

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC-12477

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NEW ENGLAND POWER GENERATORS ASSOCIATION and GENON  
ENERGY, INC.,  
Plaintiffs-Appellants,

and FOOTPRINT POWER SALEM HARBOR DEVELOPMENT LP and  
MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,  
Intervenors-Appellants,

v.

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION  
and EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL  
AFFAIRS,  
Defendants-Appellees

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On Complaint for Review of Final Regulations of the  
Massachusetts Department of Environmental Protection  
and the Executive Office of Energy and Environmental  
Affairs

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Reply Brief of Intervenor-Appellant Footprint Power  
Salem Harbor Development LP

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## INTRODUCTION

Both by the nature of their arguments and the sheer size of their briefs, the Agencies and Amicus Curiae Conservation Law Foundation ("CLF") attempt to convince the Court that the issues in this appeal are so complex and the environmental stakes so high that the Court should simply defer to the Agencies' expertise and uphold 310 C.M.R. § 7.74 ("Cap Regulation"). Footprint takes no issue with the importance of the matter,<sup>1</sup> the complexity of the issues or the expertise of the Agencies. Rather, Footprint asks only one inconvenient question: Does the Cap Regulation really work? Will the Cap Regulation reduce "statewide greenhouse gas emissions" as required by the GWSA, or will the Cap Regulation, due to ISO-NE's electric generating facility dispatch regime, increase these emissions in contravention of the GWSA?

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<sup>1</sup> The Commonwealth of Massachusetts has already expressly determined that Footprint's facility is consistent with the GWSA. Footprint Br. 1-2. Indeed, Footprint conceived, developed and permitted its facility with the GWSA in mind, as the overriding purpose for the Footprint Facility was to replace a highly polluting coal-fired plant with a state-of-the-art, efficient, less greenhouse gas emitting facility. Footprint Br. 2.

In its opening brief, Footprint demonstrated that the Cap Regulation will inevitably cause an increase in statewide greenhouse gas emissions associated with electric generating facilities outside of Massachusetts serving Massachusetts demand. Because ISO-NE dispatches its units based on their cost and efficiency, every time the Cap Regulation limits the operation of a Massachusetts fossil-fuel unit, ISO-NE will dispatch a less efficient, and higher polluting fossil-fuel units elsewhere in New England. There is absolutely no evidence in the Administrative Record to the contrary.

Neither the Agencies nor CLF provide a direct answer to Footprint's question anywhere in their combined ninety-eight (98) pages of briefing. Instead, they launch a barrage of arguments that serve to obfuscate, rather than elucidate, this critical issue. However, such obfuscation cannot blur the clear fact that the Cap Regulation, by causing an increase in the very emissions that are required to be reduced by the GWSA, is contrary to the plain language of the GWSA.

## ARGUMENT

### **I. The Cap Regulation Does Not Work in Concert with the CES Regulation**

The Agencies state that the Cap Regulation is consistent with the GWSA because the Cap Regulation and 310 C.M.R. §7.75 the ("CES Regulation"), working "together," or "hand in glove," or in "tandem" will reduce carbon emissions in accordance with the GWSA. See, e.g., Agencies Br. 3, 5, 20. However, the Agencies fail to cite even one case supporting their assertion that a regulation can be upheld based solely on how it interfaces with a separate, valid regulation and not on its own merits. Regardless, even if applicable law allowed such regulatory bootstrapping, there is nothing in the record that provides a basis for the Court to do so here.

