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

REGION 1 MOTION TO STRIKE AND OPPOSITION TO PETITIONER'S MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

Respectfully submitted by EPA Region 1,

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On January 3, 2007, Dominion Brayton Point, LLC (the "Petitioner" or "Dominion"), filed a Motion to Supplement the Administrative Record (the "Motion to Supplement") in conjunction with its "Petition for Review of November 30, 2006 Determination on Remand Issued by Region 1 in Relation to NPDES Permit for Brayton Point Station" (the "Petition"). By filing the Petition, Dominion appeals the "Determination on Remand from the EPA Environmental Appeals Board, Brayton Point Station, NPDES Permit No. MA0003654" (the "Determination on Remand" or "DOR"), issued by the United States Environmental Protection Agency's ("EPA") Region 1 office ("Region 1" or the "Region") on November 30, 2006. Ex. R2. Region 1 issued the DOR in response to the EPA Environmental Appeals Board's (the "Board") decision in *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) (the "Remand Order"). Region 1 issued NPDES Permit No. MA0003654 on October 6, 2003 (the "Permit").

INTRODUCTION

Dominion argues in the Petition that Region 1 committed clear procedural error of law by not reopening the record for additional public comment in connection with its issuance of the Determination on Remand. Petition at 18-20. Petitioner further argues that if the Board decides not to remand the Permit for additional public comment, it should "treat Petitioner's evidentiary submissions as part of the administrative record for this case." Petition at 20-21. Petitioner presents these same issues and arguments in its Motion to Supplement. Petitioner's "evidentiary submissions" include (a) Petitioner's Exhibits B, C, D and E, which are various technical documents not currently in the record that Petitioner argues are relevant to pertinent issues, and (b) Petitioner's Exhibits A and F, which provide Dominion's technical consultants' arguments in response to the Determination on Remand. Exhibits A and F also present new data not currently part of the record, as well as arguments based on these data.

Attached to the Petition, Petitioner also submits a "Table" of additional technical and legal arguments. *See id.* at Table 1. Table 1 presents a variety of arguments, some of which are based on the Exhibits, and some of which are based on, and include long quotations from, still other documents that are also not in the administrative record. Petitioner presents no specific arguments why the additional new materials in Table 1, or arguments related to them, should be considered by the Board given that they are outside the administrative record.

Region 1 responds to the above matters in this Motion to Strike and Opposition to the Motion to Supplement and intends these arguments to be incorporated by reference into the Region's Response to the Petition for Review (the "Response"). Region 1 demonstrates below (I) that its determination not to reopen the record for additional public comment was a reasonable

exercise of discretion, (ii) that Petitioner's Motion to Supplement should be denied, (iii) that Petitioner's evidentiary submissions should not be treated as part of the administrative record and, instead, that they and arguments related to them should be stricken from the record in this appeal; and (iv) that other new materials outside the administrative record and referred to in Table 1, and arguments related to these materials, should also be stricken.

I. Region 1's Decision Not to Reopen the Record for Additional Public Comment on Remand was a Reasonable Exercise of Discretion

The Board's Remand Order remanded two substantive issues to the Region for further consideration, *Dominion* at 293, and noted that the Region might have to reopen the record for additional public comment under 40 C.F.R. § 124.14. *Dominion* at 135, 288, 294. After addressing the issues remanded by the Board, the Region exercised the discretion afforded by 40 C.F.R. § 124.14(b) to determine that reopening the comment period was not necessary for either issue. Ex. R2 (DOR) at 30-32, 59-61. Petitioner's argument that this constitutes procedural error should be rejected.

A. Legal Background

EPA regulations at 40 C.F.R. § 124.14(b) (emphasis supplied) provide that "if any data[,] information[,] or arguments submitted during the public comment period . . . appear to raise substantial new questions concerning a permit, the Regional Administrator *may* . . . reopen or extend the comment period."[1] A Region's decision not to reopen the comment period under 40 C.F.R. § 124.14(b) is subject to review under an "abuse of discretion" standard and the Board has

[1] Region 1 and Dominion agree that 40 C.F.R. § 124.14(b) is the governing regulation. *See* Petition at 19 (citing § 124.14(b) as "the relevant regulations").

noted that a Region has "substantial discretion" in this regard.[2] *In re Chelalis Generating Station*, PSD Appeal No. 01-06, slip op. at 32-33 (EAB, Aug. 20, 2001) (Order Denying Review). *See also In re Metcalf Energy Center,* PSD Appeal Nos. 01-07 & 01-08, slip op. at 27-30 (EAB, Aug. 10, 2001) (Order Denying Review). The Board's Remand Order summarized the legal framework surrounding 40 C.F.R. § 124.14(b) as follows:

