the Board determined that an applicant is not required to show that: (1) the facility could never be constructed because of the delay caused by an appeal; or (2) but for the appeal, the facility could be constructed. Id. at 12-13. The Siting Board also stated that in making its determination on an Initial Petition, it would look to the nature and timing, and the length of delay in construction that would result from the pendency of an appeal. Id.

In this proceeding, Exelon asserts similar circumstances as the above cases surrounding the appeal by CLF of the Air Plan Approval. The record demonstrates that the pendency of the CLF Appeal precludes Project construction until after a decision on the Appeal has been issued. MassDEP has stated that while the adjudicatory review of Exelon's final Air Plan Approval is pending, Exelon has not received a final Air Plan Approval which would allow the Company to begin construction. In addition, there are no regulatory timelines governing MassDEP's adjudicatory process, and MassDEP's adjudicatory review of the CLF Appeal has been stayed pending the outcome of this Certificate proceeding.

The record in this proceeding shows that, even if the CLF Appeal had not been filed, Exelon may not have been able to begin Project construction on February 1, 2017, as originally planned. However, any delays to the construction schedule attributable to (1) the Company's decision to suspend its EPC contractor in August 2016 and (2) the need to fulfill the outstanding conditions of the Board's approval of the petition to construct are likely less than the 12 to 18 month timeframe typically necessary to resolve an appeal of a MassDEP air plan approval. Thus, the CLF Appeal has imposed delay to construction beyond those imposed by other factors.

In addition, the Board rejects CLF's arguments regarding the likely in-service date of the Facility. Under the Certificate Statute, an applicant is not required to demonstrate that delays caused by the appeal of any approval, consent, permit, or certificate would ultimately result in a delay to the target (or contractual) in-service date of a generating facility. Rather, it is sufficient for purposes of G.L. c. 164, § 69K½ (vi) for the applicant to demonstrate that because of such an appeal the applicant cannot proceed with facility construction. This result is consistent with the statutory grant of authority to the Siting Board to remove permitting-related obstacles to construction of generating facilities that it has approved. G.L. c. 164, §§ 69K½ - 69O½.

Based on the Siting Board's analysis in Footprint Power and IDC Bellingham, and the record in this proceeding, the Siting Board finds that the pendency of the CLF Appeal prevents the Company from proceeding with Facility construction. This showing is sufficient to demonstrate that the facility cannot be constructed due to delay caused by the CLF Appeal, within the meaning of G.L. c. 164, § 69K½ (vi).

D. Decision on the Initial Petition

As noted in Section I, above, the Company asserted in its Initial Petition one of the seven grounds on which the Siting Board's grant of an Initial Petition may be based. The Siting Board has found that Exelon has established a valid basis for granting the Company's Initial Petition. Accordingly, the Siting Board [GRANTS] the Company's Initial Petition.

III. APPLICATION

A. Standard of Review

Pursuant to G.L. c. 164, § 69O½, any Certificate issued must include the Siting Board's findings and opinions with respect to the following: (1) the compatibility of the facility with considerations of environmental protection, public health, and public safety; (2) the extent to which construction and operation of the facility will fail to conform with existing state or local laws, ordinances, by-laws, rules and regulations and the reasonableness of exemption thereunder, if any, consistent with the implementation of the energy policies contained in this chapter; and (3) the public interest or convenience requiring construction and operation of the generating facility. G.L. c. 164, § 69O½. See Footprint Power at 12-15; IDC Bellingham at 20; Berkshire Power Development, Inc., EFSB 98-6, at 13 (1999) ("Berkshire Power").

The Siting Board bases its findings and opinions on both the record developed in the Certificate proceeding and the record developed in the underlying Siting Board proceeding in which the Board reviewed and approved the proposed facility. See Cape Wind Associates, LLC, EFSB 07-8, at 3-4 (2009) ("Cape Wind"); see also G.L. c. 164, §§ 69O, 69O½. The Siting Board does not relitigate in a Certificate proceeding issues already fully and fairly determined in the underlying proceeding. Berkshire Power at 18-19. However**,** in order to provide a full review of a previously approved facility, the Board: (1) reviews the decision from the underlying Siting Board proceeding; and (2) determines the extent to which new information has been developed or the circumstances of a project may have changed in the intervening period. See, e.g., Cape Wind at 13.[12] Finally, an applicant must demonstrate that it met the requirement in G.L. c. 164, § 69L½ to make a "good faith effort" to obtain the permits the applicant seeks to include in the Certificate.

B. Opinions and Findings

The three specific findings the Siting Board must make to support the issuance of a Certificate of Environmental Impact and Public Interest for a facility are discussed below. A discussion of which of the twelve permits and approvals requested by the Company should be included in a Certificate, if granted, follows in Section III.C, below.

1. Compatibility with Environmental Protection, Public Health and Safety

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

---

12 Additionally, in Certificate cases where the applicant is challenging an adverse agency permitting decision, the Siting Board verifies that the issues raised by the agency have been addressed in a comprehensive manner by the Board, either in its review of the facility under G.L. c. 164, § 69J¼ and/or in its review under G.L. c.164, § 69K½. See G.L. c. 164, §§ 69O, 69O½; Cape Wind at 13. Such an inquiry is not relevant here, as the Company's Initial Petition and Application are based on the appeal by third parties of an agency decision favorable to the Company; the Company does not seek to overturn or modify an adverse agency decision.

a. Positions of the Parties

Exelon argues that the Siting Board comprehensively reviewed the environmental impacts of the Facility, including its consistency with the Global Warming Solutions Act ("GWSA"), in the underlying Siting Board petition to construct proceeding (Company Brief at 31). Exelon states that in Exelon West Medway, the Siting Board directly addressed the environmental, public health, energy, and public safety aspects of the Facility and found them to be consistent with the Commonwealth's health, safety and environmental policies (Company Brief at 31). Exelon further argues that there is nothing in the evidentiary record in this Certificate proceeding, nor any change in circumstances since the issuance of the Decision in Exelon West Medway, which would require the Siting Board to revisit any of its findings from the petition to construct proceeding (Company Brief at 33). Finally, Exelon contends that the Siting Board's finding in Exelon West Medway of the Facility's consistency with the GWSA cannot be changed in this proceeding as Siting Board precedent does not allow relitigating issues in a Certificate proceeding that have been fully and fairly decided in the underlying petition to construct proceeding (Company Reply Brief at 3).

CLF asserts that Exelon's requested Certificate is incompatible with considerations of environmental protection, public health, and public safety required by the GWSA (CLF Brief at 5). CLF argues that the greenhouse gas ("GHG") emissions cap included in the Air Plan Approval is unlikely to have any material effect on, or lead to any meaningful reduction of direct GHG emissions from the Facility between 2018 and 2050, and therefore the cap is arbitrary (CLF Brief at 4). CLF further asserts that the Air Plan Approval's GHG emission cap fails to ensure that "the Facility will not emit GHG emissions that may cause or contribute to a condition of air pollution, or cause damage or threat of damage to the environment" or that the Facility operations "will help achieve the 2020 mandate to reduce GHG emissions by 25% from 1990 emission levels, and the 2050 mandate for an 80% reduction from 1990 emission levels as required by the GWSA" (CLF Brief at 4-5).

Using information developed in the petition to construct proceeding, CLF's witness presented an analysis of the effect of the Air Plan Approval's GHG emission cap on operation of the Facility from 2019 through 2050. As input data, CLF used the Air Plan Approval's GHG emission rates, a yearly capacity factor of approximately ten percent based on dispatch models run by Exelon in the petition to construct proceeding, and fuel oil use of ten days per year

(Exh. CLF-1, at 9-10). Based on this analysis, CLF contends that the Air Plan Approval GHG emission cap would allow the Facility to operate at more than three times the highest capacity factor shown in Exelon's own dispatch modeling, and would "barely effect the levels of [carbon dioxide ("CO_2")] emissions by the Facility between 2018 and 2050" (Exh. CLF-1, at 10). At the assumed ten percent capacity factor, CLF asserts that the Facility could operate through about 2092 without ever having to reduce or limit its CO_2 emissions through use of "accumulated over compliance credits" (Exh. CLF-1, at 10).

Referring to the Declining Cap Market Mechanism ("DCMM") CLF presented in the petition to construct proceeding, CLF contends that its DCMM and the MassDEP Air Plan Approval declining CO_2 cap share similar characteristics—e.g., both include a declining annual emissions schedule and both would allow the generation of over compliance credits (Exh. CLF-1, at 10-11). However, CLF contends that unlike the Air Plan Approval's declining CO_2 cap, CLF's DCMM would actually reduce the Facility's expected CO_2 emissions between 2019 and 2049 by about five million tons and would do so at the nominal expense of about 0.5% of the Facility's lifetime net present value, and with no material impact on the Facility's ability to provide reliable and cost efficient energy for the Commonwealth (Exh. CLF-1, at 10-11).

