

AR 4066

EXHIBIT R3



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

November 30, 2006

Ms. Pamela F. Faggert
Vice President and Chief Environmental Officer
Dominion Energy New England, Inc.
5000 Dominion Boulevard
Glen Allen, VA 23060

Mr. Barry Ketschke,
Director Fossil & Hydro Station
Dominion Energy New England
1 Brayton Point Road
Somerset, MA 02726-0440

Re: Brayton Point Station - NPDES Permit No. MA0003654

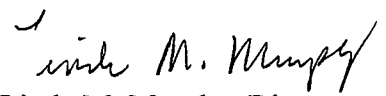
Dear Ms. Faggert and Mr. Ketschke:

Please find enclosed the "Determination on Remand from the EPA Environmental Appeals Board (Brayton Point Station, NPDES Permit No. MA0003654)," (Determination on Remand) issued by the New England Region 1 office of the United States Environmental Protection Agency (Region 1). Region 1 issued a new, final National Pollutant Discharge Elimination System (NPDES) permit to Brayton Point Station (BPS) pursuant to the federal Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, on October 6, 2003 (Permit). BPS appealed the Permit, however, to EPA's Environmental Appeals Board (EAB). On February 1, 2006, the EAB issued a decision on the merits of the permit appeal upholding the Region's determinations in most respects, but remanding two substantive technical issues and two administrative issues to Region 1 for further consideration and resolution. *In re Dominion Energy Brayton Point, L.L.C. (Formerly USGen New England, Inc.) Brayton Point Station*, NPDES Appeal No. 03-12 (EAB, Feb. 1, 2006) (*Remand Order*). The enclosed Determination on Remand provides Region 1's resolution of the remanded issues. For the reasons stated in the Determination on Remand, Region 1 has determined that its earlier decisions regarding the two remanded substantive issues should be reaffirmed and that no changes to the Permit's limits are necessary or appropriate.

The EAB's *Remand Order* indicates that BPS or other participants in the remand proceeding may appeal the Region's decisions on the remanded issues to the Board pursuant to 40 C.F.R. § 124.19 on the condition that the "subject matter of any such appeal must be limited to . . . [the remanded issues]." *Remand Order* at 294. The Board also orders that such an appeal will be required to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1)(iii). Any appeal under 124.19(a) must be filed with the EAB within 30 days from the date of receipt of this Determination on Remand. Therefore, the current stay of the Permit's contested conditions (and uncontested conditions not severable from the contested conditions) will be lifted and these conditions will go into effect if no appeal of the Region's decisions on the remanded issues is filed with the EAB by the required date. Any petition for review should be submitted to the EPA's Environmental Appeals Board as outlined in the enclosure discussing NPDES permit appeal procedures.

Should you have any questions concerning the Permit or the Determination on Remand, please feel free to contact Damien Houlihan at 617/918-1586 or have your attorneys contact Mark Stein at 617/918-1077.

Sincerely,



Linda M. Murphy, Director
Office of Ecosystem Protection

Enclosures

- cc: Arleen O'Donnell, Acting Commissioner MassDEP
- W. Michael Sullivan, PhD, Director, RI DEM
- Patrick C. Lynch, Attorney General of Rhode Island
- Wendy B. Jacobs, Esq., Foley Hoag (Counsel for BPS)
- James R. Allison, III, Esq., Hunton & Williams (Counsel for UWAG)
- Carol Lee Rawn, Esq., Conservation Law Foundation of New England
- Wendy Waller, Esq., Save the Bay
- Mr. Joseph L. Callahan, Board of Directors, Taunton River Watershed Alliance, Inc.
- Ms. Ann Morrill, Vice President, Kickemuit River Council

APPEALING AN NPDES PERMIT

If you wish to contest any of the provisions of this permit, you must petition the Environmental Appeal Board (EAB) within thirty (30) days. If you received notice of this permit via certified mail, the 30-day period begins on the date of receipt. If you were served by regular mail, the 30-day period begins the day after the date of mailing of the notice by EPA. Where notice is served by regular mail, note that an additional three days are added to the period within which to appeal in order to compensate for mail delay.