For two of anything to work "together," or "hand-in-glove" or "in tandem," each must make an individual contribution toward achievement of that objective (e.g., by "combined action").<sup>2</sup> For example, two

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<sup>2</sup> WEBSTER'S THIRD NEW INT'L DICTIONARY (2002) ("WEBSTER'S") defines "work/working" as "to do" or "to fashion or create by expending labor or exertion," "hand-in-glove" as "in extremely close relationship," "tandem" as "in partnership" or "acting in

individuals, Person A and Person B, agree to work together to dig a ten-foot trench. Person A (CES Regulation) takes a shovel and vigorously digs the trench. Person B (Cap Regulation) sits under a nearby tree and sleeps. Whenever Person A takes a break from the labor, Person B awakes and throws dirt into the excavated hole. There is no reasonable interpretation of the above terms leading to the conclusion that Person A and Person B are "working together" or working "hand in glove" or in "tandem" to dig the trench.

Here, the CES Regulation *and* the Cap Regulation do not "work together" to reduce statewide greenhouse gas emissions. Rather, as the Agencies' Emissions Study demonstrates, statewide greenhouse gas emissions are reduced solely due to the efforts of the CES Regulation.<sup>3</sup> For example, the Emissions Study modeled eight scenarios. In seven out of the eight scenarios, the model shows that the CES Regulation produces a

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conjunction, "together" as "in or by combined action or effort."

<sup>3</sup> As discussed *infra*, the other studies in the Administrative Record demonstrate that the Cap Regulation, acting alone, increases statewide greenhouse gas emissions.

sufficient amount of renewable resources such that the Cap Regulation does not come into play. RA 3175-3176,<sup>4</sup> Agencies Br. 53 ("[t]he modeling thus projects that the Cap Regulation's declining limits will not themselves constrain (or "bind") power-plant operations to reduce emissions").

This is not surprising -- due to ISO-NE's least cost dispatch methodology, renewable resources will be dispatched before any fossil-fuel resources, thereby producing a decrease in statewide greenhouse gas emissions. If the CES Regulation does produce more renewable resources, those resources will be dispatched by ISO-NE before all fossil-fuel resources, producing a net decrease in greenhouse gas emissions both in the Commonwealth and the region. Like Person A in the analogy, the CES Regulation does help accomplish the goals of the GWSA.

But what of Person B -- the Cap Regulation? Notwithstanding the Agencies' assertions, the

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<sup>4</sup> The Cap Regulation was triggered in only one year of one of the eight scenarios modeled by the Emissions Study -- 2018. RA 3226-3228. As Footprint demonstrates *infra*, this modeling scenario does not demonstrate that the two regulations work together to reduce greenhouse gas emissions. That is, the Cap Regulation alone does not reduce emissions.



Emissions Study expressly demonstrates that the Cap Regulation had no effect on emissions reductions -- the CES Regulation accomplishes the goals of the GWSA without any assistance from the Cap Regulation. There was no *combined* action -- Person B (Cap Regulation) remained asleep under the tree.

## **II. The Cap Regulation Does Not Serve as an Enforceable Back Stop**

Notwithstanding the fact that the Agencies' modeling conclusively demonstrates that it is the CES Regulation, and not the Cap Regulation, that reduces statewide greenhouse gas emissions, the Agencies claim that the Cap Regulation ensures that statewide greenhouse gas emissions will be reduced by serving as an anti-backsliding enforceable backstop. *See, e.g., Agencies Br. 26, 29, 36, 54.*

To truly test that assertion, the impacts of the Cap Regulation need to be analyzed in isolation (*i.e.,* under a scenario where the CES Regulation does not produce the renewable resources that the Agencies assume will come online). However, the Agencies never studied whether the Cap Regulation ensures that statewide greenhouse gas emissions decrease instead of increase in the absence of the CES Regulation (when

Person B is forced to start digging the trench). The Agencies and CLF contend that there is no need for such an analysis because that is not the world in which the Cap Regulation would actually operate. Agencies Br. 54-55, CLF Br. 7, 8, 14. However, such contention is without merit, as the Agencies and CLF offer no proof that their hope-for world will inevitably come into existence.