CLF also contends that without a "valid facility-specific cap," and in the absence of a sector-wide regulation that ensures the Facility "complies with the GWSA," the Siting Board cannot issue a certificate in this proceeding (CLF Reply Brief at 24). In a calculation presented for the first time in its Reply Brief, CLF maintains that the Facility would lead to a net increase of in-state CO_2 emissions of 604,697 tons, cumulatively, between 2018 and 2030 (CLF Reply Brief at 24).

CLF also argues that the Board has insufficient information to assess the Facility's impact on the health and safety of the public for the other permits and approvals Exelon has requested be included in a Certificate (CLF Brief at 4).

MassDEP disagrees with CLF's contention that the Air Plan Approval is inconsistent with the Commonwealth's GHG policies, including the GWSA (MassDEP Brief at 16, 21-22). MassDEP states that in the underlying petition to construct proceeding the Board concluded that MassDEP's proposed Air Plan Approval was compatible with all environmental protection, public health and safety requirements (MassDEP Brief at 15). MassDEP characterizes the emissions limits contained in the proposed Air Plan Approval reviewed by the Board as "substantively

identical" to those in the final Air Plan Approval appealed by CLF (MassDEP Brief at 21). MassDEP argues that no new evidence was presented in this proceeding that would require the Board to reassess its original findings in Exelon West Medway that MassDEP's Air Plan Approval, and the associated declining annual GHG emissions limit, is sufficient to satisfy the requirements of G.L. c. 164, § 69O½ and the GWSA (MassDEP Brief at 21-23). Moreover, MassDEP questions the validity of emissions calculations submitted by CLF in support of its assertions (MassDEP Reply Brief at 4-5).

MassDEP states that it issued the Air Plan Approval to Exelon because the proposed Facility complies with MassDEP air quality statutory and regulatory requirements (including the GWSA), and will not cause a condition of air pollution (MassDEP Brief at 24). MassDEP states that the GHG emissions cap included in the Air Plan Approval is not intended to ensure the Facility, alone, achieves the CO_2 emissions reductions required under the GWSA, but rather is intended to reduce statewide GHG emissions, thereby helping the Commonwealth achieve the GWSA goals (MassDEP Brief at 24-25; MassDEP Reply Brief at 7).

MassDEP explained how the Facility's GHG emissions cap was developed, noting that MassDEP used an existing declining CO_2 cap applicable to the Footprint Power generating facility as a starting point,[13] and among other things, made adjustments to reflect the intermittent operating characteristics of the Facility, and operational limits prescribed under New Source Performance Standards ("NSPS"), Subpart TTTT (Standards of Performance for Greenhouse Gas Emissions for Electric Generating Units) (Exh. DEP-3, at 5; Tr. 3, at 408-411, 419-422; MassDEP Brief at 26). MassDEP concludes that the Air Plan Approval is compatible with considerations of environmental protection, health and safety and should be adopted by the Board in its entirety in a Certificate (MassDEP Brief at 29-30).

---

[13] MassDEP stated that it used a facility-specific CO_2 cap to be consistent with a settlement agreement between CLF and the project proponent in Footprint Power (Tr. 3, at 409). In that settlement agreement, CLF and Footprint included a level playing field provision in which the settlement agreement could be reopened in the event that other power plants received "materially less stringent requirements" in their air permit approvals than those imposed on Footprint. Footprint Power, Att. 4, 8-9. The settlement agreement was incorporated as part of the Certificate awarded to Footprint Power. Footprint Power, Att. 4.

b. Analysis and Findings

As stated in Section III.A above, the Siting Board: (1) reviews the decision from the underlying Siting Board proceeding; and (2) determines the extent to which new information has been developed or the circumstances of a project may have changed in the intervening period. The Siting Board does not relitigate in a Certificate proceeding issues that have been fully and fairly decided in the underlying proceeding. This practice reflects considerations of both fairness and administrative efficiency. See Footprint Power at 13; Berkshire Power at 18-19.

> It is the Siting Board's view that, as a general rule, a Certificate proceeding should not serve as a vehicle for the re-litigation of issues that have already been fully and fairly determined in the related facility approval proceeding, particularly where the issue in question is one that is central to the Board's fulfillment of its statutory obligations. To allow it to do so would effectively render the Facility approval proceeding meaningless. It also would violate accepted principles of due process for those parties, including the project applicant, who participated in the facility approval proceeding, litigated the issues in question, and justifiably held the expectation that they could rely upon the finality of the Siting Board's Final Decision in that proceeding. Berkshire Power at 18-19.

As indicated above, the Siting Board conducted a full adjudicatory proceeding on the Company's petition to construct the Facility, and issued a Final Decision approving the Project in November 2016. In the underlying proceeding, the Siting Board conducted a comprehensive review of the environmental impacts of the proposed Facility, including GHG emissions impacts. See Exelon West Medway at Sections IV.B through IV.J. The Siting Board found that with conditions relating to air, water, visual, noise, traffic, safety, and hazardous and solid waste, Exelon's plans for the construction of the proposed Facility would minimize the environmental impacts of the Facility consistent with the minimization of costs associated with the mitigation, control, and reduction of the Facility's environmental impacts. See Exelon West Medway at 126, 146-147. The Siting Board also found that the plans for the construction of the proposed generating Facility are consistent with current health and environmental protection policies of the Commonwealth, and with such energy policies of the Commonwealth as have been adopted by the Commonwealth for the specific purpose of guiding the decisions of the Siting Board. See Exelon West Medway at 134, 147. Finally, the Siting Board found that the construction and operation of the Facility is consistent with the GWSA. See Exelon West Medway at 133. These issues were fully and fairly determined in the underlying proceeding.

Siting Board precedent in Certificate proceedings also considers "the extent to which new information has been developed or the circumstances of a project may have changed in the intervening period." See Footprint Power at 10; Cape Wind at 9-10. With regard to the Facility's GHG emissions and consistency of the Facility with the GWSA, there has been new information in the intervening period that warrants review and analysis beyond that contained in Exelon West Medway.[14]

First, on December 16, 2016, MassDEP issued a set of six proposed regulations for limiting or reducing GHG emissions for several categories of sources in the Commonwealth, including electric generating facilities. Of particular note is 310 C.M.R. § 7.74, proposed under G.L. c. 21N, § 3(d), which would establish a mass-based, annually declining limit on GHG emissions from power plants. Although the draft Air Plan Approval evaluated in Exelon West Medway indicated that the permit GHG cap would be superseded by any forthcoming electric sector GHG emissions cap regulation, the substance of the proposed regulation was not known at the time of the Board's decision.[15]

Second, in the recent decision in NRG Canal 3 Development LLC, EFSB 15-06/D.P.U. 15-180 (July 5, 2017) ("NRG Canal 3"), the Siting Board approved the proposed generating facility and established a methodology as to how prospective regional emissions reductions associated with a proposed generating facility would be viewed and quantified with respect to GWSA consistency and "statewide greenhouse gas emissions" reductions, as defined in the GWSA.

The circumstances of the present case are appropriate for the application of the NRG Canal 3 prospective statewide greenhouse gas emissions reduction quantification methodology. In both NRG Canal 3, and this proceeding, each record includes dispatch modeling analyses, accepted by the Board, of the respective generating facilities' operations during

---

[14] The Board notes that the dispatch modeling for the Facility and the quantity of projected greenhouse gas emissions from the Facility have not changed since Exelon West Medway.

[15] MassDEP confirmed that as a 3(d) regulation, the proposed 310 C.M.R. § 7.74 GHG emission cap would sunset pursuant to Section 16 of the GWSA after December 31, 2020 (Tr. 3, at 518-519). If the Air Plan Approval emission cap is superseded by the final version of 310 C.M.R. § 7.74, and if the final regulation remains a Section 3(d) rule, the emission cap for the Facility would also sunset after 2020 (Tr. 3, at 518-519). However, final regulations are not due to be issued until August 11, 2017.

substantially overlapping future time periods. The respective dispatch models in both proceedings demonstrated that the addition of the proposed facilities to the regional resource mix would result in displacement of emissions at generating facilities in Massachusetts and elsewhere in New England, leading to a net regional emissions reduction of GHGs. In NRG Canal 3, the Board determined that the regional emissions reductions reflected in the dispatch model results also constitute, in whole or part, a valid measure of statewide GHG emissions reductions, as defined by the GWSA. See NRG Canal 3 at 73. In reaching this conclusion, the Siting Board identified and adopted two methods to account for prospective statewide GHG emissions reductions relating to dispatch model results: (1) the regional method of GHG Inventory accounting, calculated and published by MassDEP in its periodic GHG Inventory updates required by the GWSA; and (2) a marginal emissions methodology used by MassDEP in the development of its GWSA regulations and by the Secretary of Energy and Environmental Affairs in the 2020 Clean Energy and Climate Plan Update ("2020 CECP Update"). NRG Canal 3 at 42-43, 70-74; see also EFSB 17-01, Exhs. EFSB-7; EFSB-8; Tr. 3, at 521-522.