In order to be eligible to petition the EAB, you must have filed comments on the draft permit or participated in any public hearing that may have been held pertaining to this permit. In addition, the issues raised in the appeal must have been raised during the public comment period so long as they were reasonably ascertainable. Any person who failed to file comments or failed to participate in any public hearing on the draft permit may petition for administrative review only to the extent of changes from the draft to the final permit decision.

The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by NPDES regulations and when appropriate, a showing that the condition in question is based on: (i) a finding of fact or conclusion of law which is clearly erroneous or (ii) an exercise of discretion or an important policy consideration which the EAB should review.

Procedures for appealing permits can be found at 40 CFR §§ 124.19, 124.20, and 124.60. Copies of the regulations are below. More information on the appeals process and EAB filing and service requirements can be found on the Internet at <http://www.epa.gov/eab/>. The Practice Manual can be found on the Internet at <http://www.epa.gov/eab/manual.htm>. The EAB website and the Practice Manual should be carefully reviewed prior to filing an appeal.

STAY OF NPDES PERMITS

The effect of a properly filed appeal of an NPDES permit on the conditions and effective date of the permit can be found at 40 CFR §§ 124.16 and 124.60. Copies of these regulations are below.

FREQUENTLY ASKED QUESTIONS

What is the Environmental Appeals Board?

The Environmental Appeals Board (EAB) of the U.S. Environmental Protection Agency (EPA) is the final Agency decisionmaker on administrative appeals under all major environmental statutes that EPA administers. It is an impartial body independent of all Agency components outside the immediate Office of the Administrator. It was created in 1992 in recognition of the growing importance of EPA adjudicatory proceedings as a mechanism for implementing and enforcing the environmental laws. The EAB sits in panels of three and makes decisions by majority vote.

The EAB's caseload consists primarily of appeals from permit decisions and civil penalty decisions. The EAB has authority to hear permit and civil penalty appeals in accordance with regulations delegating this authority from the EPA Administrator. Appeals from permit decisions made by EPA's Regional Administrators (and in some cases, state permitting officials) may be filed either by permittees or other interested persons. A grant of review of a permit decision is at the EAB's discretion. Permit appeals are governed primarily by procedural regulations at 40 C.F.R. Part 124. Appeals of civil penalty decisions made by EPA's administrative law judges may be filed, as a matter of right, either by private parties or by EPA. Penalty appeals are governed primarily by procedural regulations at 40 C.F.R. Part 22.

How can I contact the Board?

The Board's telephone number is (202) 233-0122. The Board's fax number is (202) 233-0121.

Where should I file a pleading in a matter before the Board?

a. EAB Mailing Address

All documents that are sent through the U.S. Postal Service (except by Express Mail) MUST be addressed to the EAB's mailing address, which is:

*U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001*

Documents that are sent to the EAB's hand-delivery address (below) through the U.S. Postal Service (except by Express Mail) will be returned to the sender and shall not be considered as filed.

b. Hand Delivery Address

Documents that are hand-carried in person, delivered via courier, mailed by U.S. Postal Service Express Mail, or delivered by a non-U.S. Postal Service carrier (e.g., Federal Express or UPS) MUST be delivered to:

*U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005*

Documents that are hand-carried may be delivered to the Clerk of the Board from 8:30 a.m. to 12:00 p.m. and from 1:00 p.m. to 4:30 p.m., Monday through Friday (excluding federal holidays).

Is there a fee for filing a petition or an appeal with the EAB?

No

How many copies of each filing and each exhibit must I file?

The Board requests one original and five copies of any filing. Where exhibits are more than 30 pages, the Board requests that three sets of exhibits be filed.

Is a pleading timely if it is postmarked by the specified filing date or must it be actually received by the Board by the filing date?

The postmark date of a pleading is not determinative. If the pleading has been mailed to the Board, it must be received in the EPA mail room by the specified filing date. The pleading is then date-stamped and forwarded to the Board. If the pleading is hand-delivered directly to the Board, it must be received at the Board's offices by the specified date. If the Board establishes a briefing schedule by order, any date the Board specifies for filing a pleading means the date by which it must be received, unless otherwise specified in the order.