In today's world, renewable energy only provides approximately 10% of New England's annual fuel mix. RA 2867.<sup>5</sup> Moreover, according to the President of ISO-NE, the region is "decades away from installing enough renewable resources" and that "for the foreseeable future, the region will require resources such as natural-gas fired units that can do what wind and solar resources cannot: make large contributions to meeting regional electricity demand; run in any type of weather and at any time of the day; quickly change

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<sup>5</sup> ISO-NE 2017 Regional Electricity Outlook, available at: [https://www.iso-ne.com/static-assets/documents/2017/02/2017\\_reo.pdf](https://www.iso-ne.com/static-assets/documents/2017/02/2017_reo.pdf) (last accessed April 25, 2018)

output levels; and provide essential grid-stability services." RA 2867-2868.<sup>6</sup>

In today's world, the mere promulgation of the CES Regulation does not guarantee that any renewable resource will receive the necessary permits or secure the needed financing. The demise of the Northern Pass project (a key component of the CES Regulation's renewable energy procurement -- RA 2155)) is the most recent example.<sup>7</sup> Accordingly, Footprint is not "arbitrarily omitting" the CES Regulation "from consideration" (Agencies Br. 55), rather Footprint is merely stating that a realistic assessment of the efficacy of the Cap Regulation must include consideration of how the regulations affect greenhouse gas emissions if the CES Regulation does not produce the hoped for levels of new renewable resources. That

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<sup>6</sup> ISO-NE 2017 Regional Electricity Outlook, available at: [https://www.iso-ne.com/static-assets/documents/2017/02/2017\\_reo.pdf](https://www.iso-ne.com/static-assets/documents/2017/02/2017_reo.pdf) (last accessed April 25, 2018)

<sup>7</sup> On February 1, 2018, the New Hampshire Site Evaluation Committee voted to unanimously deny the Northern Pass Project a Certificate of Site and Facility. Available at: <https://macleanenergy.com/83d/> (last accessed April 17, 2018).

is, what happens when Person A takes a break and leaves the task of digging the trench to Person B.

As described in detail in Footprint's opening brief, there are four studies in the Administrative Record that do just that ("Four Studies"), and they all conclusively demonstrate that the Cap Regulation, instead of decreasing statewide greenhouse gas emissions, causes these emissions to increase. Footprint Br. 11-16. Accordingly, the Cap Regulation does not "ensure"<sup>8</sup> that the required emissions reductions will occur, and it therefore cannot be reasonably construed as an anti-backsliding or anti-degradation measure.<sup>9</sup>

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<sup>8</sup> WEBSTER'S defines "ensure" as the "making of an outcome sure, certain or inevitable."

<sup>9</sup> The Agencies favorably compare the Cap Regulation to the anti-backsliding/degradation regulatory measures discussed in *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253, 256 (D.D.C. 1972) and *Sierra Club v. EPA*, 325 F.3d 374, 379 (D.C. Cir. 2003). However, unlike the regulations at issue in these cases, the Cap Regulation, when triggered, does not preserve the status quo. Instead, the Cap Regulation causes an increase in the very emissions that must be reduced under the GWSA. Since the Cap Regulation results in further degradation and emissions back sliding, it cannot be viewed as similar to the regulations at issue in the *Sierra* cases.

### **III. The Court Cannot Disregard the Four Studies Contained in the Administrative Record**

The Agencies assert that the Court should not entertain Footprint's challenges to the Cap Regulation that are based on the results of the Four Studies because the Agencies have made a policy decision to reduce statewide greenhouse gas emissions by placing declining limits on Massachusetts fossil fuel plants. Agencies Br. 32-33, 53-55. Citing *Borden, Inc. v. Comm'r of Pub. Health*, 338 Mass. 707, 722-23 (1983) and *Mass. Fed'n of Teachers AFT, AFL-CIO v. Bd of Educ.*, 436 Mass. 763, 771 (2002), the Agencies assert that such a policy decision cannot be overcome by an argument that the regulation is not supported by substantial evidence. Agencies Br. 64-65.

