FOLEY
HOAG LLP
ATTORNEYS AT LAW

John M. Stevens
Boston Office
617.832.1159
jstevens@foleyhoag.com

October 16, 2007

BY HAND DELIVERY

Robert W. Varney
Regional Administrator
EPA New England, Region 1
One Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

BY FACSIMILE & U.S. MAIL

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

Re: **In the Matter of Dominion Energy Brayton Point LLC**
Brayton Point Station
Renewal of NPDES Permit No. MA 003654
NPDES Appeal No. 07-01

Dear Mr. Varney and Ms. Durr:

On behalf of Dominion Energy Brayton Point, LLC, the Permittee and Petitioner, I am herewith submitting Petitioner's Motion For Stay Pending Judicial Review and attached Affidavit of J. David Rives and accompanying Certificate of Service.

Thank you for your attention to this matter.

Sincerely,

John M. Stevens

JMS:mlb
Enclosures
cc: Mark A. Stein, Esquire] ***by hand delivery***
Joseph L. Callahan, Esquire] ***by U.S. mail***
Ann Morill, Esquire] ***by U.S. mail***
Linda Murphy, Director] ***by facsimile & U.S. mail***

B3418157.1

Tricia K. Jedele, Esquire	]	***by facsimile & U.S. mail***
Wendy A. Waller, Esquire	]	***by facsimile & U.S. mail***
Robert G. Brown, Esquire	]	***by facsimile & U.S. mail***
Brian Wagner, Esquire	]	***by facsimile & U.S. mail***
Carol Lee Rawn, Esquire	]	***by facsimile & U.S. mail***
Jerry Elmer, Esquire	]	***by facsimile & U.S. mail***

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re: Dominion Energy Brayton Point, LLC (formerly USGen. New England, Inc. Brayton Point Station)	)	**NPDES Appeal No. 07-01**
NPDES Permit No. MA 0003654	)	

MOTION FOR STAY PENDING JUDICIAL REVIEW

Dominion Energy Brayton Point, LLC (the "Petitioner" or "Brayton Point Station") hereby requests that the United States Environmental Protection Agency (the "Agency")[1] stay the force and effect of the contested conditions of National Pollution Discharge Elimination System Permit No. MA0003654 (the "Permit")[2] or stay the effective date of the final permit decision and order pending review of the Agency's decision to issue the Permit by the United States Court of Appeals. The Permit becomes effective November 1, 2007. It is undisputed that the Permit imposes compliance obligations that will, in effect, require Petitioner to rebuild its entire condenser cooling system at a cost of hundreds of millions of dollars and with a variety of energy and environmental side-effects. Absent a stay, those obligations will be in force long before judicial review, which Petitioner is entitled to seek under Section 509(b)(1)(F), reasonably could be completed.

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[1] Brayton Point Station has been advised that the appropriate party to whom to address the motion is likely the Regional Administrator for Region 1 of the Agency ("Region 1"). However, because the law is not entirely clear on this point, Brayton Point Station is submitting this motion to both the Regional Administrator and the Environmental Appeals Board (the "Board").

[2] A copy of the Permit is available at http://www.epa.gov/region1/braytonpoint/pdfs/finalpermit/BraytonPointFinalPermit.pdf.

Under the Federal Rules of Appellate Procedure ("FRAP"), before seeking a stay from the reviewing court, Brayton Point Station must "move first before the agency for a stay pending review of its decision or order." FRAP 18(a)(1). Brayton Point Station's motion for a stay should be granted because (1) the issues the Petitioner has presented to the Board and will present to the Court of Appeals are important and complex, in several instances involving questions of first impression; (2) denial of a stay will require the Petitioner to comply with Permit conditions – on an uncertain, yet-to-be-imposed compliance schedule – that mandate irreversible expenditures and commitments by Brayton Point Station during the pendency of the appeal in an amount estimated at $10.5-11 million; and (3) the issuance of a stay to allow full and deliberate consideration of the important issues presented will not cause harm to the public.