NOTE: As previously stated, documents may be filed by hand-delivery with the Clerk of the Environmental Appeals Board only from 8:30 a.m. to 12:00 p.m. and from 1:00 p.m. to 4:30 p.m. Eastern Time Monday through Friday (excluding Federal holidays).

May I fax my petition for review, notice of appeal, or brief, to the EAB?

No. The Board will not accept petitions for review, notices of appeal, or briefs, for filing by facsimile.

May I fax a motion to the EAB?

Yes. The Board will consider motions that are faxed to the Board. However, if a motion is faxed to the Board, a copy of the motion should be placed in the mail or hand-delivered to the Board within 24 hours of faxing the motion. The copy need not be received by the Board within the 24 hour period. Copies of the motion should also be faxed to other parties.

Is there a required format for a petition for review or notice of appeal?

There is no required format for a petition for review or notice of appeal. However, the Board requests that these documents be typewritten and double-spaced on 8.5 x 11 paper. A petition for review should contain a caption that indicates the name of the case and the permit number. A notice of appeal in an enforcement matter should contain a caption that indicates the name of the case and the docket number. Both documents should contain the name, address, telephone number, and fax number (if any) of the person filing the pleading.

Is there a required format for exhibits?

There is no required format for exhibits. Each exhibit should be clearly marked with consecutive numbers or letters to distinguish it from other exhibits. Exhibits should be clearly referenced in the pleadings. If multiple exhibits are submitted, at least one complete set of exhibits should be rubber banded or clipped together, not spiral or "comb" bound.

Can I find out when the Board will issue a decision in my case?

No. The Board will take under consideration a motion for expedited consideration of a particular matter, based on unusual and compelling circumstances. The motion should clearly state why the party believes the case deserves expedited consideration. However, the Board will not routinely provide information as to when any particular matter will be decided.

Additional Mailing Requirements - Case Name and Case Identifier on Envelope or Outside Packaging.

Any envelope or other packaging containing documents sent to the EAB's mailing address or hand-delivery address, as prescribed above should bear a complete and accurate return address in the upper left hand corner. The envelope or packaging should also clearly state the case name and case identifier in the lower left hand corner.

In all instances, if an appeal has already been filed with the Clerk of the Board, the case name and case identifier are the name and appeal number assigned to the matter by the Clerk. If an appeal has not yet been filed, state the name of the permittee or facility and the permit number (e.g., NPDES Permit No. ID-0000-00). Other filing requirements are contained in the Environmental Appeals Board's Practice Manual.

May I appeal the Board's decision to the Administrator?

No. Decisions of the Board are final and may not be further appealed to the Administrator. However, the parties (other than EPA) have statutory rights of appeal to federal court.

What is the procedure for withdrawing a petition that has been filed with the Board?

The petitioner should file a motion requesting to withdraw the petition.

Whom may I call if I have additional questions that have not been answered here?

The Clerk of the Board is available to answer questions from 8:30 a.m. to 12:00 p.m. and from 1:00 p.m. to 4:30 p.m. Eastern Time Monday through Friday (excluding Federal holidays). Counsel to the Board are also available to answer general questions about the appeals process. Counsel will not discuss the merits or status of any matter before the Board. The Clerk of the Board and Counsel to the Board may be reached at (202) 233-0122.

TITLE 40--PROTECTION OF ENVIRONMENT
CHAPTER I--ENVIRONMENTAL PROTECTION AGENCY (CONTINUED)
PART 124--PROCEDURES FOR DECISIONMAKING--Table of Contents
Subpart A--General Program Requirements

Sec. 124.16 *Stays of contested permit conditions.*

(a) *Stays.* (1) If a request for review of a RCRA, UIC, or NPDES permit under Sec. 124.19 of this part is filed, the effect of the contested permit conditions shall be stayed and shall not be subject to judicial review pending final agency action. Uncontested permit conditions shall be stayed only until the date specified in paragraph (a)(2)(i) of this section. (No stay of a PSD permit is available under this section.) If the permit involves a new facility or new injection well, new source, new discharger or a recommending discharger, the applicant shall be without a permit for the proposed new facility, injection well, source or discharger pending final agency action. See also Sec. 124.60.

