

**THE STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF ENVIRONMENTAL SERVICES**  
**AIR RESOURCES DIVISION**

**In Re Permit No. TP-0256**

**SAINT-GOBAIN'S PETITION FOR A VARIANCE**  
**PURSUANT TO RSA 125-C:16 & ENV-A 202**

**\*\*\*EXPEDITED REVIEW REQUESTED\*\*\***

Saint-Gobain Performance Plastics Corporation (“Saint-Gobain”),<sup>1</sup> through its counsel, McLane Middleton, Professional Association, requests a variance of the February 11, 2021 deadline (“Deadline”), set pursuant to RSA 125-C:10-e and the terms of Permit No. TP-0256 (the “Permit”) issued by the Department of Environmental Services Air Resources Division (“DES”) to Saint-Gobain, to complete construction and installation of the Regenerative Thermal Oxidizer (“RTO”), identified in Table 3 and Table 5, Item 5 of the Permit, at its facility located at 701 Daniel Webster Highway in Merrimack, New Hampshire (the “Facility”). Saint-Gobain requests that the variance be granted for one year from the Deadline, such that it is extended until February 11, 2022, or in the alternative for one year from the date of the final, non-appealable order disposing of the Town of Merrimack’s appeal of the Permit, whichever is earlier. The variance is necessary due to two events that have put Saint-Gobain in an extremely difficult position relative to its ability to complete the RTO project by the Deadline: First, the Town’s appeal of the Permit, which now casts real uncertainty on the RTO project; and, second, the COVID-19 pandemic, which has led to material delays in the supply chain and Saint-Gobain’s

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<sup>1</sup> Saint-Gobain’s address is 701 Daniel Webster Highway, Merrimack, NH 03054. Its daytime telephone number is (603) 424-9000. Undersigned counsel is available to answer questions about this petition on behalf of Saint-Gobain. Env-A 202.04(a).

vendors' and subcontractors' ability to meet their project schedules, which independently make Saint-Gobain's ability to meet the Deadline unworkable. Either circumstance, on its own, provides an independently sufficient basis for the granting of a variance of the Deadline. That these events have arisen at the same time compounds the unavoidable practical impediments Saint-Gobain faces and demonstrates the compelling need for a variance to provide a necessary extension of the Deadline. In further support of this Petition, Saint-Gobain states as follows:

**I. Introduction**

1. The Permit, which was issued on February 11, 2020 as the culmination of a process spanning approximately one-and-a-half years, requires Saint-Gobain to construct and install an RTO by February 11, 2021. This 12-month deadline is set by RSA 125-C:10-e, II. The Permit selected the RTO to control the air emissions of certain perfluorinated compounds ("PFCs") and precursors.

2. Under ideal circumstances, a 12-month deadline is a tight one for completing a project of this magnitude. As DES is aware, this RTO will technologically be the first of its kind designed specifically to treat an air stream with such low PFC concentrations associated with fabric coating operations; the unit has been custom designed for this application and will have three chambers with an active combustion chamber designed to maintain a minimum temperature of 1832 degrees Fahrenheit and a minimum gas residence time of 1 second. Per the Permit, this is intended to control emissions of two PFCs<sup>2</sup> which, combined, the Facility, pre-control, emits at a rate of less than 13 ounces (or 0.80 pounds) per year.<sup>3</sup> The addition of this emission control

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<sup>2</sup> Although the Permit requires control of emissions of PFOA and PFOS, as a matter of fact, the RTO controls emissions of all PFCs

<sup>3</sup> The pre-control rate of emission for PFOS is already lower than the annual emissions limit set in the Permit.

device is a significant and complicated project. Aside from the design and construction of the novel RTO itself based on specific and detailed engineering specifications, additional significant efforts are involved relative to the Facility, including but not limited to modifications to existing and new internal duct-work networks, electrical and other mechanical systems, construction of new foundations, and structural elements each requiring a considerable amount of coordination with different contractors and related bidding, procurement and scheduling. To be able to complete the RTO project by the Deadline, Saint-Gobain's initial project schedule necessarily requires the completion of the design and engineering of the RTO (so the design is final), the preparation of the bid package, completion of the bidding process, vendor selection, gaining final internal appropriation approval and issuance of a purchase order to the selected vendor by the end of May/early June 2020.

