



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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Via Federal Express and Electronic Submission

April 19, 2007

Eurika Durr, Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building
1341 G Street NW, Suite 600
Washington, D.C. 20005

**Re: In re Dominion Energy Brayton Point, L.L.C. (Formerly USGen New England, Inc.)
Brayton Point Station - NPDES Permit No. MA 0003654 – Appeal No. NPDES 07-01**

Dear Ms. Durr:

In connection with the above-referenced permit appeal, please find EPA Region 1's Sur-Reply Brief enclosed for docketing and review by the United States Environmental Protection Agency's ("EPA") Environmental Appeals Board ("Board"). A Certificate of Service is also enclosed. The Region is filing the required additional copies of this document using the Board's electronic filing system.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Stein".

Mark A. Stein
Senior Assistant Regional Counsel

cc: Recipients listed on enclosed Certificate of Service

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

In re: Dominion Energy Brayton Point, L.L.C.)
 (Formerly USGen New England, Inc.))
 Brayton Point Station)


 NPDES Permit No. MA 0003654)

NPDES Appeal No. 07-01

EPA REGION 1 SUR-REPLY BRIEF

Respectfully submitted by EPA Region 1,

Dated: April 19, 2007



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TABLE OF CONTENTS

	Page
I. Petitioner Identifies No Issue Warranting EAB Review of the Five-Day Threshold.....	1
II. Petitioner Identifies No Issue Warranting EAB Review Regarding Production Forgone.....	7
CONCLUSION.....	10

EPA REGION 1 SUR-REPLY BRIEF

I. Petitioner Identifies No Issue Warranting EAB Review of the Five-Day Threshold

In Casterlin and Reynolds (1982) (AR 385), sixteen juvenile winter flounder were individually tested for three days each in electronic shuttleboxes that “allow the fish to control water temperatures by means of normal, unconditioned swimming movements.” *See* Ex. R7 at 178. Within that period, the fish were allowed to voluntarily occupy their preferred temperatures simply by moving between chambers of the shuttlebox. *Id.* Each such movement was “recorded automatically along with water temperatures.” *Id.* Citing the absence of “published data on laboratory thermal preference or avoidance behavior” of juvenile winter flounder, the authors expressly designed the experiment to measure “thermoregulatory behavior (preferred or avoided temperatures)” of the species. *Id.* at 177-178. Cumulative frequency data over the entire three-day period showed that juvenile winter flounder avoided temperatures above the critical temperature threshold selected by the Region (*i.e.*, 24°C) 84% of the time and avoided temperatures below 8°C and above 27°C one hundred percent of the time. *Id.* at 178 (Figure 1); Ex. R2 (DOR) at Exhibit 8.

The Region concluded that the final overall distribution of voluntarily selected temperatures over the three-day experiment revealed a “clearly discernible preference/avoidance pattern.” Ex. R2 (DOR) at 24. It thus “interpreted this data to indicate that by three days of exposure to the critical temperature, juvenile winter flounder would be likely to indicate their temperature preferences.” *Id.* Although aware that it was unlikely that all the fish waited “until the 72nd hour to avoid sub-optimal temperatures” and “that it was likely avoidance began before that point,” *id.* at 24-25, the Region also recognized that there was no firm basis for identifying a particular threshold less than three days from Casterlin and Reynolds (1982) alone because the

study did not “precisely identify the time prior to three days at which significant avoidance occurred in the laboratory.” Region 1 Response to Petition for Review (“Resp. to Pet.”) at 32.

In its Petition, at 13, Dominion argued that Casterlin and Reynolds (1982) “did not really test avoidance, much less determine how long young winter flounder could be exposed to warm temperatures before beginning to exhibit avoidance behavior.” This technical interpretation of the paper, however, is flatly contradicted by its authors, who expressly concluded that an “upper avoidance temperature of 27°C” was “evident” in the final cumulative distribution frequency (Figure 1). *See* Ex. R7 at 178. The argument is also contradicted by Petitioner’s own past position on the study, which it argued supported a higher critical avoidance temperature.¹ Having previously drawn avoidance-related inferences from the paper to bolster its own arguments, Petitioner now makes the incongruous argument that the study “had nothing to do” with the temporal threshold issue. Reply Brief (the “Reply”) at 8-9. Either the three-day period of the experiment is sufficient to draw conclusions about avoidance or it is not. These fundamental inconsistencies undermine the credibility of Petitioner’s new, alternative view of Casterlin and Reynolds (1982), and Petitioner offers no explanation for them in its Reply.²