(2)(i) Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions. The Regional Administrator shall identify the stayed provisions of permits for existing facilities, injection wells, and sources. All other provisions of the permit for the existing facility, injection well, or source become fully effective and enforceable 30 days after the date of the notification required in paragraph (a)(2)(ii) of this section.

(ii) The Regional Administrator shall, as soon as possible after receiving notification from the EAB of the filing of a petition for review, notify the EAB, the applicant, and all other interested parties of the uncontested (and severable) conditions of the final permit that will become fully effective enforceable obligations of the permit as of the date specified in paragraph (a)(2)(i) of this section. For NPDES permits only, the notice shall comply with the requirements of Sec. 124.60(b).

(b) *Stays based on cross effects.* (1) A stay may be

granted based on the grounds that an appeal to the Administrator under Sec. 124.19 of one permit may result in changes to another EPA-issued permit only when each of the permits involved has been appealed to the Administrator and he or she has accepted each appeal.

(2) No stay of an EPA-issued RCRA, UIC, or NPDES permit shall be granted based on the staying of any State-issued permit except at the discretion of the Regional Administrator and only upon written request from the State Director.

(c) Any facility or activity holding an existing permit must:

(1) Comply with the conditions of that permit during any modification or revocation and reissuance proceeding under Sec. 124.5; and

(2) To the extent conditions of any new permit are stayed under this section, comply with the conditions of the existing permit which correspond to the stayed conditions, unless compliance with the existing conditions would be technologically incompatible with compliance with other conditions of the new permit which have not been stayed. [48 FR 14264, Apr. 1, 1983, as amended at 65 FR 30911, May 15, 2000]

Sec. 124.19 *Appeal of RCRA, UIC, NPDES, and PSD Permits.*

(a) Within 30 days after a RCRA, UIC, NPDES, or PSD final permit decision (or a decision under 270.29 of this chapter to deny a permit for the active life of a RCRA hazardous waste management facility or unit) has been issued under Sec. 124.15 of this part, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any

condition of the permit decision. Persons affected by an NPDES general permit may not file a petition under this section or otherwise challenge the conditions of the general permit in further Agency proceedings. They may, instead, either challenge the general permit in court, or apply for an individual NPDES permit under Sec. 122.21 as authorized in Sec. 122.28 and then petition the Board for review as provided by this section. As provided in Sec. 122.28(b)(3), any interested person may also petition the Director to require an individual NPDES permit [[Page 272]] for any discharger eligible for authorization to discharge under an NPDES general permit. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision. The 30-day period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the condition in question is based on:

(1) A finding of fact or conclusion of law which is clearly erroneous, or

(2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

(b) The Environmental Appeals Board may also decide on its own initiative to review any condition of any RCRA, UIC, NPDES, or PSD permit decision issued under this part for which review is available under paragraph (a) of this section. The Environmental Appeals Board must act under this paragraph within 30 days of the service date of notice of the Regional Administrator's action.

(c) Within a reasonable time following the filing of the petition for review, the Environmental Appeals Board shall issue an order granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. Public notice of any grant of review by the Environmental Appeals Board under paragraph (a) or (b) of this section shall be given as provided in Sec. 124.10. Public notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief. Notice

of denial of review shall be sent only to the person(s) requesting review.

(d) The Regional Administrator, at any time prior to the rendering of a decision under paragraph (c) of this section to grant or deny review of a permit decision, may, upon notification to the Board and any interested parties, withdraw the permit and prepare a new draft permit under Sec. 124.6 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part. Any portions of the permit which are not withdrawn and which are not stayed under Sec. 124.16(a) continue to apply.

(e) A petition to the Environmental Appeals Board under paragraph (a) of this section is, under 5 U.S.C. 704, a prerequisite to the seeking of judicial review of the final agency action.