MassDEP supported the Board's use of the marginal emissions methodology to assess the results of Exelon dispatch models in determining future statewide GHG emissions reductions, much as MassDEP does in its own such prospective analyses (Tr. 3, at 537-541). For example, MassDEP stated that in its own assessments of GHG impacts in the electric sector relating to its prospective regulations and market developments (such as plant retirements or changes in electric load), MassDEP relies on a marginal unit methodology that is similar to the dispatch model reviewed by the Board in Exelon West Medway and also in NRG Canal 3 (Tr. 3, at 539). MassDEP indicated that this marginal unit methodology is also used in the 2020 CECP Update to estimate prospective GHG impacts of future policies and market events, such as plant shutdowns (Tr. 3, at 540-541). MassDEP further advised the Siting Board, that in looking prospectively at the electric system, a marginal unit analysis, like that used by MassDEP and in the 2020 CECP Update, provides an appropriate basis to evaluate the GHG impacts for purposes of GWSA consistency (Tr. 3, at 542-543).[16]

[16] MassDEP also described the "Massachusetts Method" of GHG Inventory accounting, which it relies upon as its primary method for historical GHG Inventory accounting (Tr. 3, at 521-522). MassDEP indicated that the Massachusetts method of GHG Inventory accounting is well suited for retrospective use, but is not an appropriate method for prospective analysis, and MassDEP does not use if for that purpose (Tr. 3, at 538-539).

CLF disagrees on the appropriate method to calculate statewide GHG emissions for the Facility. CLF argues that the Facility would lead to a "net increase in in-state emissions" that is inconsistent with the GWSA (CLF Reply Brief at 24). During the evidentiary hearings, CLF made a record request to have MassDEP evaluate the effect of the Facility's operations on the 2014 Massachusetts GHG Inventory (Tr. 3, at 449). CLF specified that in performing this analysis, MassDEP would use as input data the dispatch model analysis of the first full year of the Facility's operation in 2019, provided by Exelon in the petition to construct proceeding (Tr. 3, at 449). In response to the request, MassDEP expressed concern that the methodology specified by CLF "doesn't make sense" (Tr. 3, at 441). In particular, MassDEP expressed concern that since the 2014 Massachusetts GHG Inventory is a retrospective evaluation of past activity in 2014, and the dispatch model analysis for the Facility (which is not expected to become operational until at least 2018) is a projection for 2019, CLF's proposed methodology would inappropriately attempt to "meld the two" and that the request was mixing "apples and oranges" (Tr. 3, at 441, emphasis added). MassDEP indicated that while it could build some sort of spreadsheet in response, it viewed the exercise as having "no relevance" (Tr. 3, at 442).

The Company also objected to CLF's request, pointing out that the 2014 Massachusetts GHG Inventory and the 2019 dispatch model results are not logically conjoined (Tr. 3, at 444). As an example of this concern, the Company noted that generating units included in the 2014 Massachusetts GHG Inventory may have already retired by 2019, when the effects of the Facility on the grid are evaluated prospectively in the dispatch model (Tr. 3, at 444).

In ruling on CLF's record request, the Presiding Officer noted that the request presented an "apples and oranges comparison" that would require a host of methodological assumptions and produce a too-speculative result that would not produce useful evidence (Tr. 3, at 454). Accordingly, the Presiding Officer denied the record request.[17]

The Siting Board has previously noted various deficiencies of the Massachusetts Method for use in prospective analysis of statewide GHG emissions reductions. NRG Canal 3 at 71-72.

[17] Although it did not object to the ruling at the time, in its Reply Brief, CLF presented its own calculation of the effect of Facility on "in-state emissions" for the period between 2018 and 2030 (a calculation absent in the record) but noted that "a more direct calculation of this increase in in-state emissions was requested by CLF and technically possible" but that its request was rejected (CLF Reply Brief at 24, n.75). While the basis and accuracy of

In Exelon West Medway and NRG Canal 3, the Board determined that, as a result of economic dispatch practices used by ISO-NE which dispatches units in order of lowest variable cost (and therefore greatest efficiency and lowest emissions), each facility would typically operate only when it is less costly and less polluting to do so than other available units on the grid. See Exelon West Medway at 59; NRG Canal 3 at 74. As further discussed in NRG Canal 3, the addition of a new, efficient peaking facility in Massachusetts to the regional resource mix dispatched by ISO-NE would increase net GHG emissions within the borders of the Commonwealth; however, due to the resulting reduction of imports of electricity, the Commonwealth would still achieve a net reduction in "statewide GHG emissions," as defined by the GWSA. See NRG Canal 3 at 70-71, 73. Given the accounting methodologies adopted by the Board in NRG Canal 3 to assess prospective statewide emissions reductions for new generation facilities – which are equally applicable to the dispatch modeling performed in Exelon West Medway – the Board now concludes that the Facility would achieve statewide GHG emissions reductions, as defined by the GWSA.[18]

In NRG Canal 3, the Board also found that imposing a binding declining emissions cap on new gas generating facility in Massachusetts would cause a relatively efficient facility to run less than it would have otherwise, and would increase, not decrease regional CO_2 emissions. See NRG Canal 3 at 78. Further, based on the methodologies approved by the Board for assessing GHG impacts, the Board concluded these diminished regional reductions (in whole or part) also constitute diminished "statewide greenhouse gas emissions" reductions. See NRG Canal 3 at 69-74, 78. Accordingly, the Siting Board declined to impose the more stringent GHG emission

---

CLF's calculation is unsubstantiated, and not appropriately introduced as evidence in a Reply Brief, it appears that this analysis nevertheless overlooks the definition of "statewide GHG emissions" for the electric sector, which the GWSA defines as including emissions associated with both in-state generation and imported electricity. See G.L. c. 21N, § 1.

[18] In Exelon West Medway, the Board noted that "Whether [regional CO_2 emissions reductions would also result in statewide GHG reductions] is the case, or not, depends in part on the detailed calculations of the GHG accounting system established by MassDEP pursuant to its responsibilities under G.L. c. 21N, § 3." Exelon West Medway at 58. In light of the Siting Board's approved methodology in NRG Canal 3 regarding the evaluation of prospective regional and statewide GHG emissions reductions, as defined by the GWSA, the Board now concludes that the record in Exelon West Medway and supplemented in this proceeding establish that the Facility would result in statewide GHG emissions reductions.

cap sought by CLF, and instead elected to rely on MassDEP as to whether and to what degree, a GHG cap would apply to the Canal 3 Facility. See NRG Canal 3 at 77, 80.[19,20]

In this proceeding, the Siting Board similarly sees no merit in CLFs argument to impose more stringent GHG emissions caps than those imposed by MassDEP in the Air Plan Approval for Exelon and any generating sector regulations that may supersede the Air Plan Approval. Accordingly, the Siting Board rejects CLF's call for a more stringent GHG emissions cap. Based on the above findings, the Siting Board concludes that when the Facility operates, it serves to reduce both regional and statewide GHG emissions, and promotes the objectives of the GWSA. On the basis of the record in this proceeding we will continue to rely on MassDEP's final Air Plan Approval and any forthcoming regulations that may be applicable to the Facility as the appropriate limit of any ongoing emissions from the Facility. See Exelon West Medway at 65 n.62; see also Section II.B.2., footnote 23.

Subsequent to the Siting Board's approval of Exelon's petition to construct, on February 24, 2017, the Company submitted a Notice of Project Change to the Board relating to the Facility's proposed water supply plan (Exh. EFSB-EX-3). Rather than rely on a combination of water from the Town of Millis and an on-site well to meet the Facility's water requirements, Exelon proposed to rely solely on its on-site well for operation under normal and reasonably foreseeable operating conditions (Exh. EFSB-EX-3). The Siting Board conducted an adjudicatory proceeding on the proposed Project Change, and has found [that, with the implementation of additional conditions, the Company's plans for implementation of its modified water supply plan

---

19 In declining the more stringent GHG emissions cap proposed by CLF, the Siting Board also noted that CLF's profitability analysis used to support its proposal was at odds with the post-restructuring Siting Board statutes and precedent. See NRG Canal 3 at 79-80. In addition, the Board found that a binding cap that reduces operation of a relatively efficient generating facility in Massachusetts, but causes a more-than-offsetting emissions increase elsewhere in the region, creates a "leakage" concern, as defined by the GWSA. See NRG Canal 3 at 78-79.

