

RECEIVED
U.S. E.P.A.

2007 JAN .3 PM 2:26

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re: Dominion Energy Brayton)
Point, LLC (formerly)
USGen New England, Inc.))
Brayton Point Station)
NPDES Permit No. MA 0003654)

MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

Dominion Energy Brayton Point, LLC (the “Petitioner,” the “Permittee” or “Brayton Point Station”) hereby moves to supplement the administrative record to include a number of important documents that are necessary to allow a meaningful review of Region 1’s decision on the Permit. The missing documents include summaries of comments that Brayton Point Station would have provided with regard to the analyses contained in the Determination on Remand had it not been wrongfully denied that opportunity as well as a number of scientific documents that the Region should have considered but did not or that are necessary to understand the background behind Region 1’s decision. The Board should direct that Region 1 supplement the record to include all such materials prior to certifying the record for submission to the Board or, in the alternative, should allow Permittee to supplement the record with these materials for purposes of the Board’s review.

DISCUSSION

The Board noted in its Remand Order that the Region may have to reopen the record for additional public comment in relation to new material with which it supplemented the record. Although the Region's analyses in the Determination on Remand raised substantial new questions, the Region failed to reopen the record for public comment, wrongfully denying Brayton Point Station the opportunity to comment on the new analyses contained in the Determination on Remand as well as on the sources added to the administrative record during the remand. The Board has repeatedly recognized the importance of making the analyses on which a permit relies available for public review and comment. *See, e.g., Hawaii Electric Light Co., Inc.*, 8 E.A.D. 66, 102-103 (EAB, November 25, 1998); *In re Knauf Fiber Glass*, 8 E.A.D. 121, 175-176 (EAB, February 4, 1999). Here, however, Brayton Point Station was denied the opportunity to review and comment on the substantial new questions raised by the Region's analyses on remand. Rather, Brayton Point Station's Petition provides the Petitioner with its first opportunity to respond to these issues. Should the Board choose not to remand to the Region with instructions to reopen the comment period with respect to these and other new issues raised by the Determination on Remand, the Board should treat Petitioner's evidentiary submissions as part of the administrative record for this case. *See, e.g., In re Metcalf Energy Center*, PSD Appeal No. 01-7, 01-08 (Aug. 10, 2001), unpublished final order at 22, n.13 (treating "extra-record" evidence that was not considered in the determination and had not been included in the administrative record as part of the administrative record for the case where the appeal before the Board "provided the first opportunity for parties to submit their views" on the analysis).

In the alternative, the Board should consider the Petitioner's evidentiary submissions under one of the recognized exceptions to the general rule that the "focal point for judicial

review should be the administrative record [] in existence”. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Courts have allowed supplementation of the record where a court needs background information to determine whether all relevant factors were considered because it is often impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. *See, e.g., The Fund for Animals v. Williams*, 391 F. Supp. 2d 191 (D.D.C. 2005); *National Wilderness Institute v. U.S. Army Corps of Engineers*, 2002 U.S. Dist. Lexis 27743 at *9-*12 (D.D.C. Oct. 9, 2002). A court may also look beyond the record if it appears that the agency deliberately or negligently excluded documents that may have been adverse to its decision. *See, e.g., id.* In this case, review of Brayton Point Station’s evidentiary submissions is appropriate as the submissions demonstrate that Region 1 excluded documents that were adverse to its determination and failed to consider issues that should have been considered by the Region in its Determination on Remand or are necessary to understand the errors behind Region 1’s decision.

At this time, Brayton Point Station requests that the Board direct Region 1 to supplement the record to include the following materials prior to certifying the record for submission to the Board or, in the alternative, allow Permittee to supplement the record with these materials for purposes of the Board’s review. A brief explanation as to why supplementation is appropriate is provided for each document.

1. Technical Analysis of Determination on Remand, HDR | LMS (2006). This document provides comments on the biological issues Region 1 discusses in the Determination on Remand. The Determination on Remand contained new analyses and referenced a number of sources that were added to the administrative record. The present appeal to the Board provides Brayton Point Station and their technical consultants their first opportunity to submit their views on the substantial new information contained in the Determination on Remand and

accordingly should be considered as part of the administrative record for the case. A copy is filed herewith as Exhibit A.