Footprint does not take issue with the Agencies' policy decision, and in fact supports it. Rather, the gravamen of Footprint's appeal is that the Cap Regulation will contravene, rather than accomplish, the Agencies' purported policy goal. That is, the Cap Regulation will never reduce statewide greenhouse gas emissions, but will increase such emissions whenever it is applied. The logic of the ISO-NE Dispatch allows no other conclusion.

The Agencies are incorrectly applying the law of these cases. In contrast to those cases, Footprint is not asking the Court to substitute its judgment for that of the Agencies regarding a fairly debatable regulation. Footprint is not asking the Court to sift through conflicting evidence supporting or opposing a regulation. *Borden*, 338 Mass. at 724. Rather, Footprint asserts that there is no debate or conflict -- the record is devoid of any material showing that the Cap Regulation acting alone will decrease statewide greenhouse gas emissions; instead, the record conclusively demonstrates the opposite -- the Cap Regulation will always increase statewide greenhouse gas emissions whenever it is applied. There is nothing in the Administrative Record to the contrary.

As a result, notwithstanding the Agencies' protestations, the Court cannot ignore the modeling contained in the Four Studies, since these models prove that the Cap Regulation, by increasing statewide greenhouse gas emissions, is at cross-purposes with the GWSA.

**IV. The Administrative Record Conclusively Demonstrates that the Cap Regulation will increase Statewide Greenhouse Gas Emissions**

**A. The Agencies' Criticisms of the Four Studies are Unsupported**

The Agencies claim that even if the Court were to review the Four Studies, the modeling contained therein supports their contention that the Cap Regulation and the CES Regulation, working together, cause a reduction in statewide greenhouse gas emissions. As described below, these claims are not supported by the studies.

Because all the studies in the Administrative Record, including the Emissions Study, seek to simulate the ISO-NE dispatch, they all inevitably show the same general result (regardless of differing numerical results caused by different assumptions): renewable resources decrease statewide greenhouse gas emissions and limits on Massachusetts efficient fossil units will increase them. There is no evidence in the Administrative Record to the contrary.

None of the critiques advanced by the Agencies contradict the stark conclusion reached by ISO-NE in its study concerning the adverse impact of the Cap

Regulation.<sup>10</sup> The Agencies' critiques boil down to a methodological quibble,<sup>11</sup> a mischaracterization of the results and, most importantly, a failure to acknowledge a key conclusion of the NE-ISO Study.

The Agencies mischaracterize the results by citing to a figure in the ISO-NE Study (RA 2396) that

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<sup>10</sup> ISO-NE concluded that the Cap Regulation causes "relatively efficient clean burning facilities in Massachusetts" to operate less and "relatively inefficient and less clean resources in other states" to run more. As a result, "emissions totals attributable to Massachusetts under the [Cap Regulation] actually increase under the proposed policy" RA 2371-2372.

<sup>11</sup> The Agencies criticize the ISO-NE Study's use of cost of allowances, rather than the Mwh limits, and the amount selected for such cost - - \$2/ton. Neither criticism is correct from a methodological perspective, and neither point has any effect on ISO-NE's overall conclusion. Use of allowances, rather than Mwh limits, is the more accurate approach because the ultimate operating limits imposed on each generating unit by the Cap Regulation will be a function of how many allowances each unit purchases at the auction. The Mwh limits in the Cap Regulation are only the starting point. A particular unit may end up having the right to operate either above or below the Mwh limit depending upon whether it is a net seller or buyer of allowances.

As for the \$2/ton estimate, there is no wrong or right answer because no one, including the Agencies, knows what the cost of an allowance will be until the auction occurs. If the allowance cost is higher than \$2/ton, the increase in statewide greenhouse gas emissions will likely be higher; if less, it may be lower. The key point, which the Agencies ignore, is that whatever cost of allowances is assumed, the result will be higher GHG emissions.



purportedly supports three conclusions: (1) the Cap Regulation will not constrain the operation of Massachusetts units, (2) the Cap Regulation will not increase regional emissions, and (3) the Cap Regulation will increase the Commonwealth's share of clean energy resources. Agencies' Br. 67-69. Even a cursory review of the figure in question flatly contradicts each of these three contentions.