(f)(1) For purposes of judicial review under the appropriate Act, final agency action occurs when a final RCRA, UIC, NPDES, or PSD permit decision is issued by EPA and agency review procedures under this section are exhausted. A final permit decision shall be issued by the Regional Administrator: (i) When the Environmental Appeals Board issues notice to the parties that review has been denied; (ii) When the Environmental Appeals Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or (iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(2) Notice of any final agency action regarding a PSD permit shall promptly be published in the Federal Register.

(g) Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the administrator, [[Page 273]] rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to Sec. 124.2 and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the

final order unless specifically so ordered by the Environmental Appeals Board. [48 FR 14264, Apr. 1, 1983, as amended at 54 FR 9607, Mar. 7, 1989; 57 FR 5335, Feb. 13, 1992; 65 FR 30911, May 15, 2000]

Sec. 124.20 Computation of time.

(a) Any time period scheduled to begin on the occurrence of an act or event shall begin on the day after the act or event.

(b) Any time period scheduled to begin before the occurrence of an act or event shall be computed so that the period ends on the day before the act or event.

(c) If the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day.

(d) Whenever a party or interested person has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days shall be added to the prescribed time.

SUBPART D--SPECIFIC PROCEDURES APPLICABLE TO NPDES PERMITS

Sec. 124.60 Issuance and effective date and stays of NPDES permits.

In addition to the requirements of Secs. 124.15, 124.16, and 124.19, the following provisions apply to NPDES permits:

(a) Notwithstanding the provisions of Sec. 124.16(a)(1), if, for any offshore or coastal mobile exploratory drilling rig or coastal mobile developmental drilling rig which has never received a final effective permit to discharge at a [[Page 281]] "site," but which is not a "new discharger" or a "new source," the Regional Administrator finds that compliance with certain permit conditions may be necessary to avoid irreparable environmental harm during the administrative review, he or she may specify in the statement of basis or fact sheet that those conditions, even if contested, shall remain enforceable obligations of the discharger during administrative review.

(b)(1) As provided in Sec. 124.16(a), if an appeal of an initial permit decision is filed under Sec. 124.19, the force and effect of the contested conditions of the final permit shall be stayed until final agency action under Sec. 124.19(f). The Regional Administrator shall notify, in accordance with Sec. 124.16(a)(2)(ii),

the discharger and all interested parties of the uncontested conditions of the final permit that are enforceable obligations of the discharger.

(2) When effluent limitations are contested, but the underlying control technology is not, the notice shall identify the installation of the technology in accordance with the permit compliance schedules (if uncontested) as an uncontested, enforceable obligation of the permit.

(3) When a combination of technologies is contested, but a portion of the combination is not contested, that portion shall be identified as uncontested if compatible with the combination of technologies proposed by the requester.

(4) Uncontested conditions, if inseverable from a contested condition, shall be considered contested.

(5) Uncontested conditions shall become enforceable 30 days after the date of notice under paragraph (b)(1) of this section.

(6) Uncontested conditions shall include: (i) Preliminary design and engineering studies or other requirements necessary to achieve the final permit conditions which do not entail substantial expenditures; (ii) Permit conditions which will have to be met regardless of the outcome of the appeal under Sec. 124.19; (iii) When the discharger proposed a less stringent level of treatment than that contained in the final permit, any permit conditions appropriate to meet the levels proposed by the discharger, if the measures required to attain that less stringent level of treatment are consistent with the measures required to attain the limits proposed by any other party; and (iv) Construction activities, such as segregation of waste streams or installation of equipment, which would partially meet the final permit conditions and could also be used to achieve the discharger's proposed alternative conditions.

(c) In addition to the requirements of Sec. 124.16(c)(2), when an appeal is filed under Sec. 124.19 on an application for a renewal of an existing permit and upon written request from the applicant, the Regional Administrator may delete requirements from the existing permit which unnecessarily duplicate uncontested provisions of the new permit. [65 FR 30912, May 15, 2000]