3. In light of the foregoing and the Deadline, after issuance of the Permit, Saint-Gobain promptly started the process of designing and engineering the RTO and the required Facility modifications, Saint-Gobain has already completed significant work on the project, and DES has been kept up-to-date via the monthly status reports required by the Permit.

4. However, two developments, neither the fault of Saint-Gobain, have made meeting the Deadline unrealistic, impractical, and likely impossible. First, the Town has appealed the Permit, which now casts real uncertainty on whether the terms of a final permit will be technically achievable and feasible as well as causing pervasive uncertainty about the equipment specifications for the RTO project, which carries ramifications for key design considerations such as electrical requirements, natural gas requirements, and equipment foundations. Should the appeal result in changes to the project, the RTO, or the Permit, as requested in the Town's Notice of Appeal, then Saint-Gobain, will need to change the entire

RTO design and engineering, bidding and procurement processes, etc., resulting in significant wasted time and money. It would create inefficiencies in the use of resources, unnecessary duplication of hundreds, if not thousands, of man hours and untold effort, and make it impossible to meet the Deadline. Second, the COVID-19 pandemic has already caused material disruption and delays in the supply chain and the inability of Saint-Gobain's vendors and subcontractors to meet their project schedules. Going forward additional delays will likely arise, which will make it impossible to meet the Deadline.

5. Saint-Gobain is therefore requesting a variance from the requirement in RSA 125-C:10-e, II and the Permit that the RTO be completed within 12 months of issuance of the Permit, or February 11, 2021. Saint-Gobain requests that DES grant a variance extending that deadline by one year, to February 11, 2022, or in the alternative for one year from the date of the final, non-appealable order disposing of the Town of Merrimack's appeal of the Permit, whichever is earlier. This will provide the additional time needed to allow (1) for the Town's appeal to be resolved such that the current real project uncertainty will be eliminated before Saint-Gobain commits to an RTO design, thus avoiding potential serious economic and related serious hardships and losses, and (2) for Saint-Gobain to complete the RTO with the requisite time needed to account for the complications already caused by and anticipated to be caused by COVID-19.

## II. Legal Standard for a Variance

6. RSA 125-C:16 allows a person to be granted a variance to suspend the enforcement of "the whole or any part of the [statute] or rule" adopted thereunder who shows "that the enforcement thereof would produce serious economic hardship on such person without equal or greater benefits to the public." RSA 125-C:16, I (emphasis added).

7. In evaluating a petition for a variance:

[T]he commissioner shall give due recognition to the progress which the person requesting such variance shall have made in eliminating or preventing air pollution; the character and degree of injury to, or interference with, the health and physical property of the people; and the social and economic value of the source of air pollution. In such cases, the commissioner shall consider the reasonableness of granting a variance conditioned on the person's effecting a partial abatement of pollution or a progressive abatement thereof or such other circumstances as the commissioner may deem reasonable. No variance shall be granted to any person applying therefor who is causing air pollution which creates a danger to public health, welfare or safety.

RSA 125-C:16, II.

8. A request for a variance must also comply with DES's regulations, which require that any petition for variance address the above-referenced statutory factors. Env-A 202.4(c)-(d).

9. DES's rules also state that the Department shall grant a variance if the Department determines that:

(1) The petitioner has taken reasonable steps to eliminate or prevent air pollution; (2) Granting a variance would not create a danger to public health, welfare, or safety; (3) The source of air pollution has social and economic value to the area in which it is located; and (4) Enforcement of the requirement for which the variance is sought would produce serious economic hardship on the petitioner without equal or greater benefits to the public.

Env-A 202.07(b).

### III. Argument

#### A. **Enforcement of the Deadline Would Produce Serious Economic Hardship on Saint-Gobain Without Equal or Greater Benefits to the Public**

- (i) The Town's Appeal Casts Real Uncertainty on the RTO Project that Could Lead to Significant Lost Time, Effort and Monies Spent and it Being Impossible to Meet the Deadline