Prior Proceedings

Brayton Point Station filed an application with Region 1 for renewal of its NPDES permit in January 1998, six months before the expiration of its then-existing permit. *In Re Dominion Energy Brayton Point, LLC,* NPDES Appeal No. 03-12, slip op. at 17 (EAB, Feb. 1, 2006) (the "Board Decision of Feb. 2006").[3] No action having been taken on the application, Brayton Point Station supplemented the application with a request for a variance under § 316(a) of the Clean Water Act in September 2001. (*Id.* at 17-18) Three months later, in December 2001, it submitted a demonstration study in support of the requested variance. (*Id.* at 18)

[3] A copy of the Board Decision of Feb. 2006 is available at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Case~Name/9CF85A6AA39DF68C852571080052B146/$File/Dominion.pdf.

Region 1 issued the draft permit on July 22, 2002. (*Id.* at 19) It then opened what was initially a 45-day, and ultimately a 75-day, comment period. (*Id.*) The comment period expired on October 4, 2002. (*Id.*)

On October 6, 2003, almost exactly a year after the close of the comment period, Region 1 issued the final Permit. (*Id.* at 20) Within the 30-day period provided by law, Brayton Point Station filed a petition with the Board for review of the Permit. (*Id.*) Over Region 1's objections, the Board granted review of the petition by order dated February 19, 2004. (*Id.* at 21) The Board established a briefing schedule and heard oral argument from the Petitioner, the Region and several *amici curiae* on September 9, 2004. (*Id.* at 22-24)

The Board issued a 294-page decision on February 1, 2006. (*Id.* at 1) The disposition of the petition by the Board was to remand the Permit to the Region on two substantive and two procedural issues. (*Id.* at 293-94)

On November 30, 2006, almost exactly ten months after the remand by the Board, Region 1 issued its determination on remand, reissuing the Permit without any change in conditions. On January 3, 2007, within the 30-day period allowed by law as enlarged by the extended New Years' holiday, Brayton Point Station filed a petition for review of the Permit, as reissued, with the Board. The Board received briefs in support and in opposition to the Petition through April 21, 2007. On September 27, 2007, the Board denied the Petition.[4]

[4] The Order Denying Review is available at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Case~Name/2AF489C4B3AEE49D852573630072A3D6/$File/Denying...71.pdf.

In a letter dated October 1, 2007, the Regional Administrator notified Brayton Point Station that the conditions of the permit that had been stayed pending the appeal before the Board would become effective on November 1, 2007.[5]

Brayton Point Station has implemented most of the NPDES permit issued in October 2003, with the exception of the permit conditions that have been stayed through the pendency of the appeal to the EAB. In addition, the Station has been operating under the Memorandum of Agreement II (MOAII) issued in April 2007 which limits heat and flow on a monthly and seasonal basis.

Brayton Point Station's Operations and the Permit Conditions

Brayton Point Station, which is located on the north shore of Mt. Hope Bay in Massachusetts near the mouths of the Taunton and Lee Rivers, has been generating power for decades. Like other power stations that commenced operations before enactment of the Clean Water Act, Brayton Point Station withdraws water from the Rivers, uses this water to cool its generating equipment and then discharges the water into the Bay, a process known as once-through or open-cycle cooling.

The Permit conditions create limits that effectively would require Brayton Point Station to convert to closed-cycle cooling, both because of its thermal discharge and its cooling water intake, regulated pursuant to §§ 316(a) and 316(b) of the Clean Water Act. 33 U.S.C. § 1326 (2000). As to the thermal discharge, Region 1 first set a "technology-based" limit under §§ 301(b)(2)(A) and 304(b)(2) using its "best professional judgment" ("BPJ") in the absence of any uniform, nationwide rule. That limit required a retrofit to closed-cycle cooling. EPA's

[5] A copy of the October 1, 2007 letter is attached hereto as Exhibit "A".

determination is unprecedented, as the Agency has never before determined, to the best of the Petitioner's knowledge, either nationally or on a BPJ basis, that closed-cycle cooling is the "best practicable" or the "best available" technology for existing power plants.

The Region then purported to temper the effect of this decision by ruling that the Station was entitled to a § 316(a) variance on the ground that the limit requiring closed-cycle cooling was "more stringent than necessary to assure the protection and propagation of a balanced, indigenous population of fish and shellfish." Nevertheless, Region 1 then established variance-based limits that still required closed-cycle cooling. As to the cooling water intake, Region 1 decided that retrofitting the condenser cooling system was the best technology available for minimizing the environmental impact of the "location, design, construction, and capacity" of the cooling water intake structure.