Petitioner’s Reply focuses on Reynolds (1977), which it continues to claim demonstrates that the Region “fundamentally” misconstrued Casterlin and Reynolds (1982). In Petitioner’s view, Reynolds (1977) “makes clear” that Casterlin and Reynolds (1982) “was designed to

¹ *See, e.g.*, USGenNE’s Brief, June 7, 2004, at 16 (describing an avoidance threshold of 26°C as “a temperature consistent with the weight of the data presented by both Duffy and Luders and Casterlin and Reynolds,” while arguing, “Casterlin and Reynolds concluded that avoidance began at approximately 27°C.”). In addition to being interpreted as evidence of juvenile winter flounder avoidance by the study’s authors and by Petitioner, Casterlin and Reynolds (1982) is also cited for that proposition by juvenile winter flounder experts in the peer-reviewed scientific literature. *See, e.g.*, Meng *et al.* (2000) (AR 4013), Ex. R10 at 293.

² Indeed, Petitioner appears instead to retreat from its blanket contention that Casterlin and Reynolds (1982) is “not really” about avoidance at all to the narrower assertion of “continu[ing] to disagree with Region 1’s contention that the study supports either an avoidance or preference threshold of 24°C.” Reply at 6, n 5.

determine what water temperatures were preferred by juvenile winter flounder in an artificial environment of continuously changing temperatures and readily available alternatives.” Reply at 9.³ According to Petitioner, because juvenile winter flounder in nature will allegedly become “acclimatized to gradually warming temperatures” and have no “known” cool water alternatives,⁴ the lessons of Casterlin and Reynolds (1982) have “no bearing whatsoever” on the duration of exposure necessary to cause avoidance or adverse effects in juvenile winter flounder under natural conditions in the Bay. *Id.*

Petitioner’s argument fails on both procedural and substantive grounds. As explained in its Motion to Strike and Opposition to Petitioner’s Motion to Supplement the Administrative Record (the “Motion to Strike”), Region 1 first received a copy of Reynolds (1977) after the final remand determination was issued and the administrative record closed. Motion to Strike at 24-25, n. 12. Reynolds (1977) is thus not in the administrative record and not properly before the Board, which confines its review to the record actually before the permit issuer, *see In re Dominion Energy Brayton Point, L.L.C. (Formerly USGen New England, Inc.) Brayton Point Station*, NPDES Appeal No. 03-12, slip op. at 25, 38-39 (EAB, Feb. 1, 2006), subject to narrow exceptions not applicable here. Motion to Strike at 18-27.

Moreover, Petitioner’s contention that it neither had reason nor opportunity to introduce

³ Petitioner offers no plausible explanation for why the study’s authors would have “designed” a study to determine what juvenile winter flounder would do in an artificial environment with no implications for the real world. The authors, instead, expressly conclude that their “experimental data,” considered together with other data and field observations, provide meaningful information about the “behavioral ecology” of winter flounder. Ex. R7 at 179.

⁴ Contrary to Petitioner’s suggestion, in the natural environment, there is nothing to prevent juvenile winter flounder from trying to avoid adversely high temperatures by swimming away or by burrowing into the cooler sediments. *See, e.g.*, Ex. 4 (DPDD) at 6-34 (acclimation in nature uncertain and debatable). The fact that juvenile winter flounder may not “know” where cooler areas of the Bay are located (assuming they exist at all) will not necessarily prevent them from seeking out those areas. Even if, as Petitioner implies, the thermal plume in Mount Hope Bay is so extensive that the juvenile winter flounder cannot swim fast or far enough to escape it, juvenile winter flounder will not necessarily acclimatize to it harmlessly. High temperatures may cause adverse temperature-related effects, such as increased swimming and burrowing, which can adversely affect growth and, as a result, lead to increased predation mortality. *See* Ex. R2 (DOR) at 22-23.