20 Similarly, the Siting Board elected in Exelon West Medway to rely on MassDEP regarding whether and, if so, how, to impose an annual declining CO_2 emissions cap on that facility's air emissions. See Exelon West Medway at 65. The Board declined CLF's more stringent declining GHG emissions cap. Id.

would minimize the environmental impacts of the Project consistent with the minimization of costs associated with the mitigation, control, and reduction of the environmental impacts of the Project. See Project Change Decision at 22.] The Board's final decision [APPROVING] the Company's Project Change request is issued contemporaneously. See Project Change Decision.

With respect to the environmental impacts of the Project beyond GHG impacts, the Siting Board finds in this case no new information or project changes which alter the environmental impacts of the Project considered by the Board in Exelon West Medway and the Project Change Decision that require additional analysis.

The conclusions and findings reached in Exelon West Medway and the subsequent Project Change Decision regarding environmental impacts, public health and safety remain valid and will be used for purposes of our findings in this Decision. Accordingly, the Siting Board finds that construction and operation of the proposed generating facility is compatible with considerations of environmental protection, public health and public safety.

2. Conformance with Laws and Reasonableness of Exemption Thereunder

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

a. Positions of the Parties

Exelon states that the Facility will confirm with all existing state and local laws, ordinances, by-laws, rules and regulations (Company Brief at 36). Exelon argues that it has already received a number of approvals for the proposed Facility, thus demonstrating consistency with applicable state and local requirements (Company Brief at 37). For example, Exelon maintains that in issuing a Certificate on the Final Environmental Impact Report for the Facility, the Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs found that the Facility adequately and appropriately complies with the Massachusetts Environmental Policy Act and its implementing regulations. In issuing a Wetlands Order of Conditions, the Medway Conservation Commission found that Facility-related work occurring in wetlands would

comply with applicable state and local laws and regulations (Company Brief at 37-38). Exelon also argues that in issuing its final Air Plan Approval, MassDEP found that: (1) the Facility's CPA Application is in conformance with the state's Air Pollution Control regulations; (2) the Facility complies with the GWSA; (3) the Facility's emissions limits represent applicable Lowest Achievable Emissions Rate ("LAER") and Best Available Control Technology ("BACT") for emissions of pollutants subject to review; (4) the benefits of the Facility significantly outweigh any environmental and social costs; (5) the Facility will comply with Massachusetts and Federal Ambient Air Quality Standards and Massachusetts Allowable Ambient Levels and Threshold Effects Exposure Limits Guidelines; (6) the impacts of a hypothetical accidental release of ammonia meet applicable standards; (7) Facility noise emissions meet applicable standards; (8) the Facility complies with NSPS and National Emissions Standards for Hazardous Air Pollutants; (9) the Facility will obtain all required emissions allowances; and (10) procedures for environmental justice communities have been followed (Company Brief at 37). Finally, regarding approvals the Company has yet to obtain, Exelon argues that an approval in lieu issued by the Siting Board, incorporating conditions recommended by other state and local authorities, would ensure that construction and operation of the Facility complies with applicable state law and regulations, as well as the bylaws and regulations ordinarily administered by the Town of Medway (Company Brief at 38-43).

As noted above, CLF maintains that the Board cannot include the final Air Plan Approval without modification because the air permit provisions fail to conform with the GWSA (CLF Reply Brief at 22). CLF also argues that the Facility cannot be approved in compliance with the GWSA prior to the finalization of 310 C.M.R. § 7.74 GHG emissions regulations proposed by MassDEP ("Proposed Regulations") (CLF Brief at 4).

MassDEP states that it issued the Air Plan Approval to Exelon because the proposed Facility complies with MassDEP air quality statutory and regulatory requirements (including the GWSA), and will not cause a condition of air pollution (MassDEP Brief at 24). MassDEP states that the Declining Cap included in the Air Plan Approval is not intended to ensure the Facility, alone, achieves the CO_2 emissions reductions required under the GWSA, but rather is intended to reduce statewide GHG emissions, thereby helping the Commonwealth achieve the GWSA goals (MassDEP Brief at 24-25; MassDEP Reply Brief at 7).

MassDEP argues that finalization of the Proposed Regulations is not a necessary prerequisite for the issuance of an Air Plan Approval (MassDEP Reply Brief at 5). MassDEP states that CLF has misread G.L. c. 21N, § 9 ("Section 9"), arguing that the plain language of Section 9 makes it clear that the Legislature's intent was to allow the construction of new power plants to proceed so long as they meet all applicable requirements in effect at the time of issuance of the permits, and that the GWSA was not intended to create a moratorium on such power plants until new regulations, like 310 C.M.R. § 7.74, are promulgated (MassDEP Reply Brief at 2). MassDEP notes that the Siting Board has previously rejected this same argument from CLF in the underlying petition to construct proceeding, and states that the Board should once again find that Section 9 does not prevent the Board from issuing a Certificate to Exelon prior to the finalization of the Proposed Regulations (MassDEP Reply Brief at 2-3, citing Exelon West Medway at 62 n.59).[21] Finally, MassDEP states that the Declining Cap, along with other compliance conditions included in the Air Plan Approval, is consistent with the terms and conditions in MassDEP's Proposed Regulations, and that the Air Plan Approval includes provisions that will ensure the Facility-specific Declining Cap is superseded by the GHG emissions limits and compliance requirements in the Proposed Regulations upon its promulgation (MassDEP Brief at 27-30).[22] MassDEP concludes that because the Air Plan Approval complies with all applicable environmental statutes and regulations, a Certificate granted to the Company should include the Air Plan Approval in its entirety, without modification (MassDEP Brief at 29-31).

b. Analysis and Findings

The Board acknowledges that the granting of a Certificate in this proceeding will allow the Company to proceed with construction of the Project, notwithstanding the pending CLF Appeal.

---

[21] In its comments on the Exelon West Medway Tentative Decision, CLF argued that "the GWSA prohibits the Board's approval of the proposed Facility in the absence of the Section 3(d) regulations that the Kain decision requires the state to issue… thus the Board must wait until those regulations are issued before it can render a decision on the Petition" (cites omitted). See November 14, 2016, CLF's Comments on Tentative Decision, at 5, EFSB 15-01/D.P.U. 15-25. In Exelon West Medway, the Board determined that construction of the Project could proceed despite the absence of final 310 C.M.R. § 7.74 regulations. Exelon West Medway at 65.

[22] Special Terms and Conditions 23-26 in the Facility's final Air Plan Approval of December 19, 2016 (Exh. EX-1, app. A).

The Siting Board notes that this result was intended by the Legislature in enacting the Certificate Statute, and is consistent with the statute. Further, although the Certificate Statute does not require it, the Board provided each of the permitting agencies with the opportunity to recommend appropriate permit conditions, and to indicate whether it opposed inclusion of its permit(s) in the Siting Board Certificate.

In response, MassDEP expressed its support for the issuance of a Certificate inclusive of the Air Plan Approval issued by MassDEP on December 19, 2016, including all of the compliance conditions prescribed therein. In support of its recommendation, MassDEP explained the basis for the Declining Cap included in the Air Plan Approval, and how construction of the Facility would contribute to GHG emissions reduction requirements established in the GWSA. While CLF and MassDEP disagree on whether or not the Air Plan Approval will ensure consistency with the GWSA, the Board gives great weight to the expertise of MassDEP with respect to setting air emissions permitting requirements for electric generating facilities. Consistent with the underlying petition to construct proceeding, the Board elects to rely on MassDEP regarding how best to regulate the Facility's air emissions.[23,24]

---

[23] The Massachusetts Supreme Judicial Court has recognized that the Siting Board may appropriately rely on the expertise of MassDEP with respect to setting air emissions permitting requirements for electric generating facilities. City of Brockton v. Energy Facilities Siting Board, 469 Mass. 196, 207 (2014) (Board may rely on NAAQS set by USEPA and MassDEP as "the legislative scheme contemplates that much of what the Board does in the area of air pollution will be dependent on [MassDEP] which has a significant and independent role in the permit process for new generating facilities"), citing Town of Andover v. Energy Facilities Siting Board, 435 Mass. 377, 381-382 (2001) (Board "neither delegated nor abdicated its responsibility to establish "final, binding emissions limits for the proposed facility" because it never had that authority. Regulation of the actual emissions of the proposed facility is a matter within the jurisdiction of the [MassDEP], not the board"). In accord, Box Pond Association v. Energy Facilities Siting Board, 435 Mass. 408, 422 (2001) (determining whether [new air pollution control technology] is BACT or LAER "[is] properly left to other agencies;" Clean Air Act administered by MassDEP).