> [t]he critical elements of this regulatory provision are that new questions must be 'substantial' and that the Regional Administrator 'may' take action.' *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 585 (EAB 1998), *rev. denied sub nom. Penn Fuel Gas, Inc. v. EPA,* 185 F.3d 862 (3d Cir. 1999); *accord In re Ash Grove Cement Co.*, 7 E.A.D. 387, 431 (EAB 1997). Thus, based on the language of this regulation, the Board has long acknowledged that the decision to reopen the public comment period is largely discretionary." *NE Hub,* 7 E.A.D. at 585; *Amoco Oil.*, 4 E.A.D. at 980; *see also Old Dominion,* 3 E.A.D. at 797. Furthermore, where the Agency adds new information to the record in response to comments, "the appellate review process affords [petitioner] the opportunity to question the validity of the material in the administrative record upon which the Agency relies in issuing a permit." *Caribe,* 8 E.A.D. at 705 n.19 (EAB 2000); *accord NE Hub,* 7 E.A.D. at 587 n. 14; *Ash Grove,* 7 E.A.D. at 431.

Dominion at 278. In addition, the Board has stated that its review under § 124.14(b) will be "deferential." *NE Hub,* 7 E.A.D. at 585.

While 40 C.F.R. § 124.14(b) refers to reopening a public comment period based on new information submitted during the comment period, it has also been applied to the analogous situation of a remand proceeding, where new information may also be added to the record. *See NE Hub Partners*, 7 E.A.D. at 584-86 (applying § 124.14(b) to determine that public comment period did not have to be reopened on remand). Therefore, to warrant a reopening of the

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[2] Dominion concedes that the Region's "decision whether to reopen the record for public comment is to some extent discretionary." Petition at 19.

comment period, the questions raised by the new information must be both new (*i.e.*, not an issue already evident in the permit proceeding) and substantial (*i.e.*, have a material effect on the permit result). Moreover, even if a question is new and substantial, the Region still has discretion as to whether to reopen the comment period.

Many considerations may inform the Region's exercise of this discretion, including whether permit conditions have been changed, whether the new information or new permit conditions were developed in response to comments received during prior proceedings for the permit, whether the record adequately explains the agency's reasoning so that a dissatisfied party can develop a permit appeal, and the significance of adding delay to the particular permit proceeding. *See, e.g., Chelalis,* slip op. at 33, 35-36; *Metcalf Energy*, slip op. at 29; *NE Hub*, 7 E.A.D. at 587, n. 14; *In the Matter of Old Dominion Elec. Co.*, 3 E.A.D. 779, 797-98 (Adm'r 1992); *In the Matter of Thermalkem, Inc., Rock Hill, South Carolina,* 3 E.A.D. 355, 357-58 (Adm'r 1990). It bears emphasis that in responding to comments or addressing issues presented on remand, a Region may generate new information and analysis, may add new materials to the administrative record, and may even change permit conditions, without necessarily triggering a need to reopen the public comment period under 40 C.F.R. § 124.14(b). *See* 40 C.F.R. §§ 124.17(b) (in responding to comments, new materials may be added to administrative record for final permit) and 124.18(b)(4). *See also Dominion* at 277-78 (citing numerous cases); *NE Hub*, 7 E.A.D. at 584-86 (reopening public comment period not required on remand).[3] Thus, for

[3] Neither the EAB nor the courts have construed applicable law to create a disincentive to developing improved analyses or changed permit conditions after a comment period or a remand by necessitating additional rounds of public comment in every case in which new information is added to the record. *See, e.g., Old Dominion*, 3 E.A.D. at 797. Otherwise, the public comment process might never end and necessary agency actions might never take place. *See Rybachek v. EPA*, 904 F.2d 1276, 1287 (9th Cir. 1990); *BASF Wyandotte Corp., et al., v. Costle*, 598 F.2d 637, 644 - 47 (1st Cir. 1979).

example, in the Remand Order, the Board concluded that reopening the record to seek additional public comment was not necessary where revised economic benefits analyses included in the Region's response to comments addressed comments on an issue already in the permit proceeding, led to similar results, and did not change Region 1's ultimate determination regarding permit conditions. *Dominion* at 279 (citations omitted).

Petitioner cites three cases, *In the Matter of GSX Services of South Carolina, Inc.*, 4 E.A.D. 451, 465 (EAB 1992); *In re Hawaii Electric Light Co., Inc.,* 8 E.A.D. 66, 102-03 (EAB 1992); and *In re Knauf Fiber Glass*, 8 E.A.D. 121, 175-76 (EAB 1999), for the propositions that reopening a public comment period may be necessary where new information raises substantial new questions, and that it is important to make the analyses that a permit rests upon available for public review. Yet, regardless of these general propositions, these cases do not establish that the comment period should have been reopened in the instant case under § 124.14(b).