Reynolds (1977) into the record until now because the Region “did not disclose its erroneous understanding of Casterlin and Reynolds (1982) in connection with issuance of the draft and final permits” is without merit. This paper, with its citation to Reynolds (1977), has been in the permit record since at least 2002 and had a key role supporting the critical avoidance temperature of 24°C. There have also been longstanding disagreements over the nature and extent of the avoidance-related inferences that can reasonably be drawn from it. *See Dominion* at 125, n. 151.

Furthermore, the ultimate implication of Reynolds (1977) for Casterlin and Reynolds (1982), as argued by Petitioner in its Reply, is solely grounded in its oft-argued theory of juvenile winter flounder temperature acclimation in Mount Hope Bay.⁵ If, as Petitioner now claims, temperature variation (or lack thereof) truly holds the key to understanding whether the Casterlin and Reynolds (1982) laboratory study has any rational application to natural conditions in Mount Hope Bay in light of Petitioner’s long held acclimation theory, then there would have been an obvious “reason to understand [the] relevance or materiality,” Reply at 7, of the citation to Reynolds (1977) well before now. From Petitioner’s perspective, the potential relevance and materiality should have been apparent from the time the Region first relied on the Casterlin and Reynolds (1982) laboratory study, with its citation to Reynolds (1977), for the express purpose of supporting the conclusions of the RI-DEM field observations comparing temperature and fish abundance in Mount Hope Bay in the context of identifying a critical avoidance temperature.

See Ex. 4 (DPDD) at 6-34. Petitioner offers no reason why it could not have located or discussed the paper in its comments on the draft permit or in its earlier appeal. Its failure to do so does not

⁵ In fact, in October 2002, Petitioner’s consultants cited to Casterlin and Reynolds (1982) as among the papers used by the Region “[i]n support of its rejection of the acclimation concept” and specifically objected to the Region’s use of the paper “in support of” field observations under natural conditions in Mount Hope Bay to establish a threshold temperature for avoidance. *See Ex. 33, Vol. II, Tab 11 (AR 3263) (LMS Response)*, pp. I-4, I-5, I-43 (reproducing frequency of distribution graph Figure 1 from Casterlin and Reynolds and concluding, “It shows that winter flounder occupy areas with temperatures up to 27°C. These results contradict EPA’s fixed thermal threshold of 24°C.”).

justify *post hoc* supplementation of the record. *Dominion* at 38-39. See also *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1455-56 (1st Cir. 1992) (material not seen by agency is outside of the record for CWA § 404 permit).

Although Petitioner argues that it has been uniquely disadvantaged by an unprecedented procedural maneuver “to shield [the Region’s] errors from review,” Reply at 2, in actual fact Petitioner finds itself in the procedural posture that ordinarily results upon final permit issuance after application of 40 C.F.R. Part 124 procedures. Once a draft permit is issued, the public has an opportunity to comment on it and, under 40 C.F.R. § 124.18(b)(1)-(3), all documents and comments submitted by the public during that time must be included in the administrative record. After the public comment period closes, the permit issuer prepares a response to the public comments. At this stage, the permit issuer may also add new materials to the record to respond to comments. 40 C.F.R. §§ 124.17(b), 124.18(b)(4). Part 124 regulations “do not require the permit issuer to invite public comment on such new information added to the record after the close of public comment.” *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, slip op. at 64 (EAB, Aug. 24, 2006). See also Motion to Strike at 3–5. Rather, “[t]he purpose of the response to comments and any supplementation of the administrative record at that time is to ensure that interested parties have full notice of the basis for final permit decisions and can address any concerns regarding the final permit in an appeal to the Board pursuant to 40 C.F.R. section 124.19.” *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 431 (EAB 1997).⁶

⁶ Thus, 40 C.F.R. Part 124 will not necessarily provide a commenter the opportunity to submit additional comments or add materials to the administrative record when information received during the public comment period leads a permit issuer to revise a draft permit or more fully articulate its reasoning in the response to comments. Had Region 1 fully explained the basis for the five-day threshold in its original responses to comments on the Draft Permit (supplementing the record and amplifying the rationale to the extent necessary and as specifically contemplated by 40 C.F.R. § 124.17(b)), as it subsequently did in the Determination on Remand, Petitioner would have been in the same position it finds itself today. Then, as now, Petitioner would not have had license to insert new information