The cost of retrofitting Brayton Point Station to use closed-cycle cooling would be substantial, requiring hundreds of millions of dollars by any estimate. Although the Region's and Brayton Point Station's estimates of record are both several years out of date, Brayton Point Station's current estimates predict that the cost of conversion to closed-cycle cooling will be substantially greater than previous estimates. Affidavit of J. David Rives (the "Rives Aff.") p.4.[6]

ARGUMENT

An administrative agency may stay the effective date of its action pending judicial review when it "finds that justice so requires." 5 U.S.C. § 705. In deciding whether to grant such a stay, four factors must be balanced: (1) the likelihood that the appeal will succeed on the merits (or, where a stay is sought from the agency responsible for the decision to be stayed, the presence of

[6] A copy of the Rives Aff. is attached hereto as Exhibit "B."

serious and difficult questions of law where the law is somewhat unclear); (2) the degree to which the movant will suffer irreparable harm if the stay is denied; (3) the substantial harm that other parties involved may suffer if the stay is granted; and, (4) whether the public interest is served by granting the stay. *See Special Counsel v. Starrett et al.*, 28 M.S.P.R. 425 (Merit Sys. Protection Bd., July 24, 1985); *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144 (D. Mass. 1998); *In the Matter of Midwest Steel Division, National Steel Corp.*, 3 E.A.D. 307 n.2 (E.A.B. 1990) (denying stay where petitioner had "failed to argue, much less show, that such a stay is in the public interest, necessary to prevent irreparable injury, or otherwise appropriate"). The consideration of these factors is derived from, and consistent with, the decisions of federal courts. *See, e.g., Virginia Petroleum Jobbers Ass'n. v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).[7]

A stay is warranted here because Brayton Point Station can demonstrate that (1) the issues raised are serious and complex, and arise in an area where the law is unclear; (2) Brayton Point Station will be immediately and irreparably harmed, absent a stay; (3) issuance of the stay will not injure the other parties involved; and (4) granting of a stay will serve the public interest.

I. Brayton Point Station's Appeal Will Raise Serious, Complex, and Novel Legal Issues, Thus Satisfying the First Prong of the Balancing Test

Although there is an inherent difficulty in persuading an agency to grant a stay based on the probability that its decision will be overturned on appeal, a stay is nevertheless appropriate here. Brayton Point Station's position is that the Permit is arbitrary, capricious, an abuse of discretion and contrary to law for a number of reasons. However, the Agency need not

[7] Federal courts have applied the same standard in deciding an application under FRAP 18 for a stay of administrative action pending review and an application under FRAP 8 for stay of a district court order pending review. *See, e.g., Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67, 68 (7th Cir. 1983).

acknowledge any merit in the position or any error in its decision in order to stay implementation of the Permit.

A. The Existence of Serious Legal Questions Satisfies the Requirement of Likely Success on the Merits.

Common sense dictates that the moving party need not persuade an agency that its decision is likely to be reversed on appeal. Rather, "with regard to the first prong of the [] test, the movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear." *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144 (D. Mass. 1998) (finding that differing outcomes of two decisions addressing the same regulatory scheme constituted sufficiently serious legal issues to satisfy the threshold requirement for a stay, but as the other factors weighed in favor of denial of a stay, stay was denied). Such a standard also finds support in the requirement of FRAP 18 that motions for stay "must ordinarily be made in the first instance" to the agency that issued the challenged order. Prior recourse to the initial decision maker would hardly be required if the agency could grant such interim relief only on a prediction that it has rendered an erroneous decision.