10. The projected cost of the RTO project (which includes the cost of the RTO unit itself and installation costs) is \$4.63 million.<sup>4</sup> The scope of the RTO project is extensive. In addition to construction of the RTO unit itself, the project requires significant changes at the Facility, including mechanical ductwork necessary to capture emissions at 14 different points and direct them to the RTO, in addition to transformers, electrical work, significant modifications to natural gas supply infrastructure, concrete foundations, structural elements, and fiber optics, among many other components. The project also entails significant coordination among the various utilities, contractors and vendors and the various bidding, contracting and scheduling processes. Since January 2020, two Saint-Gobain employees have been spending a combined total of approximately 50 hours per week solely on the RTO project, and they would continue to do so until installation. Beginning in September 2020, two additional employees would start spending an additional combined total of approximately 60 hours per week solely on the RTO project through installation. All told, Saint-Gobain anticipates these four employees alone would spend well over 4,000 hours on this project—and that does not include other Saint-Gobain employees who are or will be involved on a less than full-time basis. Nor does it include

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<sup>4</sup> The cost of the RTO unit itself is approximately \$2.3 million. It is typical for the total cost of a capital improvement to be in the range of 1.2 to 2.0 times the cost of equipment. The \$4.63 million figure does not include well in excess of \$100,000 that Saint-Gobain has already paid to a contractor to design the RTO to the Permit specifications.

the myriad contractors that Saint-Gobain will need to hire to complete the preparation and installation work described above (electricians, mechanical, materials, etc.).

11. The RTO has been specifically designed to comply with the specifications set forth in the Permit—a three-chamber RTO with an active combustion chamber designed to maintain a minimum temperature of 1832 degrees Fahrenheit, a minimum gas residence time of 1 second, a flow rate of 70,000 SCFM and additional heat recovery options, which is intended to control emissions of two PFCs<sup>5</sup> that (combined) the Facility, pre-control, emits at a rate of 0.79 pounds per year. *See* RSA 125-C:10-e, II (“Within 12 months of permit issuance, the applicant shall complete construction and installation of controls *consistent with the permit.*”) (emphasis added). An extensive amount of work has already occurred in this regard, including months spent working on the RTO unit design, engineering and planning structural changes to the Facility, and research and preparation for procurement and bidding.

12. The Town, however, has appealed the Permit to the Air Resource Council (“ARC”). That appeal was received by the ARC on March 10, 2020, was accepted by the ARC during its April 13, 2020 meeting, and is currently pending. The minutes of the April 13, 2020 ARC meeting reflect that, due to COVID-19, it could be three months before a hearing date is set. As of today, a Hearing Officer has not been assigned to the appeal and no prehearing conference has been scheduled. A hearing likely will not occur for a number of months, and the appeal will not be completed until many months after the end of May/early June 2020 timeframe, thus extending the real uncertainty for the RTO project until some unknown date in the future when the case may be decided or otherwise resolved.

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<sup>5</sup> See footnote 2.

13. This timeline highlights the difficulties inherent with the 12-month deadline for constructing and installing best available control technology (“BACT,” in this case the RTO) under RSA 125-C:10-e, II. The 12-month period does not reasonably account for appeals of a permit, such as the Town’s, which will take months to resolve and ultimately could require the complete redesign of a BACT. It puts a permittee in the position of being forced to move forward with a BACT project in order to meet the 12-month deadline while risking that all such work is economically wasteful depending on the outcome of the appeal.

14. The Town is challenging the emissions limits for PFCs set forth in the Permit and requests the ARC to amend the Permit to apply the emissions limits for PFCs set forth in the Permit Application Review Summary.<sup>6</sup> The Town also requests that the ARC require Saint-Gobain to install a hydrogen fluoride (HF) scrubber. Town of Merrimack Appeal, 20-05 ARC, at 4-9.

15. The mere fact of the appeal and the relief it seeks cast real uncertainty on the RTO project. Now Saint-Gobain cannot be sure that a final permit will contain limits and conditions that are technically achievable and feasible and that can be complied with for this first of its kind RTO project. In addition, should the appeal result in changes to the project, the RTO or the Permit, as requested by the Town, then Saint-Gobain, depending on the scope and timing of the changes, will need to change the entire RTO design and engineering, bidding and procurement processes, etc., likely resulting in significant lost time and monies spent, with no ability today to even know if the changes will be technically achievable and feasible. This would create

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<sup>6</sup> In the Permit, the maximum annual controlled PFC limits are 0.45 lbs/yr PFOA and 0.57 lbs/yr PFOS. Permit, Table 5, Item 5(f). In the Permit Summary, the maximum annual emissions limits were indicated as 0.075 lbs/yr PFOA and 0.048 lbs/yr PFOS. Permit Summary at 10. Current emissions for PFOS are already lower than the emissions limit.