Substantively, Petitioner's argument related to Reynolds (1977) boils down to whether the Casterlin and Reynolds (1982) laboratory study can rationally be translated to natural conditions in the Bay given Petitioner's acclimation theory.⁷ Yet, the Board already considered and upheld Region 1's decision not to rely on the acclimation concept in establishing the Permit's thermal discharge limits. *Dominion* at 122. Moreover, using a laboratory study to set a temporal threshold for avoidance coincides with Petitioner's own view that "[t]he traditional way to define thermal tolerances is via laboratory studies." Ex. 33, Vol. II, Tab 11, p. I-5.

In the end, Petitioner has not established how the Region's mistaken assumption regarding the Casterlin and Reynolds (1982) methodology affects the final permit determination or has prejudiced Petitioner. Region 1's interpretation of the final cumulative frequency distribution was not predicated on whether temperatures were held constant in a series of shuttleboxes or were varied over the course of the experiment in only two connected shuttleboxes. Resp. to Pet. at 36-38. If anything, the Region's error in describing this aspect of the methodology benefits Petitioner because it was used as one basis for adjusting the temporal threshold up from three days to account for variable temperatures in the Bay. See Resp. to Pet. at 32, n. 20. The error made by the Region is thus harmless, not fatal as Petitioner contends. See *In*

and data into the record in order to rebut changes between the draft and final permits. See Motion to Strike at 4-5 (discussing *NE Hub Partners, L.P.*, 7 E.A.D. 561 (EAB 1998)).

⁷ Petitioner does not employ Reynolds (1977) to point out any substantive error in the Region's interpretation of the cumulative frequency data in Figure 1 of Casterlin and Reynolds (1982). Instead, it uses Reynolds (1977) in an effort to demonstrate that the results of the 1982 experiment are incapable of being translated to conditions in Mount Hope Bay. Its charge that "temperature changes were too rapid to determine effects of extended exposure" to any one temperature, Reply at 9, does not provide an explanation for why the fish in the experiment avoided temperatures above 24°C for the vast majority of time and avoided temperatures below 8°C and above 27°C one hundred percent of the time over the course of the three-day experiment. On the other hand, the Region's interpretation of the paper—that juvenile winter flounder exhibited a clear preference or avoidance response to various temperatures by the end of the three-day experiment—rationally accounts for these cumulative frequency data. In addition, contrary to Petitioner's claim, Region 1's interpretation does not turn on the precise point at which a fish chose to leave a box to seek out a cooler or warmer temperature, but instead depended upon the final frequency of distribution at the end of the three-day experiment. Resp. to Pet. at 36-38. The Board should defer to the Region's reasonable view on this technical matter. *NE Hub*, 7 E.A.D. at 567.

re *City of Moscow, Idaho*, 10 E.A.D. 135, 143, n. 23 (EAB 2001) (error benefiting permittee held to be harmless).⁸

II. Petitioner Identifies No Issue Warranting EAB Review Regarding Production Foregone

Dominion argues that Region 1's production foregone estimates go to the "very foundation of the permit" and that "if the Region's original estimate of production foregone is significantly overstated, then . . . the Permit limits under § 316(b) are unnecessarily stringent." Petition at 1-2, 6-7. Dominion's Reply Brief renews this argument, at 10-13 and Exhibit 1, presenting more detailed substantive claims of production foregone errors.

This argument does not warrant further EAB review. The assertion that production foregone estimates go to the foundation of the § 316(b) limits is incorrect.⁹ The intake limits have a fully adequate basis regardless of the production foregone estimates. As the Region has consistently maintained, these estimates were immaterial for the Permit limits. *See* Resp. to Pet. at 74-76, App. A, p. 3; Ex. 2 (RTC) at IV-47, App. X, p. 2.