This standard has been recognized and applied in the numerous cases in which lower courts, in substantially the same position as the Agency is here, have found that parties against whom they have ruled nevertheless presented serious legal issues for appeal warranting a stay. For example, in *Evans v. Buchanan*, 435 F. Supp. 832 (D. Del. 1977), in granting a stay pending a determination by the United States Supreme Court of a petition for a writ of certiorari, the district court stated as follows:

> According to the test accepted by virtually all courts . . . one seeking a stay pending appeal . . . must make "a strong showing that he is likely to succeed on the merits of the appeal." Although this standard is similar to one of the tests for issuance of a

> preliminary injunction, the posture of a case is significantly different when preliminary injunctive relief is sought from when a stay is requested. In the former, the Court has not ruled on the merits of the case and need only make an initial determination of the reasonable probability of the applicant's eventual success. In the latter, the Court has issued its determination, after a full consideration of the merits. The above-quoted standard would seem to require that a district court confess to having erred in its ruling before issuing a stay.
>
> Common sense dictates that a literal reading of the standard would lead most probably to consistent denials of stay motions, despite the immediate threat of substantial irreparable injury to the movant. The almost inescapable conclusion is that the standard cannot mean what its language would indicate.
>
> A more reasonable interpretation can be developed by analyzing the policy underlying its inclusion as a criterion for issuance of a stay. In a case where the movant will suffer irreparable injury in the absence of a stay, consideration of the merits of the movant's appeal permits an evaluation of whether that injury is likely to occur in any event. It seems illogical, however, to require that the court in effect conclude that its original decision in the matter was wrong before a stay can be issued. Rather, a stay may be appropriate in a case where the threat of irreparable injury to the applicant is immediate and substantial, the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear and the interests of the other parties and the public are not harmed substantially.

Id. at 843-44. *See also Exxon Corp. v. Esso Worker's Union, Inc.*, 963 F. Supp. 58, 60 (D. Mass. 1997) ("Courts . . . have not interpreted literally the . . . requirement that the 'stay applicant [make] a strong showing that he is likely to succeed on the merits.' Rather, what has generally been required is that 'the appeal raise[] serious and difficult questions of law in an area where the law is somewhat unclear.'") (internal citations omitted); *Chamber of Commerce v. Reich*, 897 F. Supp. 570, 584-85 (D.D.C. 1995), *rev'd on other grounds*, 74 F.3d 1322 (D.C. Cir. 1996) (granting motion for order staying enforcement of judgment pending review under "serious legal question" standard where questions raised in the case were "sufficiently serious, substantial, and difficult, to make them 'a fair ground for litigation and . . . more deliberative investigation.'")

Thus, "[w]hat is fairly contemplated is that tribunals [and agencies] may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *E.g., Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977) (holding that the district court did not abuse its discretion in staying its permanent injunction, even though the court thought that the plaintiff was unlikely to succeed on the merits). Accordingly, "an order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success." *Id.* at 844; *see also Providence Journal Co. v. Fed'l Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979) (granting stay where "serious legal questions were presented" and stating that where "denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay").

B. <u>The Appeal Will Present Important, Complex Issues Of Law</u>.

The claims that have been advanced by Brayton Point Station and addressed by the Board and that now will be presented on appeal raise serious and difficult questions of law. As stated by the Board itself, "This matter involves a number of important, complex legal issues under [the Clean Water Act] that are of regional, and potentially national, significance." (Board Decision of Feb. 1, 2006 at 7) Many of these issues raise questions of first impression or arise from the basic principle mandating that the citizenry be subject to rules of general application, thus

ensuring that those who are similarly situated will be similarly treated. It is important not only to Brayton Point Station and its customers, but to all customers of electric generators, that these issues relating to both the thermal discharges and the cooling water intakes of power stations receive careful consideration from the courts as well as the Agency.

The rationale underlying the Permit's thermal restrictions raises a number of important legal issues. For example, in upholding the "conservative" thermal limits imposed by Region 1, the Board held that the Region, having determined that the technology-based thermal limit it had derived was more stringent than necessary to assure protection and propagation of the balanced indigenous population or "BIP," was under no obligation to select the least stringent thermal limit capable of protecting the BIP. Thus, although § 316(a) clearly anticipates that dischargers will not be subject to thermal limits "more stringent than necessary" to assure protection of the "BIP," the EAB ruling allowed Region 1 to do just that, and indeed, to set limits essentially the same as those it found to be overly stringent.