[24] This is consistent with NRG Canal 3, wherein the Siting Board found the proposed generating facility, and an associated declining cap proposed by MassDEP, to be consistent with the GWSA prior to the promulgation of the Proposed Regulations. See NRG Canal 3 at 139.

Furthermore, the Board has previously considered, and rejected, CLF's argument that the Facility cannot be approved in compliance with the GWSA prior to finalization of the Proposed Regulations. In Exelon West Medway, the Board stated that "the GWSA explicitly recognizes the necessity of new power plants in the foreseeable future," citing G.L. c. 21N, § 9, which states "[n]othing in this chapter shall preclude, prohibit or restrict the construction of a new facility or the expansion of an existing facility subject to regulation under this chapter, if all applicable requirements are met and the facility is in compliance with regulations adopted pursuant to this chapter." See Exelon West Medway at 62, n.59. No new evidence regarding the emissions from the Facility or MassDEP's policies relating to facility specific emission caps and the GWSA has been presented in this proceeding that would cause the Board to reconsider its position on this matter.

Finally, with respect to the other permits necessary for construction and operation of the Facility, as discussed in Section III.C.2., below, the Siting Board [DECLINES TO GRANT] the eleven state and local permits Exelon has requested be included in a Certificate in favor of allowing the Company to pursue normal permitting processes. Accordingly, the Siting Board finds that the record in this proceeding does not demonstrate any area of actual or potential non-conformance with local or state laws, ordinances, by-laws, rules or regulations.

3. Public Interest or Convenience

Pursuant to G. L. c. 164, § 69O½, the Siting Board must make a finding with respect to the public interest or convenience requiring construction and operation of the Facility.

a. Positions of the Parties

Exelon argues that in the underlying proceeding the Board expressly found that construction of the Facility "contributed on balance to a reliable, low-cost, diverse regional energy supply with minimal environmental impacts," and that the Facility was "reasonably necessary for the convenience or welfare of the public" (Company Brief at 44, citing Exelon West Medway at 137; Company Reply Brief at 2). In reaching this conclusion, Exelon states the Board examined (1) the need for, or public benefits of, the present or proposed use; and (2) the environmental impacts or any other impacts of the present or proposed use, and then balanced the interests of the general public against the local interest (Company Brief at 44, citing Exelon West Medway

at 137). As such, Exelon argues that the construction and operation of the Facility more than satisfies the public interest or convenience standard set forth in G. L. c. 164, § 69O½ (Company Reply Brief at 2). Exelon argues that there is nothing new in the record of this proceeding that changes the Board's findings in this regard, but rather the expert testimony of MassDEP in this case further reinforces the Board's original findings (Company Brief at 45-46).

MassDEP agrees with the Company's position, stating that the Siting Board should issue a Certificate because it is in the public's interest for Exelon to construct and operate the Project (MassDEP Brief at 31). In support, MassDEP cites the Board's findings in the underlying proceeding, as well as MassDEP witness testimony during this proceeding (MassDEP Brief at 31-35). According to MassDEP, operation of the Facility will help reduce statewide GHG emissions for two reasons: (1) the clean, highly efficient Exelon Facility will be dispatched ahead of older, less efficient generating units, thereby displacing those facility's dirtier emissions; and (2) operation of a quick-start intermittent Facility will support the integration of more zero-emitting renewable resources in the Commonwealth or elsewhere in New England (Tr. 3, at 417, 436-441; MassDEP Brief at 33).

CLF argues that the public interest does not require the construction of the proposed Facility, and that no Commonwealth energy policy would be served by exempting the Facility from applicable state and local laws (CLF Brief at 5). Furthermore, CLF argues that there is no public need to accelerate the Facility's schedule (CLF Reply Brief at 13). CLF asserts that evidence presented in this Certificate proceeding demonstrates that a delay in the construction of the Facility will in no way jeopardize the reliability of energy supply in the Commonwealth or ISO-NE,[25] and that even the grant of a Certificate cannot ensure the Facility will be available to supply power to the SEMA/RI load zone by June 1, 2018 (CLF Reply Brief at 14-15). Finally, CLF argues that to the extent operation of the Facility might complement other Commonwealth energy policies, such as the integration of intermittent renewable generation, there is no evidence

[25] In response to a request from the staff, the Company obtained a letter from ISO-NE regarding Exelon's ability to qualify for a deferral of its CSO (RR-EFSB-18(1)). In its letter, ISO-NE stated that, while a formal assessment had not been undertaken, in its professional opinion the proposed Facility is not needed for transmission security purposes, and therefore would be unlikely to qualify for a deferral (RR-EFSB-18(1)). However, ISO-NE stated that the reliability review for the deferral process considers transmission security only, and does not consider system resource adequacy needs (RR-EFSB-18(1)).

in the record indicating that the Facility must be operational in the 2018-2019 timeframe in order to do so (CLF Reply Brief at 16, citing Tr. 3, at 423-426).

b. Analysis and Findings

After conducting an extensive review of the potential environmental impacts of the proposed generating Facility, the Siting Board found in the underlying proceeding that upon compliance with specific conditions set forth in Exelon West Medway, construction and operation of the Facility will provide a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost, in keeping with the Siting Board's statutory obligations under G.L. c. 164, § 69H. See Exelon West Medway at 147. The Siting Board further found that the general public interest in constructing the Project outweighs identifiable adverse local impacts. See Exelon West Medway at 138. Accordingly, the Siting Board found that the Exelon Project is reasonably necessary for the convenience or welfare of the public. See Exelon West Medway at 138.

In the subsequent Project Change proceeding, the Siting Board found [that, with the implementation of additional conditions, the Company's plans for implementation of its modified water supply plan would minimize the environmental impacts of the Project consistent with the minimization of costs associated with the mitigation, control, and reduction of the environmental impacts of the Project. See Project Change Decision at 22.]

Nothing in the record of the instant proceeding changes any of the Siting Board's findings in the underlying petition to construct proceeding, nor in the subsequent Project Change proceeding. While CLF argues that the Facility is not required to maintain electric system reliability in 2018, the Board's assessment of the public interest is not an assessment that there is a demonstrated need for an increment of additional capacity in a particular resource year.[26] In

[26] In 1997, the Legislature eliminated language in § 69H requiring the board to review the "need" for power to be generated by proposed facilities. "The 1997 Restructuring Act also added a new provision to G. L. c. 164 to govern the board's review of proposed generating facilities. That provision, § 69J¼, explicitly states that "[n]othing in this chapter shall be construed as requiring the board to make findings regarding the need for, the cost of, or alternative sites for a generating facility" (except in limited circumstances not relevant here) and prohibits the board from seeking data relative to "the necessity for, or cost of, [a] proposed generating facility." Alliance v. Energy Facilities Siting Board, 448 Mass. 45, 48 (2006).

determining the public interest, the Siting Board considers benefits and impacts, and balances multiple factors. On the whole, the evidence presented in this Certificate proceeding further reinforces the Board's previous conclusions that construction and operation of the Facility serves the public interest.

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

4. Decision on the Application

The Siting Board has made the three findings that are required in order to issue the Certificate pursuant to § 69O½. Specifically, the Siting Board has found that: (1) granting a Certificate containing approval(s) for the Project is compatible with considerations of environmental protection, public health and public safety; (2) there is no evidence of non-compliance with any applicable state and local laws, ordinances, by-laws, rules or regulations; and (3) issuing such a Certificate would serve the public interest or convenience. The three findings made by the Siting Board support granting a Certificate for the Project so that it may go forward, and the Siting Board hereby [GRANTS] such a Certificate.

C. Scope of the Certificate

As noted in Section I.A.2., above, Exelon has requested that the Certificate include twelve separate permits identified by the Company as necessary for Project construction and operation. The Siting Board considers below which of these permits should be included in the Certificate and addresses the efforts that the Company has made to obtain said permits.