In *GSX*, the Region added important facility location standards to the final permit that had not been included in the draft permit. 4 E.A.D. at 465. In the present matter, the permit provisions have not changed and have previously been subjected to public review and comment. In *Hawaii Electric*, the state permitting agency relied upon new data not identified to the public or subjected to public review and comment despite the fact that the applicable Clean Air Act statutory and regulatory provisions specifically contemplated that the data in question would be subject to public review and comment. 8 E.A.D. at 102. This contrasts with the instant case, in which no new data is at issue and whether the comment period should be reopened is governed by the discretionary text of § 124.14(b).

Knauf Fiber Glass is also inapposite. In that case, the state failed to respond to specific

comments presenting information to indicate that the proposed location for a new facility was a low income community subject to "environmental justice" guidelines that would be violated if the project went forward. 8 E.A.D. at 174. Therefore, the Board concluded that, along with another remanded issue, the environmental justice issue should be addressed on remand and the state's conclusions explained and subjected to public review and comment. *Id.* at 175. By contrast, in the instant case, the Board did not mandate that additional public comment was necessary. Moreover, unlike the petitioner in *Knauf*, Dominion did not provide specific comments in favor of a particular temporal threshold to which the Region failed to respond. Instead, Petitioner only argued that the rationale provided by the Region for the five-day threshold was inadequate. The Region has cured this problem on remand. Thus, the instant appeal does not have the problem of the permit record containing specific countervailing information on a key issue that the permit issuer failed to address in the permit record.

B. Region 1 Did Not Abuse Its Discretion in Deciding Not to Reopen the Record for Additional Public Comment On the Closed-Cycle Cooling Noise Issue

With regard to the closed-cycle cooling noise issue, the Remand Order dictated that:

> [b]ecause of the potential significance of the noise impacts analysis on the determination of the appropriate BTA for BPS, and because we cannot determine whether Petitioner's concerns about the NIA are legitimate given the current state of the record, we conclude that the Final Permit must be remanded to the Region to supplement its response to comments with a rationale that addresses Petitioner's concerns raised on appeal regarding the NIA or to modify the permit requirements , as appropriate. . . . If the Region modifies the permit requirements, the Region may have to reopen the record for additional public comment in accordance with 40 C.F.R. § 124.14.

Dominion at 288 (citations omitted). On remand, the Region exercised its discretion to

determine that it need not reopen the record for additional public comment under 40 C.F.R. § 124.14 for the following reasons:

- the Region's analysis responded to issues raised by Petitioner and the EAB in the permit appeal proceeding and, thus, as stated by the Board, was in the nature of a supplement to the Region's responses to comments, *see Dominion* at 288;
- the Region's analysis did not raise new questions, but instead addressed the same questions raised and discussed previously in the record;
- the Region's analysis did not involve the collection of new technical data, but rather only reassessed existing data; and
- the Region decided that no changes to its earlier BTA determination or the Permit's intake limits would be necessary or appropriate.

Ex. R2 (DOR) at 59-61.

The Region also considered that on February 17, 2006, just a few weeks after the Board issued the Remand Order, Dominion sent a letter requesting that the comment period be reopened, Ex. R16 (AR 4023), but decided in the Determination on Remand to deny this request.[4] Ex. R2 (DOR) at 60. As grounds for its request, Dominion's letter stated only that "the EAB concluded that the record is inadequate" on the noise issue and that the issue was important to the final permit. Ex. R16. The Region received no other submissions from Dominion related to the issues before the Region on remand from the Board.

In the DOR, the Region explained that it is not required to reopen the comment period on remand by either 40 C.F.R. § 124.14(b) or the Board's Remand Order, and the Region explained the reasons that it determined that the comment period did not need to be reopened in this case.

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[4] On April 3, 2006, Region 1 replied to Dominion with a letter stating that the "Region has yet to make any decisions about the remanded issues, including whether or not to re-open the record for additional public comment," but also indicating that the company's request was noted and would be taken into account in the Region's decision-making. Ex. R17 (AR 4024). Therefore, Dominion's request was considered in development of the Determination on Remand.