There are many other examples, both procedural and substantive. They include, but are not limited to: (1) whether EPA may make a determination that "conservative" thermal limits should be applied in order to assure protection and propagation of a balanced, indigenous population without first defining, in some meaningful quantitative sense, the characteristics and requirements of such a population and the extent to which curtailing thermal discharges will contribute to achievement of those characteristics and requirements; (2) whether a permittee must anticipate and address in its comments every argument and issue that could be raised as the result of EPA's subsequent analysis of information submitted in those comments in order to preserve the issue or argument for appeal; and (3) whether the extent which the Region and the EAB constrained the record in effect denied the Petitioner due process of law.

The Permit's conditions limiting Brayton Point Station's cooling water intake to a level that requires conversion of the condenser cooling system from open- to closed-cycle raise a set of similarly important issues. For example, the Board allowed the Region to completely divorce its site-specific "BPJ" determination from the facts and analyses the Agency simultaneously was developing at the Headquarters level in connection with § 316(b) regulations for existing power plants like Brayton Point Station. Thus, while EPA Headquarters ultimately determined that closed-cycle cooling should not be required as "best technology available" nationally,[8] the Region nevertheless required it for Brayton Point Station.

Equally important, Region 1 justified its decision requiring closed-cycle cooling based on its own novel interpretations of state law. The Board held that this application of "designated uses" in Massachusetts' and Rhode Island's water quality standards was not "clear error" even though such a requirement was not required by Massachusetts' § 401 certification or authorized on the face of either state's standards. Moreover, to the best of Petitioner's knowledge, neither the Region nor the state had ever applied those designated uses in similar circumstances, nor did EPA explain why the level of control imposed was necessary to ensure attainment of the designated uses. Indeed, only after the permit was issued and EAB review nearly concluded did Massachusetts take steps to amend its water quality standards to authorize an imposition of requirements for power plant cooling water intake structures. See 314 Code Mass. Rules § 4.05(3)(b)(2)(d) (2006). Its action is the subject of an action in Massachusetts Superior Court. See *Entergy Nuclear Generation Co. v. Mass. DEP*, No. SUCV 2007-00366 (Suffolk Superior Ct.) (complaint filed January 26, 2007).

[8] Earlier this year, the United States Court of Appeals for the Second Circuit remanded to EPA various parts of the Agency's "Phase II" § 316(b) for existing facilities, including its BTA determination. *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007). EPA then suspended that rule, pending further proceedings. 72 Fed. Reg. 37,107 (July 9, 2007). Petitions for certiorari must be filed by November 2, 2007.

Again, these are just a few examples of the many novel and complex issues likely to be presented on appeal in this case. None of these issues have been resolved by the courts.

II. The Balance Of Equities Favors Granting A Stay.

When important matters are at issue, as they are here, an appellant is entitled to a stay if the equities suggest that the status quo should be preserved pending resolution of the appeal. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d at 844-45. In this case, the balance of the equities tips markedly in favor of a stay. Brayton Point Station and its customers are threatened with great and irreparable harm in the absence of a stay. On the other hand, neither the public interest nor, therefore, the Region or the intervenors, who are charged with protecting the public interest, will be harmed by a stay. As noted above, the Station has been complying with all but the contested portions of the October 2003 permit and has been operating under the April 2007 MOAII, which limits heat and flow on a monthly and seasonal basis.

The potential harm to Brayton Point Station and its customers from denial of a stay is manifest. As the Board has recognized, "The Final Permit challenged here imposes conditions that require a substantial retrofit of the facility at significant cost (up to $120.2 million dollars according to the Region's final estimates), the cost of which will likely affect the rates charged to BPS's customers." (Board Decision of Feb. 2006 at 7) Brayton Point Station's current estimate, which takes into account conditions specific to the Station's constrained site and years of construction escalation, is significantly larger than that amount, into hundreds of millions of dollars. Rives Aff. p.4. Whatever the total, denial of a stay will give the Permit immediate effect and therefore require Brayton Point Station to proceed forthwith with the extensive permitting required for conversion to closed-cycle cooling. As a result Brayton Point Station

will likely have to expend or commit more that $10-11 million for permitting and associated engineering during the pendency of an appeal. Rives Aff. ¶ 5. At this point, the full magnitude is unknown given the uncertainties of the demands the Region will impose on the Station in an administrative order containing a compliance schedule. If the permit limits are overturned on appeal, these substantial expenses will have been incurred for no purpose. Because there is no basis for recovery of these costs by Brayton Point Station or, to the extent they may be passed on to them, its customers, the loss will be irreparable. Moreover, if the appeal is successful, not only Brayton Point Station but also a number of public agencies will have expended substantial amounts of time and other resources addressing complex permitting and engineering issues to no purpose.