inefficiencies in the use of resources, unnecessary possible duplication of significant man hours and effort, and make it impossible to meet the Deadline. Saint-Gobain would not simply be able to “flip a switch” or make a few minor modifications to its current RTO project. There would need to be a drastic redesign which could change aspects of the RTO unit itself, which in turn would set off a domino effect impacting the other equipment needed to install and operate the RTO. For example, if the RTO needed to operate at a higher temperature for a longer period of time, it could mean bigger fans are needed in the unit, which in turn could necessitate a larger transformer, increase the amount of concrete and change the load-bearing design for the required foundation and other structural elements, trigger the need to re-engineer all of the necessary electrical connections, and so on, again with no basis today to conclude that the changes to RTO project, if any, will be technically achievable and feasible. In short, the likely millions of dollars Saint-Gobain will have spent on the RTO project as currently designed, and related personnel resources, effort and most importantly crucial time, will have been lost, and it will be impossible to meet the Deadline.

16. RSA 125-C requires that Saint-Gobain “construct and install” the RTO “consistent with the permit” within 12 months of its issuance. RSA 125-C:10-e, II. Yet, Saint-Gobain will not know what is ultimately “consistent with the permit” until the appeal has been resolved. It is impossible to design, build, and install a moving target. The appeal will not be resolved until after the point at which Saint-Gobain must commit to a design to have any realistic chance of meeting the Deadline. This puts Saint-Gobain in a classic catch-22 scenario.

17. It is wholly unreasonable as a matter of law for Saint-Gobain to be forced into moving forward at risk as to the RTO project, where it must decide whether to continue on the current project path while the appeal is pending knowing that it could result in project changes

and the loss of extraordinary time and expense, in which case it will be impossible to meet the Deadline, or wait until the appeal is resolved so that it knows the specifications to which the RTO needs to be designed before making multi-million dollar investments, in that case also likely missing the Deadline.

18. The serious and significant economic hardship that Saint-Gobain faces could be practically remedied by granting a variance extending the February 11, 2021 deadline under RSA 125-C:10-e, II for one year, until February 11, 2022, or for one year from the date of the final, non-appealable order disposing of the Town of Merrimack's appeal of the Permit, whichever is earlier. That would allow the additional necessary time needed for the Town's appeal to be resolved such that the current real project uncertainty can be eliminated before committing to an RTO design, thus avoiding the potential serious aforementioned economic and related hardships.

19. Enforcement of the February 11, 2021 deadline prescribed by 125-C:10-e, II would not provide for an equal or greater benefit to the public. It would not benefit the public for Saint-Gobain to unnecessarily expend millions of dollars to build an RTO in accordance with a Permit that is on appeal if its requirements could be amended, requiring the RTO to be scrapped, redesigned, and rebuilt. Indeed, the public would not realize any benefit if Saint-Gobain nearly completes construction of the RTO in accordance with the Permit, only to have the Permit amended on appeal, thus requiring Saint-Gobain to remove the newly built infrastructure and start from scratch.

- (ii) COVID-19 Has Caused Material Delays in the Supply Chain, Seriously Affected the Ability to Meet the Deadline Causing Serious Hardship to Saint-Gobain

20. The drastic measures state and local governments, not to mention the federal government, have taken as a result of the COVID-19 pandemic are all too well known. There are stay-at-home orders of some type in effect for large swaths of the country, including New

Hampshire, schools have been closed, and non-essential businesses shuttered. In many places, gatherings are limited to no more than 10 people. Even when people are together outside their homes, social distancing guidelines provide that we stay 6 feet apart from one and another.

21. Recognizing the severity of the pandemic, DES has issued a number of temporary changes in operation and extensions as a result of COVID-19.

<https://www.des.nh.gov/covid19/index.htm>. For example, DES has automatically extended the expiration date of asbestos licenses and certifications for 6 months,<sup>7</sup> extended the deadline for submitting 2019 annual backflow prevention device testing reports for 3 months,<sup>8</sup> and reduced requirements for 2020 testing for backflow prevention devices.<sup>9</sup> Similarly, here, DES should recognize that the unique and extraordinary circumstances of COVID-19, which are completely out of Saint-Gobain's control, warrant an extension of the February 11, 2021 deadline.