Still, Region 1 requested its consultant on production foregone, Stratus Consulting, Inc. ("Stratus"), to review Petitioner's Reply Brief and Exhibit 1 to ensure their full consideration. Based on its review of Exhibit 1, Stratus now informs Region 1 that Stratus has been persuaded that its method of estimating larval weights appears to have produced biologically unrealistic

⁸ Petitioner is also demonstrably wrong in alleging there is "no support in the record whatsoever that juvenile winter flounder exposed to elevated temperatures for fewer than seven days will experience adverse effects." Reply at 6. Not only does Casterlin and Reynolds (1982) show avoidance and elevated activity levels in the laboratory from exposures of at least three days to non-preferred temperatures, but Region 1 concluded that lengthier exposures would be more likely to cause avoidance and related adverse impacts in the natural environment. *Id.* at 26, 29. In addition, the Gold Book, Ex. R8 (AR 4002), suggested that seven-day exposures to temperatures even less than 24°C could cause significant adverse growth impacts for juvenile winter flounder and that an exposure of more than seven days was "extensive." *See* Ex. R2 (DOR) at 26-28. Finally, Petitioner provides no support for its suggestion that exposure to 24°C for less than seven days will not have adverse effects.

⁹ This argument is also barred because substantive issues related to production foregone estimates are beyond the scope of the appeal allowed by the Board's Remand Order. *See* Resp. to Pet. at 73, 75.

high or low values for certain species, including a significant overestimate of the larval weight for tautog. Because this single species dominates the overall production foregone totals, a further recalculation would yield a substantially lower total production foregone estimate, possibly close to Petitioner's figure. The Region reports this information since it had previously stated to the Board, based on Stratus' analysis of Petitioner's previous comments, that Stratus' production foregone estimates were reasonable. *See* Resp. to Pet. at App. A 2-3.

Nevertheless, the fact remains that even if Dominion's production foregone estimates are used, or if no such estimates are considered at all, the Permit's limits would not be affected. The intake limits under § 316(b) are based on Region 1's technology assessment determining that closed-cycle cooling represents the Best Technology Available ("BTA") for minimizing adverse environmental impacts from the Brayton Point Station ("BPS") intakes, and the Region's determination that the cost of installing such technology would not be wholly disproportionate to its benefits. *See, e.g.*, Ex. 2 (RTC) at IV-41; Ex. 4 (DPDD) at 7-166 to 7-181. The benefits side of the Region's analysis turned on qualitative and quantitative/non-monetized assessments of benefits, *see* Ex. 2 (RTC) at IV-21 to IV-23; Ex. 4 (DPDD) at 7-127 to 7-134, and a monetized consideration of potential non-use values.¹⁰ *See* Ex. 2 (RTC) at IV-26 to IV-29; Ex. 4 (DPDD) at 7-140 to 7-150. *See also* *Dominion* at 251-63, 270-71. Production foregone estimates had no effect on the non-monetized assessments and a negligible effect on the monetized non-use value estimates. *See* Ex. 2 (RTC) at IV-41 to IV-42, IV-47, App. X, p. 2. Region 1 also estimated use values. The monetized estimate of the indirect use value of forage fish lost to the intake was based on production foregone estimates. The value derived from Stratus' original production

¹⁰ In addition, Region 1 has explained that even if for the purpose of argument an infirmity was assumed in its monetized assessment of non-use benefits, any such error would be harmless because monetized estimates are not required and the qualitative and quantitative/non-monetized assessment of benefits independently support Region 1's permit determination. *See* Region 1 Brief in Response (July 8, 2004) at 31-32. *See also* *Dominion* at 270.

foregone estimate was so small (only a few thousand dollars) that the result was of no consequence for the overall benefits analysis. *See* Resp. to Pet. at 75, App. A, pp. 1, 3; Ex. 4 (DPDD) at 7-139 to 7-140. *See also* *Dominion* at 264. Thus, even using Dominion's lower production foregone estimate, or no estimate at all, would not, and could not, change the outcome of the Region's analysis.¹¹ *See id.* at 267-68 (noting "questionable importance" of production foregone revisions to overall benefits analysis).

In addition, Region 1 used production foregone values in the DPDD as one metric, but neither the only nor the primary one, for depicting the relative biological effects resulting from different permitting alternatives. Resp. to Pet. at App. A, p. 2. Because production foregone for each option was simply calculated by reducing the estimate for current operations based on the flow reduction achieved by that option, the relative differences between options remain the same even if Petitioner's production foregone estimate for open-cycle operations is used as the starting point. *See id.* at App. A, pp. 2-3. Moreover, even without any production foregone estimates, the significant relative differences among the options remain evident from the other, unrelated metrics, such as absolute levels of entrainment and impingement, adult fish losses, and winter flounder population losses. *See Dominion* at 153-155, 207 n. 248, 210-13.