On the other side of the balance, the actions of the entities charged with representing the public interest demonstrate that there is no great perceived harm from deferring the commencement of closed-cycle cooling until the Agency's decisions have been reviewed by the Court of Appeals. If the Agency viewed an immediate retrofit of Brayton Point Station to closed-cycle cooling as necessary to prevent irreparable harm, the Region would not have taken four years after the filing of the application to issue a draft Permit; it would not have taken a year after the close of the comment period to issue the Permit; it would not have allowed the appeal of the Permit to the Board to remain under consideration for 18 months; it would not have taken 10 months to address the two substantive issues remanded by the Board; and it would not have taken nine months to rule on the petition for review of the decision on remand. These actions and inaction by the Agency evince a recognition, even on the part of those who maintain that Brayton Point Station's thermal discharge and cooling water intake have a significant effect on aquatic life in Mt. Hope Bay, that many factors affect the health of the Bay and that no single

step, taken alone, can effect a rapid cure. The public interest is best served by careful and deliberate judicial review of the important issues raised by Brayton Point Station, before it and its customers are required to incur substantial expense.

CONCLUSION

For the foregoing reasons, the Agency should grant the motion and stay the Permit pending Brayton Point Station's appeal to the Court of Appeals.

By its attorneys,

John M. Stevens
Elisabeth M. DeLisle
Foley Hoag LLP
155 Seaport Boulevard
Boston, Massachusetts 02210-2600
(617) 832-1000
Attorneys for Petitioner

Dated: October 16, 2007

B3374292.4

EXHIBIT A

10/3/07

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

October 1, 2007

VIA FEDERAL EXPRESS

James K. Martin
Vice President
Dominion
P.O. Box 26532
Richmond VA 23261-6532

Re: Notice of Final Permit Decision
Dominion Energy Brayton Point, LLC (formerly USGen New England, Inc.)
NPDES No. MA0003654

Dear Mr. Martin:

Pursuant to 40 C.F.R. § 124.19(f)(1), this is a notice of the United States Environmental Protection Agency's final permit decision regarding NPDES Permit No. MA0003654 which EPA-Region 1 reissued to Dominion Energy Brayton Point, LLC (formerly USGen New England, Inc.) ("Dominion") on October 6, 2003.

In response to a petition for review of the permit filed on November 5, 2003, by USGen New England, Inc., the U.S. EPA Environmental Appeals Board ("Board") remanded the permit to EPA-Region 1 to address two substantive issues and to carry out two procedural tasks. *See In re Dominion Energy Brayton Point,L.L.C.*, NPDES Appeal No. 03-12, slip op. at 293 (EAB, Feb. 1, 2006), 12 E.A.D. ___. The Board found no clear error with respect to all other issues raised on appeal. *Id.* The Region issued a Determination on Remand on November 30, 2006. Dominion filed a timely petition for review of EPA-Region 1's permit decision. On September 27, 2007, the Board denied Dominion's petition for review of the permit. *See Dominion Energy Brayton Point, LLC (formerly USGen New England, Inc.)*, NPDES Appeal No. 07-01 (EAB, September 27, 2007). Therefore, the Region has determined and hereby notifies you that the conditions of the permit that had been stayed by the pending appeals will take effect beginning November 1, 2007. All other provisions of the permit became effective on May 26, 2004, as provided in our Notice of Uncontested and Severable Conditions dated April 26, 2004.

EPA expects to issue an administrative order that will contain a reasonable compliance schedule to complete the construction upgrade necessary to attain the final permit limits. EPA

expects to discuss the content of such an order with Dominion in the near future. Should you wish to discuss this or have any questions, please contact Mark Stein at (617) 918-1077.