2. Graph of Y-O-Y Winter Flounder, MHB June-August Stratified Means, 1993 - 2006. Region 1 states that “in the roughly four years since Region 1 arrived at its conclusion regarding the BIP in Mount Hope Bay, the BIP has shown no sign of recovery.” Region 1 should have considered the data represented in this graph, which show increased numbers of Y-O-Y winter flounders in 2006 and may be evidence of a winter flounder recovery, but Region 1 did not. A copy is Figure I in Exhibit A.
3. *Fish Orientation Behavior: An Electronic Device for Studying Simultaneous Responses to Two Variables*, Reynolds (1977). Region 1 relies heavily on Casterlin and Reynolds (1982) (AR 385) in the Determination on Remand to support its contention that by three days of exposure to the critical temperature, juvenile winter flounder would be likely to express their temperature preferences. DOR at 24. The methodology followed in Casterlin and Reynolds (1982) is described in Reynolds (1977). Region 1’s discussions of the methodology used in Casterlin and Reynolds (1982) are inconsistent with the methodology described in Reynolds (1977) and indicate a lack of understanding of the methodology and ultimate findings of Casterlin and Reynolds (1982). Region 1 should have considered the methodology used in Reynolds (1977) in order to aid its understanding of Casterlin and Reynolds (1982) but did not. A copy is filed herewith as Exhibit B.
4. *Relationships between Juvenile Winter Flounder and Multiple-Scale Habitat Variation in Narragansett Bay, Rhode Island*, Meng et al. (2005) -- A later study conducted by the same author as AR #4013, on which the Region relies heavily in the Determination on Remand to support its contention that exposure to 24°C for 10 or more days would likely have a significant adverse effect on growth. See DOR at 28. Meng et al. (2005) is more recent study which found that winter flounder densities were highest in coves and upper estuaries and noted that “in coves and upper estuaries, temperatures tend to be higher, enhancing growth” (1515). Temperatures during the study ranged to over 26°C. Meng et al. (2005) states: “An estuarine life history – which includes adaptations to fluctuating salinities, temperatures, and dissolved oxygen – also allows winter flounder to exploit many habitats.” (1516) This study suggests that temperatures of as high as 26°C help, rather than hinder, winter flounder growth. Having been published in 2005, Meng et al. (2005) was available to the Region during the remand proceedings but was not included in the administrative record. The Region’s failure to include this document demonstrates that Region 1 excluded documents adverse to its determination and failed to consider issues that should have been considered. A copy is filed herewith as Exhibit C.
5. *USEPA, Temperature Criteria for Freshwater Fish: Protocol and Procedures (May 1977)*. This document shows that the Agency uses weekly average

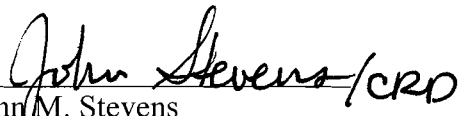
temperatures for considering the effects of temperature on fish. A copy, without appendices, is filed herewith as Exhibit D.

6. Gibson et al. 3 41°N4 (2006), *How are the Fish Doing?*, <http://seagrant.gso.uri.edu/41N/Vol3No1/pdf/41Nvol3no1.pdf> (last visited December 28, 2006). Region 1 states that “in the roughly four years since Region 1 arrived at its conclusion regarding the BIP in Mount Hope Bay, the BIP has shown no sign of recovery.” Region 1 should have considered the data described in Gibson (2006), which show increased abundances of Age 1 winter flounder in Narragansett Bay (including Mount Hope Bay) in 2005, but did not. Gibson states that, “[i]t may be that Bay conditions have recently changed such that the survival of young-of-the-year winter flounder has improved. This could be evidence of the beginning of a recovery.” Region 1 has previously relied heavily on Gibson’s findings. The Region’s failure to include this document in the record demonstrates that Region 1 excluded documents adverse to its determination and failed to consider issues that should have been considered. A copy is filed herewith as Exhibit E.
7. Technical Analysis of Determination on Remand, Epsilon Associates (2006). This document provides comments on the noise issues Region 1 discusses in the Determination on Remand. The Determination on Remand contained new information and additional analyses in relation to EPA’s Noise Levels document and referenced a number of sources that were added to the administrative record. The present appeal to the Board provides Brayton Point Station and their technical consultants their first opportunity to submit their views on the substantial new information contained in the Determination on Remand and accordingly should be considered as part of the administrative record for the case. A copy is filed herewith as Exhibit F.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that Region 1 be directed to supplement the administrative record in this action with the documents referenced herein and others that may be identified or, in the alternative, that the Permittee be allowed to supplement the record with these documents for purposes of this appeal.

By its attorneys,



John M. Stevens
Wendy B. Jacobs
Elisabeth M. DeLisle
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210-2600
TEL: (617) 832-1000
FAX: (617) 832-7000
Attorneys for Petitioner

Date: January 3, 2007