22. COVID-19 also has affected lead times up and down supply chains,<sup>10</sup> including those related for the various components needed for the construction and installation of the RTO. For instance, one piece of equipment that is needed for the RTO project is a 13.8kV-480V, 1200 amp transformer. The transformer feeds the RTO, and Saint-Gobain will not be able to start or operate the RTO until the transformer is installed. Prior to COVID-19, the manufacture and ship time, i.e., lead time, for this type of transformer was 20 weeks. Now with COVID-19, the contractor has informed Saint-Gobain that the lead time already has increased to 32 weeks—an increase of approximately 3 months. While the manufacturer of the transformer is considered an

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<sup>7</sup> <https://www.des.nh.gov/covid19/documents/20200410-asbestos-license-cert-information.pdf>

<sup>8</sup> <https://www.des.nh.gov/covid19/documents/20200324-backflow-report-deadline-ext-email.pdf>

<sup>9</sup> <https://www.des.nh.gov/covid19/documents/20200410-backflow-eo-info.pdf>

<sup>10</sup> *E.g., The Coronavirus' Impact on Global Supply Chains*, (May 5, 2020), available at <https://www.wbur.org/onpoint/2020/05/05/coronavirus-global-supply-chains> (last visited May 8, 2020) (collecting reporting from multiple sources, including the Harvard Business Review, the Wall Street Journal, and the Washington Post, regarding the challenges COVID-19 presents for global supply chains).

essential business, due to social distancing it is only able to work at half-staff. As it stands today, in light of this delay and the current planned schedule, the transformer would not be delivered until very close to or during February 2021, when the RTO must be installed. This alone directly impedes Saint-Gobain's ability to meet the Deadline to install the RTO. There is nothing that Saint-Gobain can do to expedite or shorten the manufacturer's lead time. It is a result of measures the manufacturer has taken to protect its workers' health and help stop the spread of the pandemic.

23. Lead times for other components may well be affected due to COVID-19. For example, there is significant duct work that needs to be installed to pull emissions and direct them towards the RTO for treatment. The metals and other materials required for the duct work are specialty materials, many of which Saint-Gobain must procure from overseas, including China. It is entirely reasonable to believe that there could be supply chain disruptions which affect Saint-Gobain's ability to timely procure such materials.

24. The vendor Saint-Gobain is using to construct the RTO itself also has expressed concerns with lead times of its own suppliers. The lead time for the "burner train," which according to the vendor is always one of the longer lead-time components, is becoming even longer. Saint-Gobain's vendor has to rely on others to manufacture this component and cannot assemble the RTO until it has the component.

25. Moreover, Saint-Gobain necessarily has its own COVID-related requirements that may impact the timing of the installation of the RTO. One such requirement is a travel restriction. Anyone who takes public transportation of any kind (planes, trains, buses, etc.) has to self-quarantine and cannot go on site or enter the Facility for two weeks. Saint-Gobain's management recently stated that these measures would continue in place for the foreseeable

future. This presents significant hurdles for the RTO project as anyone who may need to be on-site during this project and does not live in the Merrimack area and does not use private transportation to get to the Facility will have to self-quarantine for two weeks before being able to access the Facility and physically work on the RTO installation, assuming restrictions are still in place. A number of contractors on the RTO project, including a key employee of the contractor that is overseeing the design and installation of the RTO unit, live and work out of state and would need to fly to New Hampshire for the installation. These individuals would need to schedule trips to New Hampshire incorporating a 2-week quarantine period with appropriate accommodations. Once these individuals start to work on the installation, they would not, as a practical matter, be able to leave lest they subject themselves to another 2-week quarantine.

26. The physical installation of the RTO presents additional COVID-related problems. The conveyancing system to the RTO involves tight spaces which will need to be navigated by multiple workers at the same time. Social distancing under these circumstances would be extremely challenging as a logistical matter for these workers, but to promote the public health, safety, and welfare and to adhere to Saint-Gobain's and state's requirements, appropriate social distancing, provisions for personal protective equipment, and other controls will need to be followed to ensure the work can be safely completed in the midst of the on-going COVID-19 pandemic. Following these important rules and guidelines will slow down the installation process significantly. Moreover, it is not in the public interest to force the travel and close contact required to complete installation of the RTO, because it risks spread of the disease in both the local community and the communities from which the employees and contractors come.