Sincerely,

Robert W. Varney
Regional Administrator

cc:
Cathy Taylor, Director, Electric Environmental Services, Dominion
Barry Ketschke, Station Manager, Brayton Point Station, Dominion
Wendy B. Jacobs, Esq., Foley Hoag LLP
John M. Stevens, Esq., Foley Hoag LLP
Laurie Burt, Commissioner, MassDEP
W. Michael Sullivan, Director, RI DEM
Phil Weinberg, Deputy Commissioner, MassDEP
David Johnston, Deputy Director, SE Region, MassDEP
Robert G. Brown, Attorney, MassDEP
Eric Worrall, Special Assistant to the Commissioner, MassDEP
Andrew Goldberg, Assistant Attorney General, Mass. Attorney General's Office
Patty Allison Fairweather, Executive Counsel, RI DEM
Angelo S. Liberti, P.E., Chief, Surface Water Protection, RI DEM
Tricia K. Jedele, Special Assistant Attorney General, RI Attorney General's Office
Terence Tierney, Assistant Attorney General, RI Attorney General's Office
Michael Rubin, Assistant Attorney General, RI Attorney General's Office
Curt Spalding, Executive Director, Save the Bay
John Torgan, Baykeeper, Save the Bay
Wendy A. Waller, Counsel, Save the Bay
Peter Shelley, Director, Mass. Advocacy Center, Conservation Law Foundation

EXHIBIT B

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 Appeal No. 07-01**
NPDES Permit No. MA 0003654	)	

AFFIDAVIT OF J. DAVID RIVES

J. David Rives deposes and says as follows:

1. I am Senior Vice President of Fossil and Hydro of Dominion Resources, Inc. ("Dominion."). I make this affidavit in support of the motion of Dominion's corporate affiliate Petitioner Dominion Energy Brayton Point Station (the "Petitioner" or "Brayton Point Station") to stay the Board's decision approving issuance of National Pollution Discharge Elimination System Permit No. MA0003654 (the "Permit") to Brayton Point Station. In particular, Brayton Point Station seeks a stay of the following permit conditions: (1) Requirements that once-through cooling be limited to 122 hours annually, with a complete prohibition on once-through cooling between the first day of February and the last day of March, which would require that the Station be retrofitted with closed-cycle cooling (Permit Sections 1.A.4.a, c & d; 1.A.11.d), (2) the Requirement that the Station's annual discharge of heated water be limited to 1.7 tBTUs (Permit Sections 1.A.4.a & b), (3) Certain monitoring requirements (Permit Sections 1.A.5.a, 1.A.6.a, 1.A.7.a & a.A.26.1.iii) and (4) related limits on copper (Permit Section 1.A.4.a),

temperature rise (Permit Section 1.A.4.a) and screen wash use (Permit Section 1.A.11.d). These conditions and limits are referred to collectively as "conversion to closed cycle cooling."

2. My duties as Senior Vice President of Dominion include reviewing for capital projects, such as potential conversion to closed-cycle cooling, at Brayton Point Station. I have reviewed the conceptual schedules and estimates relating to conversion of Brayton Point Station to closed-cycle cooling, which have been prepared in accordance with the Petitioner's standard business practices. In my opinion, these schedules and estimates are the best information, currently available, as to the time and money required to develop preliminary designs and obtain permits for the conversion of Brayton Point Station to closed-cycle cooling.

3. The start point for any schedule for conversion of Brayton Point Station to closed-cycle cooling is permitting and associated engineering, which is the focus of this Affidavit. Because of the location of Brayton Point Station on Mt. Hope Bay at the confluence of the Taunton and Lee Rivers, a number of permits, approvals and authorizations from a number of public bodies would be required. Among the permits, approvals and authorizations that would or could be required are the following: (1) Obtaining coverage under the Construction General Permit for Stormwater, following analysis by the Massachusetts Historic Commission and Massachusetts Fish & Wildlife, (2) Approval of a Remedial Action Plan by the Massachusetts Department of Environmental Protection ("DEP"), together with development of a Health and Safety Plan and a Soil Management Plan, because the proposed location of the cooling towers is within a regulated waste clean-up site, (3) Obtaining coverage under the Remedial General Permit, including characterization of the groundwater and design and installation of a groundwater treatment system, if dewatering of excavations is necessary, (4) Approval by the local Conservation Commission and DEP of a Notice of Intent to carry out construction within