As a threshold matter, throughout this proceeding, Exelon has argued that the Board must issue a Certificate that "shall be in the form of a composite of all individual permits, approvals or authorizations that would be necessary for the construction and operation of the generating facility," quoting § 69K½, and therefore any Certificate granted must include the final Air Plan Approval as well as the eleven permits for which the Company has yet to apply (Exh. EFSB-EX-21). The Board notes that the Certificate Statute requires an applicant to include in its Application "a representation as to the good faith effort made by the applicant to obtain" the permits the applicant seeks to include in the Certificate. G.L. c. 164, § 69L½. See e.g., Cape

Wind at 7, n.8, 31-32; Footprint Power at 25-26. Furthermore, the Board's Certificate regulations provide that if the application relates to more than one permit, the Board may issue a Certificate with regard to all such permits or less than all. 980 C.M.R. § 6.05(3). See also Colonial Gas Company d/b/a Keyspan Energy Delivery New England ("Keyspan"), EFSB 06-01, at 45 (2007).[27] Accordingly, as part of its review of the relief requested in the Application, the Board reviews Exelon's efforts to secure the approvals necessary to construct and operate the Facility and determines whether it is appropriate to include each of the approvals requested in the Certificate. The Siting Board first addresses the permit issued but under appeal (the MassDEP final Air Plan Approval), and then the eleven state and local permits for which Exelon has yet to apply.

1. Permits Issued But Under Appeal

In accordance with mandates under the federal Clean Air Act and 310 C.M.R. § 7.02, the Company submitted a CPA Application to MassDEP for its review and approval (Exh. EX-1, at 10). MassDEP issued a proposed Air Plan Approval on October 12, 2016, held a public hearing in the Town of Medway on the proposed actions on November 15, 2016, and established a public comment period, which ended on November 23, 2016 (Exh. EX-2, at 4, 13). MassDEP issued a final Air Plan Approval on December 19, 2016, and responded to comments received in person and in writing (Exh. EX-2, at 4, 13-14).[28] The Air Plan Approval allows for the construction and operation of the proposed Project, and among other things "sets out conditions for emission control systems, emission limits, Continuous Emissions Monitoring Systems, Continuous Opacity Monitoring System, monitoring and testing, record keeping, reporting and other requirements" (Exh. EX-2, at 4). As discussed above, CLF filed an appeal of the MassDEP final Air Plan Approval on January 9, 2017 (Exh. EX-1, att. B).

---

[27] In the Keyspan Decision, the Board declined to grant two permits. The Board then directed the Company to file for and seek to obtain those two permits from the respective agencies. The Board stated that if the Company were unable to obtain either of those permits, either as a result of denial, rejection, applicable conditions or undue delay, it could request that the Board supplement its Certificate to include such permit or approval. See Keyspan at 45.

[28] MassDEP also issued a Draft Prevention of Significant Deterioration ("PSD") permit on October 12, 2016, and a Final PSD permit on December 19, 2016.

a. Positions of the Parties

Exelon states that it does not seek to overturn or modify MassDEP's decision, and indicates that that it would view as acceptable a Certificate incorporating the final Air Plan Approval issued by MassDEP on December 19, 2016 (Company Brief at 8-9). Exelon argues that including the Air Plan Approval issued by MassDEP is consistent with the language of the Certificate Statute, which prohibits the inclusion of permits that "if so granted or modified by the appropriate state or local agency, would be invalid because of a conflict with federal air standards and requirements" (id.). The Company states that since the Board would be incorporating the final Air Plan Approval exactly as issued by MassDEP no conflict with federal air standards or requirements would occur (id. at 7).

MassDEP asserts that the final Air Plan Approval is a permit that the Board may include in a Certificate, so as long as the Board incorporates the Air Plan Approval in its entirety, as issued by MassDEP (MassDEP Brief at 29-30, 36). MassDEP further states that including the final Air Plan Approval in the Certificate would preclude both administrative and judicial appeals of the Air Plan Approval, and eliminate potentially significant delay in the commencement of Facility construction, consistent with the intent of the Certificate Statute (MassDEP Brief at 24).

CLF opposes the inclusion of the Air Plan Approval in a Certificate without modification because in CLF's opinion the permit fails to ensure compliance with the GWSA (CLF Reply Brief at 21). CLF maintains that the cap on emissions included in the Air Plan Approval is unlikely to have any material effect on, or lead to any meaningful reduction of, direct GHG emissions from the Facility between 2018 and 2050 (CLF Reply Brief at 21-22). CLF argues, that in the absence of final sector-wide regulations yet to be issued by MassDEP, the Board cannot find that the Facility would meet GWSA requirement and reduce in-state CO_2 emission between 2018 and 2030 (CLF Reply Brief at 24).

b. Analysis and Findings

Exelon has completed the application and review process before MassDEP related to its Air Plan Approval and secured a final Air Plan Approval subject to the CLF Appeal. The Company has satisfied the statutory requirement that an applicant make good faith efforts to secure the requested permits with regard to this important state approval. In addition, MassDEP, the agency

with authority to issue Air Plan Approvals in Massachusetts, has determined that a final Air Plan Approval is a permit that may be included in a Certificate, and recommends that the Siting Board include the Air Plan Approval in its entirety in the Certificate. The Siting Board hereby includes the final Air Plan Approval as issued on December 19, 2016, in the Certificate issued in this proceeding.

2. State and Local Permits Without Exelon Applications

In addition to the MassDEP final Air Plan Approval, Exelon has requested that the Board issue eleven other state and local permits for which the Company has yet to file an application. Exelon has requested that the Board grant a permit normally issued by the Office of the State Fire Marshal for the construction and use of ULSD and aqueous ammonia storage tanks, as well as ten permits otherwise issued by the Town of Medway, ranging from building permits, to water and sewer permits (RR-EFSB-17). The Company's efforts to obtain these permits and the information available in support of these permits are addressed below.

a. Positions of the Parties

According to the Company, Exelon does not yet have the detailed design and engineering plans necessary to apply for all of the permits needed for the Project, and so has yet to seek these permits from the usual issuing authority (Exh. EFSB-EX-21;RR-EFSB-6). Moreover, Exelon stated that these permits will not be needed until after the start of construction and that they could be obtained quickly when needed (Tr. 1, at 64; RR-EFSB-4(1)(Confidential) at 10).

Exelon argues that the Siting Board should not interpret the good faith effort language in the statute as requiring an applicant to file permit applications where to do so would be unreasonable or futile (Company Brief at 46-52).[29] Rather, Exelon asserts that by addressing potential conditions from the Town and the State Fire Marshal in this proceeding and including those conditions in the Certificate, the Board gives the agencies full and fair opportunity to address

[29] For example, with regard to the combustible fuel tank permits, Exelon noted that the Company does not yet have: (1) a foundation/footing plan; (2) a dike plan; (3) mechanical drawings; (4) a fire safety analysis; (5) a land license to be issued by the Town; and (6) an identification and declaration of the approved standard for installation/testing (Exh. EFSB-EX-21). The Company stated that the necessary information identified is typically available after final design of the applicable tanks (id.).

the elements of the permits while allowing the Facility to proceed to construction and operation in a timely manner (RR-EFSB-6).

Exelon's project manager testified that the CLF Appeal, rather than the need for the other permits, drove the Company's request for a Certificate, but stated that those permits, if applied for individually, could be appealed and cause further delay (Tr. 1, at 66-68). She elaborated that the reason for delay in filing the applications for the permits requested was based on the lack of available information rather than the Company's request for a Certificate to the Board (Tr. 1, at 70).

Exelon asserts that, like Footprint, it is premature or futile for the Company to apply for these permits (Company Brief at 48). According to the Company, "Exelon faces the same predicament faced by Footprint Power – as a result of permit delays and the [CLF Appeal], Exelon does not yet have the detailed design and engineering plans that are necessary to apply for the local permits that it ultimately will need" (Company Brief at 51). Exelon argues that like Footprint, the Company has satisfied the good faith effort requirement contained in G.L. c. 164, § 69L½ with respect to these permits (Company Brief at 51-52). Exelon further argues that in assessing Exelon's good faith efforts the Board should focus on areas where required permits and permitting efforts are similar to those of past Certificate applicants, and notes that, like Footprint, Exelon (1) has requested a composite Certificate of all permits identified as necessary for construction and operation of the Project, and (2) does not yet have detailed engineering plans necessary to enable its application for all of the permits sought (Company Brief at 49-52).