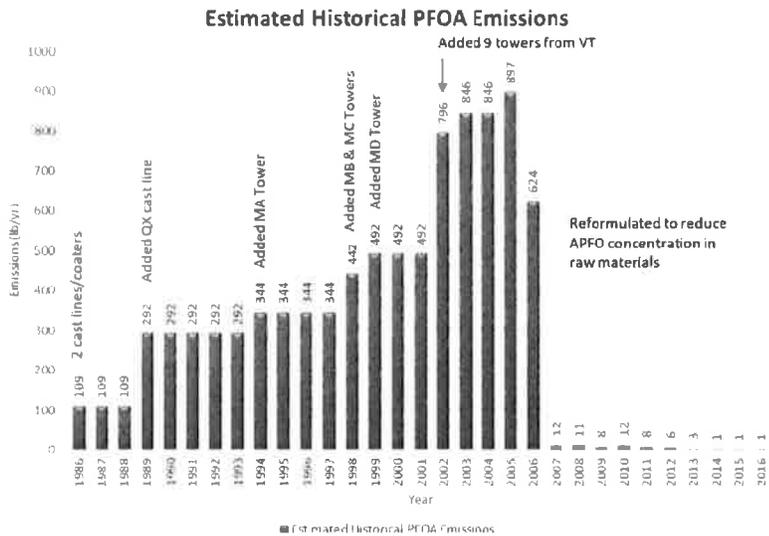
27. The serious and significant economic and related hardships that Saint-Gobain faces due to COVID-19 can be practically remedied by granting a variance extending the February 11, 2021 deadline under RSA 125-C:10-e, II for one year, until February 11, 2022, or for one year from the date of the final, non-appealable order disposing of the Town of Merrimack's appeal of the Permit,<sup>11</sup> whichever is earlier. This will provide the additional time necessary to allow Saint-Gobain to complete the RTO within a timeframe that accounts for the complications already caused by and still anticipated to be caused by COVID-19, thus avoiding the potential serious aforementioned economic and related hardships.

**B. Saint-Gobain Has Taken Reasonable Steps to Prevent Air Pollution**

28. The Facility has been permitted by DES Air Resources Division in one form or another since 1991. The Permit History for the Facility is set forth in the Permit Application Review Summary, and DES of course has the records and history relating to these permits. Saint-Gobain has worked extensively with DES with respect to these permits and the air pollution standards set by the State. PFOA emissions from the Facility, for example, have dropped dramatically since 2006, and in current years emissions have been at a rate of less than one pound per year:

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<sup>11</sup> Since such a final, non-appealable order will not issue for a matter of months, a one-year variance running from that date (whatever the exact date ends up being) would likely provide Saint-Gobain with sufficient time to address COVID-19 complications.



Permit Application Review Summary at p. 14. Emissions of the other PFC that is required to be controlled, PFOS, is likewise minute, at less than 5 one-hundredths of a pound per year. Permit Application Review Summary at 20.

29. With respect to PFC emissions that the RTO is designed to contain, the Permit states that “[o]peration of the source may continue through the construction and installation time period.” Permit at 4. Therefore, until the RTO is completed and installed, DES has recognized that it is appropriate for operations to continue. This is particularly appropriate in this case, given the minute quantities of PFCs involved and the fact that pre-control PFOS emissions are already below the annual emissions limit in the Permit.

**C. Granting a Variance Here Would Not Create a Danger to Public Health, Welfare, or Safety**

30. The quantities of PFC emissions from the Facility are quantifiably minute. Pre-control emissions for PFOS are at a rate of 0.045 pounds annually. Pre-control emissions for PFOA are at a rate of 11 ounces (or 0.74 pounds) annually. This totals less than one pound in emissions per year.

31. As noted above, DES has already explicitly stated that the Facility may continue to operate through the construction and installation time period. Permit at 4. The authority for this comes from RSA 125-C:10-e, II, which provides: “Operation of the source may continue through the permitting, construction, and installation time period.” The statute envisions that the “permitting, construction, and installation time period” will last in excess of 18 months.<sup>12</sup> The State Legislature has thus made the determination that operation of a source, such as the Facility here, pending the construction and implementation of “best available control technology”—in this case, the RTO—over an 18-month plus period is consistent with the public health, welfare, and safety. *See* RSA 125-C:1 (declaring policy and purpose of statute is, in part, to “promote the public health, welfare, and safety). Allowing the source to continue to operate over an additional 12-month period pending the construction and installation of an RTO that complies with the terms of the Permit, as they may (or may not) be amended on appeal is entirely consistent with the statute and the Legislature’s determination that such operation is consistent with the promoting the public health, welfare, and safety. RSA 125-C:1. This is particularly true where any additional emissions of PFOA and PFOS will be in the already minute pre-control quantities.