The figure displays a summary of the ISO-NE Study results for the twelve scenarios modeled, six without the \$2/allowance (Cap Regulation) and six with them. As to the Agencies' first point, Column C shows that in every scenario, Massachusetts generation is less in the scenario with the Cap Regulations (\$2/ton) than without. The differences range from 1,388 Gigawatt Hours, a thousand megawatt hours, ("Gwh"), to 2453 Gwh.

Similarly, Columns N and P contradict the Agencies' assertion that the Cap Regulation does not increase Massachusetts and regional GHG emissions. The figures in those columns demonstrate that in each of the six scenarios with the \$2/ton allowances (Cap Regulation), Massachusetts (Column N) and Regional (Column P) carbon emissions increase.

The basis for the Agencies third argument that the Cap Regulation will somehow produce more renewables and reduce GHG emissions is unclear. Agencies Br. 69. In every scenario with the \$2/ton allowance (Cap Regulation), including those assuming more renewable resources, Massachusetts production is decreased, imports go up and total Massachusetts carbon emissions increase. Although the figure is silent on this point, it is logical to assume that in the high renewable scenarios, a greater percentage of the imports to Massachusetts represent renewables than in other scenarios (because renewables are always dispatched first before any fossil units). However, even in the most robust renewable scenario, the replacement imports have higher carbon emissions see Column N).

Finally, the Agencies argue that the quantitative conclusion of the ISO-NE Study that Massachusetts carbon emissions will increase in the year 2025 due to the Cap Regulation "cannot prevent the Agencies from acting to secure emissions reductions across more than thirty years..." Agencies Br. 69.<sup>12</sup> This claim

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<sup>12</sup> In essence, the Agencies contend that the Court should ignore the increased carbon emissions

ignores the following critical finding of the ISO-NE Study: "While the ISO is only presenting results from a small possible shift in emissions in 2025, we did evaluate the effect of greater shifts under the cap that might be applicable if loads are higher than modeled, or that might occur in later years as the caps become increasingly tight. In each case, as the caps get more restrictive, costs and emissions increase." RA 2372. In other words, the ISO-NE Study states that the increased carbon emissions and costs resulting from the Cap Regulation in 2025 only get worse over time.

The Agencies' critiques of the other three studies in the Administrative Record are equally unavailing. Agencies Brief at 70-72.<sup>13</sup>

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calculated by the ISO-NE Study because those results represent merely a one year setback that must be weighed against the purported thirty years of presumed reduced emissions from the Cap Regulation.

<sup>13</sup> The Agencies tout the fact that the Tabors Model assumes that new renewables resources will eventually come on line in an amount sufficient to avoid the need to apply the Cap Regulation. Agencies Br. 70. If that is the case, Footprint agrees that the Cap Regulation will have no effect in those years. However, the Agencies are forced to concede that when the Cap Regulation does apply in the early years of the Tabors Model, overall GHG emissions increase- a result wholly consistent with Footprint's argument. Agencies Br. 70. The critiques of both the Dynegy and NRG Models are

**B. The One Scenario in the Emissions Study that Triggers the Cap Regulation Does Not Demonstrate that the Cap Regulation Causes a Net Decrease in Statewide Greenhouse Gas Emissions**

The only affirmative evidence claimed by the Agencies to support the efficacy of the Cap Regulation is the result in one year in one of the eight scenarios modeled in the Emissions Study. According to the Agencies, the results of this scenario demonstrate that the Cap Regulation caused a 4% reduction<sup>14</sup> in Massachusetts reductions, which more than offset increased out of state reductions. Agencies' Br. 56. If true, this one year result would fly in the face of the ISO-NE Dispatch logic and contradict every other study in the Administrative Record. Whether so slender a reed would support the entire edifice of the Cap Regulation is an interesting issue that the Court need not address because the Agencies' assertion is incorrect. This modeling scenario in the Emissions

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merely conclusory and offer no record evidence or reasoned argument to contradict these studies' conclusion that the Cap Regulation increases statewide greenhouse gas emissions. Agencies Br. 70-71.