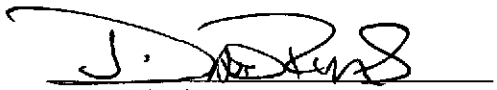
200 feet of a riverfront under the Wetland and Riverfront Protection Acts, (5) Approval by the Army Corps of Engineers of any modification of the existing discharge canal, (6) Obtaining state air permits, including modeling noise and particulate drift attributable to mechanical draft cooling towers to determine which permits are required, (7) Modeling icing and potential for fogging attributable to cooling towers on nearby roadways and bridges for purposes of vehicle safety, (7) Approval by DEP of relocation of the Station's wastewater treatment system from its current location, where cooling towers would have to be constructed, (8) Approvals for storage tanks, such as those required for diesel oil necessary to fuel a generator during construction and (9) Various approvals by local planning boards. Although the permitting bodies will control the pace of permitting, Brayton Point Station projects completion of all permitting within 24 months.

5. If Brayton Point Station is to have any possibility of completing permitting within 24 months, during the time when an appeal of the Board's decision would be pending, it would have to expend or commit an estimated amount of $10,500,000 to $11,000,000 for permitting and associated conceptual engineering, proposal development and evaluation and Original Equipment Manufacturer engineering. That total may be broken down as follows: Project Management; Legal, Engineering & Consulting Services directly associated with permitting; Conceptual Engineering (cooling towers); Conceptual Engineering (waste water treatment plant) and Conceptual Engineering (soil remediation).

6. If Brayton Point Station prevails in its appeal of the Board's decision and if it is not granted a stay of the decision pending that appeal, the Petitioner will suffer an irrevocable loss of the funds it would have to expend and commit for permitting and associated engineering while the appeal is pending.

The cost estimates and schedules prepared in or about 2001 are now entirely outdated. Taking into account escalation and Allowance for Use of Funds During Construction, the estimated cost of conversion of Brayton Point Station to closed-cycle cooling has grown substantially larger. The time required for the conversion has also increased significantly due to (1) the additional lead time needed to have major equipment delivered by manufacturers due to the high volume of projects currently planned or in progress globally and (2) the availability of design and construction labor personnel. Brayton Point Station has not yet received from Region 1 the schedule the Region would propose for the conversion. However, the Petitioner is confident that, whatever end date the Region may propose, it will require Brayton Point Station to begin forthwith and to proceed as expeditiously as possible.

Signed under the pains and penalties of perjury this 10th day of October 2007.



J. David Rives

BEFORE THE
UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In re: Dominion Energy Brayton Point, LLC (formerly USGen. New England, Inc. Brayton Point Station)	)	**NPDES Appeal No. 07-01**
NPDES Permit No. MA 0003654	)	

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the Motion For Stay Pending Judicial Review and attached Affidavit of J. David Rives by hand delivering a copy thereof to:

Mark A. Stein, Esquire
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 1
One Congress Street
Boston, MA 02114-2023

and by facsimile and mailing a copy thereof, postage prepaid, to the following:

Linda Murphy, Director
Office of Ecosystem Protection
U.S. EPA Region I
One Congress Street
Boston, MA 02114-2023

Tricia K. Jedele, Esquire
Special Asst. Attorney General
Dept. of Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

Wendy A. Waller, Esquire
Save The Bay
100 Save the Bay Drive
Providence, RI 02905

Robert G. Brown, Esquire
Dept. of Environmental Protection
One Winter Street - 3rd floor
Boston, MA 02108

Brian Wagner, Esquire
Deputy Legal Counsel
RI Dept. of Environmental Management
235 Promenade Street
Providence, RI 02903

Carol Lee Rawn, Esquire
CLF Massachusetts
62 Summer Street
Boston, MA 02110-1016

Jerry Elmer, Esquire
CLF - Rhode Island
55 Dorrance Street
Providence, RI 02903

and by mailing a copy thereof, postage prepaid, to the following:

Joseph L. Callahan
Taunton River Watershed Alliance, Inc.
P.O. Box 1116
Taunton, MA 02780

Ann Morill
Kickemuit River Council
90 Dexterdale Road
Providence, RI 02906

John M. Stevens

Dated: October 16, 20007