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<sup>12</sup> In assessing whether BACT is required, DES must first determine whether a device emits to the air any PFCs or precursors that have caused or contributed to an exceedance of an ambient groundwater quality standard or surface water quality standard as a result of the deposition of any such PFCs or precursors from the air. RSA 125-C:10-e, II. Within 6 months of that determination, the owner of the device must submit an application for a permit to DES. DES must then review and issue a permit, and within 12 months of the permit issuance, the applicant shall complete construction and installation of controls consistent with the permit. *Id.*

**D. Saint-Gobain Provides Significant Social and Economic Value to the Merrimack Area**

32. As a provider of hundreds of jobs, payer of hundreds of thousands of dollars annually in property taxes, and provider of community support in a multitude of ways, Saint-Gobain is an important and consistent Merrimack community partner and supporter.

33. Saint-Gobain employs approximately 200 people at its Facility in Merrimack. According to the Town's webpage, this places Saint-Gobain as one of the Town's 10 largest employers.<sup>13</sup> These jobs are the means by which residents of Merrimack and other area towns to provide for themselves and their families. Salaries and wages Saint-Gobain pays to employees at the Facility also support the local economy, as employees inevitably use their earnings to patronize area businesses and support local organizations.

34. Saint-Gobain pays approximately \$235,000 annually in property taxes, which support local schools and local governmental programs.

35. While always an active community partner, during the COVID-19 pandemic, Saint-Gobain has provided additional support to the local community, making at least the following donations:

- 10,000 pairs of nitrile gloves to Elliott and CMC hospitals;
- 400 KN-95 respirators to Elliott Hospital;
- 300 3D printed mask extenders per week for use by Child Advocacy Centers;
- Approximately 200 coverall suits to Elliott Hospital and United Way; and
- \$30,000 being distributed to area charities.

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<sup>13</sup> See, Town of Merrimack Economic Development Employment page on its website. <https://www.merrimacknh.gov/economic-development/pages/employment> (last visited May 6, 2020).

36. Further, in response to the COVID-19 crisis, Saint-Gobain quickly developed a process to produce level 1 medical gowns at the Facility. Saint-Gobain quickly ramped up production and has been producing approximately 100 to 250 gowns per week, which the company is donating to hospitals.

37. The response of Saint-Gobain's Merrimack Facility to COVID-19 is not limited to the local area. Saint-Gobain has donated ONESUIT suits—these are protective suits made of Lycra-grade material for hazmat and first responders—to New York City and Philadelphia.

#### **IV. Conclusion and Specific Relief Requested**

38. Saint-Gobain faces a statutory deadline of February 11, 2021 to construct and install the RTO in accordance with the specifications set forth in the Permit. RSA 125-C:10-e, II (“Within 12 months of permit issuance, the applicant shall complete construction and installation of controls consistent with the permit.”); Permit at 4. The variance is necessary due to two events that have put Saint-Gobain in a virtually impossible position relative to its ability to complete the RTO project by the Deadline. First, the Town's appeal of the Permit, which now casts real uncertainty on the RTO project and, second, the COVID-19 pandemic, which has led to material delays in the supply chain and the inability of Saint-Gobain's vendors and subcontractors to meet their estimated project schedules.