<sup>14</sup> In support of this assumed 4% reduction, the Agencies cite to Figures 11 and 12 in the Emissions Study. RA 3228. Although not dispositive of the Agencies' argument, it is difficult to derive any such number from either figure cited.

Study assumes that both the Cap Regulation and the CES Regulation are in effect. Unlike the Four Studies, this scenario does not isolate the effects of the Cap Regulation.

Only in one year, 2018, does the Cap Regulation apply to limit Massachusetts generation. The authors of the Emissions Study concede in that year, and no other, there is an offsetting increase in emissions from units out of state. RA 3227. What the Emissions Study does not say [contrary to the Agencies' assertion] is that decreases in emissions in 2018 resulting from the Cap Regulation alone outweigh the offsetting increases in emissions from out of state plants.

Rather the study states that: "When this effect (the limits in the Cap Regulation) is combined with the impact of increased renewable generation driven by the [CES Regulation], we observe lower CO2 emissions in Massachusetts in 2018-2022..." RA 3227. In other words, in every year of the five-year scenario, the CES Regulation reduces emissions as expected. In the one year in which the Cap Regulation limits apply, there is an offsetting increase in emissions from out of state units-again, the expected result.

To assess the efficacy of the Cap Regulation, the relevant question is how do the offsetting increases in emissions from out of state plants in 2018 compare to the reduction in emissions due solely to the Cap Regulations.<sup>15</sup>

The simple answer is that the Agencies chose not to address that question.<sup>16</sup> Had the Agencies truly wanted an answer, they could easily have directed that a scenario be run which assumed only the Cap Regulation in effect and not the CES Regulation. The failure to do so speaks volumes and is further confirmation that Footprint's position is correct that the Administrative Record is uncontroverted that the

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<sup>15</sup> Unless the Cap Regulation is producing a net reduction in statewide greenhouse gas emissions, it is not working in concert with the CES Regulation.

<sup>16</sup> Consider this simple numerical example: the CES Regulation causes a fifteen (15) ton decrease in emissions. The Cap Regulation results in a five (5) ton decrease in emissions in Massachusetts, but a ten (10) ton increase outside of Massachusetts. Thus, the net result of both the CAP Regulation and the CES Regulation is a ten(10)ton decrease in emissions (15+5-10), but the decrease in emissions would have been greater without the CAP Regulation. Rather than working "hand-in glove" with the CES Regulation, the Cap Regulation results in higher statewide greenhouse gas emissions than if only the CES Regulation were in place.

Cap Regulation, when applied, will inevitably increase statewide greenhouse gas emissions.

**CONCLUSION**

For all the foregoing reasons, the Court should void 310 C.M.R. § 7.74.

Dated: April 27, 2018

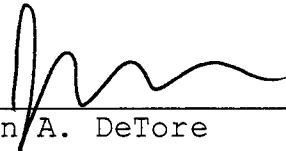


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**MASS. R. A. P. 16(K) CERTIFICATION**

I, John A. DeTore, certify that the foregoing Reply Brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6); Mass. R. A. P. 16(e); Mass. R. A. P. 16(f); Mass. R. A. P. 16(h); Mass. R. A. P. 18; and Mass. R. A. P. 20.

  
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John A. DeTore



**Certificate of Service**

I certify that on April 27, 2018, I served two copies of the foregoing Reply Brief via First Class Mail (and one copy electronically) upon all counsel of record in this matter.

A handwritten signature in black ink, appearing to read "John A. DeTore", is written over a horizontal line.

John A. DeTore