CLF argues that because Exelon has not yet applied for the State Fire Marshal permit, the Company has failed to satisfy the statute's good faith effort requirement (CLF Reply Brief at 19-21). With respect to the Town of Medway permits, CLF states that the Board does not have the information necessary to assess for each permit the Facility's impact on health and safety, and argues a Certificate should not be granted (CLF Reply Brief at 17-19). CLF asserts that the sole reason that the Company cannot present the required permit application information is because it decided to stop all work on its Project for eight months (September 2016-April 2017) (CLF Reply Brief at 17). CLF distinguishes Exelon's local permitting efforts from Footprint's permitting efforts, arguing that Footprint had generally either submitted a full application that it was seeking to obtain or had fully adjudicated the approvals it sought to include in its Certificate (CLF Reply Brief at 18).

The State Fire Marshal recommended conditions that the Board should incorporate in any issuance of an approval in lieu of a State Fire Marshal permit for the Facility's ULSD and ammonia storage tanks (Exhs. EFSB-FM-7; EFSB-FM-2). While indicating respect for the Board's authority under the Certificate statute, the State Fire Marshal has indicated a strong belief that his Office is in the best position, and has the required experience and expertise, to undertake the regulatory construction oversight of the Facility's storage tanks in a consistent and uniform manner (Exh. EFSB-FM-2(a)).

The Town of Medway does not oppose Exelon's request that local approvals be included in the Certificate to the extent that conditions proposed by the Town are incorporated and that the Town's ability to enforce the provisions incorporated in any local approvals included in the Certificate is preserved (Town Brief at 1-2).[30] Exelon stated that the Company would work with the Town to review and provide guidance and concurrence or non-concurrence on drawing on work related to the permits (Tr. 1, at 106-112). The Town and the Company also discussed the manner in which to resolve disputes associated with permit review and approval if the Board were to include these permits and approvals as part of a Certificate, including Board review of any disputes associated with the conditions of the permits and approvals (Tr. 1, at 111-113; Tr. 2, at 218).

b. Analysis and Findings

In addition to the MassDEP final Air Plan Approval, Exelon has requested that the Board issue eleven permits at the state and local level for which the Company has yet to file an application. As part of its review for these permits, the Board reviews the efforts of an applicant to secure necessary approvals for construction and operation of a proposed facility including the Company efforts related to those permits and approvals not yet secured or those for which the

30 The Town identified conditions it deemed applicable to the ten local permits in the absence of specific design information in Exhibits EFSB-TM-2; EFSB-TM-6, EFSB-TM-13, EFSB-TM-17, EFSB-TM-21, EFSB-TM-33, EFSB-TM-34 and EFSB-TM-37. The Town further clarified and augmented these conditions in testimony by the Town Manager (Tr. 2, at 212-240) and record responses (RR-EFSB-8; RR-EFSB-9; RR-CLF-4). In general, the Town emphasized that the appropriate Town authority for the permit/approval sought by the Company needed to have sufficient time to review and to seek supplemental information as part of its review of the detailed design information and other materials normally required as part of the application process (Tr. 2, at 216-218, 234-238).

applicant has yet to file an application. The Certificate statute requires an applicant to include in its Application "a representation as to the good faith effort made by the applicant to obtain" the permits the applicant seeks to include in the Certificate. G.L. c. 164, § 69L½; see also Cape Wind at 7, n.8; 31-32; Footprint Power at 25-26.

The necessity for an applicant to make a representation as to its good faith efforts in its application was discussed in the legislative history of the statutes establishing the Board. See House No. 6190, Third Report of the Massachusetts Electric Power Plant Siting Commission, at 25 (March 30, 1974).

> "The 'good faith effort' requirement places the companies on notice as to what standard they must conduct themselves by, while at the same time eliminating frivolous claims. In addition by requiring that the electric companies disclose which permits and approvals they have already obtained, this siting bill manifests a clear intention that a certificate should not be granted to an applicant who has failed to make a substantial effort to obtain the required licenses, permits and other regulatory approvals."

In light of the language of § 69L½ that an applicant make a good faith effort to obtain the permits sought to be included in a Certificate, Siting Board precedent consistently requires that applicants seek necessary permits before applying for a Certificate except in limited circumstances. The Siting Board has found in prior cases that the "good faith effort" language in the Certificate Statute is satisfied when an applicant has not applied for a permit because applying for that particular permit would be futile or unreasonable under the circumstances. For example, the Siting Board issued a Certificate where an applicant was unable to obtain a permit because the permitting authority was legally barred from issuing a permit due to a regional authority's denial of the applicant's project or where due to agency regulations relating to the timing of the award of the approval, an applicant was effectively barred from filing an application while appeals were pending. See e.g., Cape Wind at 28-30; Footprint Power at 27. In contrast, where an applicant was granted a Certificate for a regional approval that otherwise would have barred certain local permits, the Board declined to include the requested permits in the Certificate, and directed the applicant to seek the remaining local permits needed for the construction of the jurisdictional facility. Keyspan at 45.

The Board's determinations related to the ability of an applicant to secure local permits in the context of a Certificate proceeding provide guidance in addressing the appropriate scope of a

Certificate. In Keyspan, Cape Wind and Footprint Power, each applicant faced an appeal which prohibited its ability to obtain necessary permits. See Keyspan at 41-45; Cape Wind at 25; Footprint Power at 14.

In Keyspan, the Board noted "if a Certificate is granted, the identified obstacle to pursuit and potential receipt of these two local approvals will be removed. There is no indication in the record, that with this obstacle removed, Keyspan would be unable to obtain required local approvals, or that any non-conformance with the laws or related regulatory provisions applicable for these approvals would exist." In the Final Decision granting a Certificate to Keyspan, the Board directed Keyspan to file for two remaining local approvals and report on its efforts to obtain those permits to the Board. Keyspan at 41-45.

In Cape Wind, the Board found that if a Certificate was granted, there was no indication that the Company would be unable to obtain the required local approvals. Cape Wind at 25. However, the Board then included in the Certificate an approval in lieu of the four remaining local permits based on the specific circumstances of that proceeding. Cape Wind at 25. Specifically, the Board found that in the relatively unusual situation where an applicant has made a good faith effort to obtain certain necessary project permits, but is precluded by operation of law from obtaining them, it may be appropriate to avoid further permitting delay by including the otherwise unobtainable local permits in a Certificate, as opposed to requiring the applicant to undertake an entire de novo permitting process. Cape Wind at 34. The Board noted that this was particularly true when the Siting Board had comprehensively reviewed and approved the project three times over a span of seven years and the record contained examples of the types of permits in question, issued by the same agencies for a very similar project. Cape Wind at 34. Those factors are not present in this record.

In Footprint Power, the Board granted a Certificate which included certain state and local permits, which either had been granted by or draft permits were issued by the appropriate authorities. In addition, the Board included a state permit in the Certificate for the construction of a proposed ammonia storage tank and a related storage and use permit, which the applicant had not yet applied for based on both timing constraints set forth in the State Fire Marshal's regulations and the lack of financing to finalize the design plans for the tank. Footprint Power at 24-25. In that Decision, the Board found that the developer could not apply for or reasonably obtain the permit, but that the developer had completed a necessary prerequisite for applying for the Fire

Marshal permits by applying for the necessary local permit for the storage tank. Footprint Power at 26.

We believe the facts of this case differ from Footprint Power as well as Cape Wind. First, other than the Air Plan Approval, Exelon failed to apply for any of the permits it seeks in this Certificate proceeding. In the case of the permits for which Exelon has failed to yet apply, the Company is not facing a bar which prevents it from pursuing those permits with the appropriate agencies at the appropriate time. Now that the Company has released its EPC contractor, it can develop the detailed design plans necessary to complete the submission of those permit applications. Indeed, according to the Company, Exelon does not need the eleven state and local permits requested to commence Project construction, and would have applied for these permits when they became necessary in the course of the construction schedule absent the Certificate proceeding (Tr. 1, at 64-66). Furthermore, with the Town's support of the Project, it appears unlikely that the permits would be denied. In this instance, there is no evidence that the application for the permit at the time that the Company has identified as more typical in the development process would indeed be futile. The Company has not demonstrated that its failure to apply for the eleven state and local permits is a justified departure from Siting Board precedent, which requires a substantive basis to support a grant of a necessary approval in addition to a process requirement that an applicant seek permits before requesting a Certificate for those permits from the Board.

Exelon has pointed to the Board's award of a State Fire Marshal permit as part of the Certificate granted in Footprint Power as precedent that the Board has awarded permits in the absence of an application to the relevant permitting authority. However, the Board's determination in that proceeding did not include a permit award simply based on an assessment of the nature of the Company's permitting efforts. In Footprint Power, with the exception of a single permit, the project developer had applied for each permit requested in the Certificate application and provided draft or final permits issued by the relevant permitting agencies. Footprint Power at 14. In addition, Footprint had applied for and obtained the necessary permits that would be a prerequisite for applying for the remaining permit. Footprint Power at 25-26. Therefore, the Board could rely upon the factual information which would support the application for the remaining approval and which had been reviewed and approved by another agency with similar subject matter expertise and enforcement authority. Id. In contrast, in this proceeding, Exelon admits that the Company

does not have the detailed design and engineering plans necessary to apply for the local permits necessary to complete construction and operation of the Facility.