39. Relative to the Town's appeal, to be able to complete the project by the Deadline, Saint-Gobain's initial project schedule requires the completion of the design and engineering of the RTO (so the design is final), the preparation of the bid package, completion of the bidding process, vendor selection, gaining final internal appropriation approval and issuance of a purchase order to the selected vendor by the end of May/early June 2020. However, the appeal will not be completed until well after the end of May/early June, 2020 timeframe and should it

result in the changes to the project, the RTO, or the Permit, as requested in the Notice of Appeal, then Saint-Gobain, depending on the scope and timing of the changes, will need to go back to square one on the RTO design and engineering, bidding and procurement process, etc., likely resulting in significant lost time and monies spent. This would also create inefficiencies in the use of resources, unnecessary possible duplication of significant man hours and effort, and make it impossible to meet the Deadline. This will cause Saint-Gobain serious economic hardship, because the time, effort, and hundreds of thousands if not millions of dollars of expense in designing and constructing the RTO to meet the Permit specifications as they now stand in order to meet the February 11, 2021 will have been for naught. It is wholly unreasonable for Saint-Gobain to be forced into moving forward at risk as to the RTO project, because no matter the outcome Saint-Gobain risks serious economic and related hardships and the inability to meet the Deadline.

40. Moreover, and independently of the appeal, the COVID-19 crisis has created real-world, on-the-ground delays and complications which have already lead to material delays in the supply chain and the inability of Saint-Gobain's vendors and subcontractors to meet their estimated project schedules. Going forward additional delays are anticipated to arise, thus further jeopardizing the ability to meet the February 11, 2021 deadline.

41. Given these compelling circumstances and unanticipated events wholly out of Saint-Gobain's control, as well as the need for Saint-Gobain to have everything final and commit to an RTO design by the end of May/early June timeframe in order to work towards meeting the current Deadline, Saint-Gobain respectfully requests that DES take any and all steps that it can to expedite its review of this Petition and issue a decision in the most expeditious manner possible.

42. Saint-Gobain therefore requests that a variance of the February 11, 2021 deadline prescribed by RSA 125-C:10-e, II and that this time period be extended for a period of one year, until February 11, 2022. RSA 125-C:16, III (variance may be granted for a period up to one year), or for one year from the date of the final, non-appealable order disposing of the Town of Merrimack's appeal of the Permit, whichever is earlier.<sup>14</sup> This will allow sufficient time for the appeal to run its course and Saint-Gobain to design the RTO in accordance with the Permit specifications as they may (or may not) be amended after the appeal. It will also allow Saint-Gobain time to account for increased lead times for its vendors and its vendors' suppliers that have come as a consequence of the unforeseen and catastrophic impact of COVID-19. Saint-Gobain believes that DES should grant the requested in this case, that such a decision would be wholly reasonable and consistent with DES policies.

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<sup>14</sup> The Commissioner may "suspend enforcement of the whole or any part of this chapter or any rule adopted hereunder" provided the applicant meets certain criteria. RSA 125-C:16, I. As demonstrated herein, Saint-Gobain has met the requisite criteria to suspend enforcement of the requirement in RSA 125-C:10-e, II that the RTO be constructed and installed within 12 months of the issuance of the permit. RSA 125-C:16, III provides that a variance (*i.e.* suspension of enforcement of a part of the statute) "granted hereunder shall be granted for such period of time, not exceeding one year, as the commissioner shall specify." Nothing in the statute states that the one-year period for suspension of enforcement begins upon the date the *request* for a variance is granted. *In re Town of Seabrook*, 164 N.H. 635, 644 (2012) ("Nor will we consider what the legislature might have said or add words the legislature did not include."). Here, the deadline under RSA 125-C:10-e, II does not occur until February 12, 2021, and therefore DES's suspension of the enforcement deadline will not take effect until then. To construe RSA 125-C:16, III as requiring that the period of a variance begin when the request is granted would, in the circumstances here, create an unreasonable result and perverse incentives. Saint-Gobain, facing an unanticipated and unprecedented pandemic totally out of its control, as well as an appeal of its Permit, is responsibly trying to plan ahead and reasonably address the Permit requirements (as they may or may not be amended in the appeal) in an organized and economically feasible manner. If DES were to grant a variance of one-year from the date of this request, as opposed to one year from the deadline for which Saint-Gobain seeks to suspend enforcement, it would incentivize Saint-Gobain to wait and apply for a variance closer to the February 11, 2021 deadline in order to "push" the one-year period further out. However, this would create unnecessary delay and risk when the relief Saint-Gobain seeks is exactly the same—a suspension of the February 11, 2021 deadline.

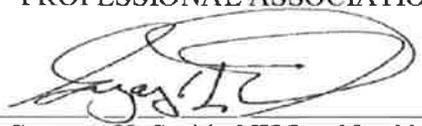
Respectfully submitted,

SAINT-GOBAIN PERFORMANCE PLASTICS  
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