Dominion's ultimate argument is that the Permit's current limits based on closed-cycle cooling are necessarily too stringent if current operations or other alternatives would result in

¹¹ Significantly, in applying the wholly disproportionate cost test in both the DPDD and the RTC to draw the ultimate conclusions regarding the appropriateness of the Permit's cooling water intake limits based on closed-cycle cooling, the Region does not mention production foregone estimates. Instead, Region 1 discusses and relies upon other manifestations of the adverse environmental impact of BPS's intakes that are independent of production foregone estimates, such as the absolute levels of entrainment and impingement, population level impacts on winter flounder and other species, and numbers of adult fish lost. *See* Resp. to Pet. at 75-76; Ex. 2 (RTC) at IV-21 to IV-23, IV-41 to IV-45; Ex. 4 (DPDD) at 7-162 to 7-164, 7-166 to 7-172, 7-180 to 7-181. The Board's Remand Order upholds the Region's consideration of these factors. *Dominion* at 210-212, 253-265. Thus, once again, any error in the production foregone estimates is harmless because there is a sound basis for the permit limits even without those values. *See In re Spokane Reg'l Waste-to-Energy*, 2 E.A.D. 809, 815 (Adm'r 1989).

less than approximately three million pounds of production foregone, because that is the amount that Region 1 estimated would result after installing closed-cycle cooling. This argument rests on an indisputably false premise. Neither Region 1 nor any other party identified an environmentally protective level of, or target for, production foregone.¹² What the Region concluded was that the 96 percent reduction in entrainment and impingement associated with converting BPS to closed-cycle cooling was the best that could be achieved with feasible technology and that these large reductions made this the only alternative likely to give fish populations *a chance to recover*, assuming that other steps to reduce stress on the fish, such as substantially reducing BPS's thermal discharge, are also undertaken. *See, e.g.*, Ex. 4 (DPDD) at 7-126; Ex. 2 (RTC) at IV-22 to IV-23; *Dominion* at 207, n. 248.

CONCLUSION

For the reasons set forth above, Petitioner has identified no issue warranting EAB review.

Respectfully submitted by EPA Region 1,



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Dated: April 19, 2007

Of Counsel:

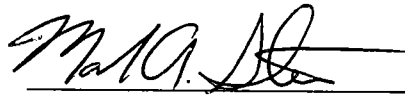
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¹² Indeed, whatever the level of production foregone is from current operations, fish populations have not recovered.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2007, EPA Region 1 served a true copy of its Sur-Reply Brief on the following parties:

1. By Federal Express to Wendy B. Jacobs, Esq., Foley Hoag LLP, counsel for the Petitioner, USGen New England, Inc., at Foley Hoag LLP, 155 Seaport Boulevard, Boston, MA 02210-2600;
2. By regular mail to Robert G. Brown, Assistant General Counsel, Massachusetts DEP, One Winter Street, Boston, MA 02108;
3. By regular mail to Tricia K. Jedele, Special Assistant Attorney General, Rhode Island Attorney General's Office, 150 South Main Street, Providence, RI 02903; and
Patty Fairweather, Executive Counsel, Rhode Island Department of Environmental Management, 235 Promenade Street, Providence, RI 02908;
4. By regular mail to Wendy A. Waller, Attorney, Save the Bay, Narragansett Bay, Inc., 100 Save the Bay Drive, Providence, RI 02903;
5. By regular mail to Joseph L. Callahan, Board of Directors, Taunton River Watershed Alliance, Inc., P.O. Box 1116, Taunton, MA 02780; and
6. By regular mail to Ann Morrill, Vice President, Kickemuit River Council, 90 Dexterdale Road, Providence, RI 02906-1926.
7. By regular mail to Carol Lee Rawn, Esq., counsel for Conservation Law Foundation, at Conservation Law Foundation, 62 Summer Street, Boston, MA 02110-1016.



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