The Supreme Judicial Court has stated that the Board's certificate authority is an "express legislative directive to stand in the shoes of any and all State and local agencies with permitting authority" over a proposed facility and assume the powers and obligations of such an agency with respect to the grant of such authorization.[31] See Alliance to Protect Nantucket Sound v. EFSB, 457 Mass. 663, 677-678 (2010). In order for the Siting Board to carry out this duty, it needs sufficient information to ensure that the permits granted here are consistent with their purposes, i.e., public health and safety. It is not possible for the Board to grant an authorization unsupported by evidence of the nature that the issuing agency would require in granting such approval. While we note the Town and Exelon have been in discussions regarding these permits, the information provided on this record regarding the potential conditions to impose as part of an approval, while helpful, is not sufficient. In the absence of necessary information for the award of the eleven permits and approvals sought by the Company, the Board cannot find that the award of these permits and approvals through the Certificate process satisfies the public health and safety goals protected by the permit approval processes of the State Fire Marshal and the Town.

Although the Company has released the EPC contractor allowing it to proceed with the design tasks necessary for the permit applications at a later stage of construction, until then, necessary information is not available. Based on the record in this proceeding, the Board cannot effectively step into the shoes of the State Fire Marshal or the Town of Medway and issue an approval in lieu of the necessary permits normally issued by those offices, in the absence of nearly all information normally included in an application. Therefore the Siting Board declines to include the eleven state and local permits in the Certificate in this proceeding.

With the grant of a Certificate related to the only pending appeal that Exelon currently faces, the Company should be able to proceed with the pursuit of the remaining approvals necessary.[32] If Exelon is unable to obtain permits as a result of a denial, rejection, applicable

---

31 Exelon also notes this directive in the Company's Reply Brief at 11.

32 The Board greatly appreciates the efforts of parties in this proceeding to prepare recommended conditions in the event that the Board were to issue a Certificate inclusive of the numerous state and local approvals requested by the Company. The Board hopes that these efforts will be helpful in the Company's future permitting activities.

conditions, undue delay or appeal, the Company may request that the Siting Board supplement its Certificate of Environmental Impact and Public Interest to include such permit(s) or approval(s) within the Certificate. Upon such a filing, the Board may elect whether to conduct additional inquiry into the relevant circumstances and may decide at that time to supplement the Certificate granted herein. G.L. c. 164, § 69L½; 980 C.M.R. § 6.05; see Keyspan at 45.

IV. CONCLUSION

The Siting Board [grants] the Initial Petition and [grants in part and denies in part]the Application of Exelon West Medway, LLC and Exelon West Medway II, LLC, for a Certificate of Environmental Impact and Public Interest, pursuant to G.L. c. 164, § 69K½. The Certificate granted is an approval that is the equivalent of a MassDEP Air Plan Approval. This Decision, the appended Certificate of Environmental Impact and Public Interest, and the approval in lieu of a MassDEP Air Plan Approval contained in the Certificate, are each conditioned on compliance by the Company with Conditions C.1 through C.9 set forth in the Certificate.

Joan Foster Evans
Donna C. Sharkey
Presiding Officers

Dated [August 4, 2017]

COMMONWEALTH OF MASSACHUSETTS
ENERGY FACILITIES SITING BOARD

In the Matter of the Initial Petition and Application of Exelon West Medway, LLC and Exelon West Medway II, LLC for a Certificate of Environmental Impact and Public Interest	)	EFSB 17-01

EXHIBIT A TO FINAL DECISION IN EFSB 17-01

CERTIFICATE OF ENVIRONMENTAL IMPACT AND PUBLIC INTEREST

Pursuant to its authority under G.L. c.164, §§ 69K½ -69O½, the Energy Facilities Siting Board hereby: (1) grants the Initial Petition and the Application of Exelon West Medway, LLC and Exelon West Medway II, LLC ("Exelon" or "Company"); and (2) issues this Certificate of Environmental Impact and Public Interest ("Certificate") to Exelon. This Certificate constitutes Exhibit A to, and is part of, the Final Decision in EFSB 17-01.

I. NATURE AND SCOPE OF CERTIFICATE

The Certificate authorizes the applicant to construct a 200 megawatt, dual fuel, simple-cycle, quick-start generating facility on the site of an existing Exelon generating facility on Summer Street in Medway, Massachusetts, as approved and conditioned by the Siting Board in Exelon West Medway, LLC and Exelon West Medway II, LLC, EFSB 15-01/D.P.U. 15-25 (November 18, 2016) ("Exelon West Medway").

A. This Certificate is issued by the Energy Facilities Siting Board pursuant to G.L. c. 164, § 69O½, in place of the issuance by the Massachusetts Department of Environmental Protection ("MassDEP") final Major Comprehensive Plan Approval ("Air Plan Approval") pursuant to G.L. c. 111 §§ 142A – 142M, and 310 C.M.R. § 7.00.

B. This approval comprises the final Air Plan Approval issued by MassDEP on December 19, 2016. The Air Plan Approval is marked as Exhibit EX-1, app. A in the EFSB 17-01 Certificate proceeding and is incorporated by reference in its entirety into this Certificate.

II. CONDITIONS

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

C.1 Conditions A-DD, but not including conditions F, I and K, of the Exelon West Medway Decision are incorporated by reference into and are conditions to this Certificate, as modified by the Project Change Decision.

C.2 Conditions EE-JJ and modified condition M of the Project Change Decision are incorporated by reference into and are conditions to this Certificate.

C.3 The applicant shall comply with all applicable federal, Massachusetts, and Town of Medway statutes, regulations, guidelines, ordinances and permitting conditions in the construction and operation of the proposed Project.

C.4 The Exelon West Medway Decision provides that construction of the proposed Project must begin within three years of the issuance date of that Decision, i.e., around and about November 18, 2019. This Certificate does not change that date. The approval granted in this Certificate also shall expire on or about November 18, 2019, if construction of the Project has not yet begun by that date. Extensions may be granted by written request to the Siting Board filed prior to the expiration date.

C.5 The applicant has an absolute obligation to construct the Project in conformance with all aspects of the Project as presented to and approved by the Siting Board in Exelon West Medway and the Project Change Decision. The applicant is required to notify the Siting Board of any changes other than minor variations to the Project so that the Siting Board may determine whether to inquire further into a particular issue. The applicant is obligated to provide the Siting Board with sufficient information on changes to the Project to enable the Siting Board to make these determinations.

C.6 The applicant shall provide a copy of this Certificate, including all Attachments, to its general contractor prior to the commencement of construction.

C.7 In accordance with G.L. c. 164, § 69K½, MassDEP shall not require any approval, consent, permit, certificate or condition for the construction, operation, or maintenance of the project. MassDEP shall not impose or enforce any law, ordinance, by-law, rule or regulation nor take any action nor fail to take any action which would delay or prevent construction, operation, or maintenance of the Project.

C.8 In accordance with G.L. c. 164,§ 69K½, that portion of the Certificate which relates to subject matters within the jurisdiction of MassDEP shall be enforced by MassDEP as if it had been directly granted by MassDEP.

C.9 This Certificate shall be appealable only by timely appeal of the EFSB 17-01 Exelon Certificate Decision to the Massachusetts Supreme Judicial Court, in accordance with G.L. c. 25, § 5 and G. L. c. 164, § 69P.

_____

Ned Bartlett, Chairman
Energy Facilities Siting Board

[Approved] By the Energy Facilities Siting Board at its meeting on [August 4, 2017], by the members present and voting. Voting for the Tentative Decision as amended:

[List members voting to Approve the Tentative Decision as amended]

[If applicable] Voting Against the Tentative Decision as amended: [list any members].

[If applicable] Abstaining [List any member who has abstained from voting.]

Ned Bartlett, Chairman
Energy Facilities Siting Board

Dated [August 4, 2017]

Appeal as to matters of law from any final decision, order or ruling of the Siting Board may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Siting Board be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Siting Board within twenty days after the date of service of the decision, order or ruling of the Siting Board, or within such further time as the Siting Board may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the clerk of said court. Massachusetts General Laws, Chapter 164, Sec. 69P; Chapter 25, Sec. 5.