The Region noted that while the Board had found inadequacies in the record, the Region concluded that its decision on remand remedied the deficiencies and did not raise substantial new questions. Ex. R2 (DOR) at 60. The Region also noted that Dominion's letter did not identify any substantial new questions and that merely reiterating the general reasons that the Board had remanded the Permit did not establish sufficient justification to reopen the comment period. *Id.* This conclusion is clearly supported by the Board's Remand Order, which despite having made findings that the record would need to be supplemented, only directed that, "[i]f the Region modifies the permit requirements, the Region may have to reopen the record for additional public comment in accordance with 40 C.F.R. § 124.14." *Dominion* at 288. Finally, Region 1 explained that it had also considered "the long delay thus far in putting the new BPS NPDES Permit into effect" and concluded that the additional time needed to hold another public comment period and respond to comments counseled against the Region reopening the proceeding for additional public comment. Ex. R2 (DOR) at 60. *See also Old Dominion Electric*, 3 E.A.D. at 797-98 (delay in permit issuance is an appropriate consideration in deciding not to reopen comment period).

The Petition for Review presents *no argument* effectively challenging the Region's analysis or conclusions on this issue. Petitioner's Motion to Supplement, at 5 (item 7), argues only that "the Determination on Remand contained new information and additional analyses related to EPA's Noise Levels document and referenced a number of sources that were added to the administrative record,"[5] and that the present appeal provides Petitioner the first opportunity to

[5] Petitioner is referring here to a document entitled, "Information On Levels Of Environmental Noise Requisite To Protect Public Health And Welfare With An Adequate Margin Of Safety" (EPA 550/9-74-004), that was issued in March 1974 by EPA's then-extant Office of Noise Abatement and Control (the "EPA Noise Levels

submit their views on this substantial new information. This argument fails to identify any substantial new question raised by the Region's Determination on Remand with regard to the noise issues.

The Region's Response to the Petition, *see* Response at § VII.A.2, makes clear that the EPA Noise Levels Information Document, Ex. R13, raises neither substantial nor new questions. The issues it raises are not substantial because they have no effect on the Permit's limits. The key issue here was consideration of the state's noise requirements, not the EPA Noise Levels Information Document. *See Dominion* at 287-88; Ex. R2 (DOR) at 43-56; Ex. R12 (Addendum to NIA) at 2-11. The latter does not set regulatory requirements, goals or other types of standards, but merely identifies various noise levels for informational purposes. *See* R12 (Addendum to NIA) at 9; Ex. R13 at Foreword-2, 4, 7, 8. *See also* Ex. R14 at I, 24, 25. Thus, while Region 1 reasonably considered the EPA Information Document and concluded that sound levels from closed-cycle cooling would not exceed the pertinent level from that document, Ex. R2 (DOR) at 56-57; Ex. R12 (Addendum to NIA) at 9, even if the level had been exceeded, the Region's determination that the analysis on remand did not raise substantial new questions would not have changed, given that Region concluded that the state regulations would likely be satisfied and that the power plant with closed-cycle cooling would only cause small changes in noise levels at the receptor sites and would produce a steady sound without problematic pure tones. *See id.* at 9, n. 10, 11; Ex. R2 (DOR) at 54-57.

In addition, just as the Region demonstrates in its Response to the Petition that the issues raised by Dominion related to the EPA Information Document have not been preserved for

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Information Document" or the "EPA Information Document"). Ex. R13 (AR 4001).

review because they could have been raised earlier, these issues do not raise substantial *new* questions under § 124.14(b) because the issues are not new. Region 1 has repeatedly indicated since the Draft Permit that there are no federal noise requirements governing the issues here. *See* Ex. 4 (DPDD) at 7-43; Ex. 2 (RTC) at IV-84; EPA Region 1 Response to Petition for Review (Dec. 24, 2003) at 59, 112 and Response to Table 2, items 54 and 89. Furthermore, Petitioner itself pointed to the EPA Information Document in its comments on the Draft Permit, Ex. 33, Vol. II, Tab 13 at 3 (TRC Report, Oct. 3, 2002) (referring to "EPA guidance")), and Region 1 discussed it in its Responses to Comments.[6] Ex. 2 (RTC Vol. II), App. L at 3. In addition, the Region's analysis on remand also did not involve the collection of new data; it was only a new analysis of existing data. Clearly, the Region's Determination on Remand does not identify any substantial new questions related to the EPA Information Document.

Additional public comment also is not necessary because of the mere fact that Petitioner did not previously have an opportunity to comment on the Region's analysis on remand. This is always the result when new analysis is added in response to comments or on remand and the comment period is not reopened for additional comment. Yet, as discussed above, reopening the comment period is not required in all cases when new information is added to the record by the permitting agency. A party dissatisfied with the agency's action has the recourse of a permit appeal. *See NE Hub*, 7 E.A.D. at 587, n. 14 (where Region used the remand period to "prepare a full and accurate response to comments and reference[] supplemental materials" relevant to the

[6] While the Region did for the first time on remand physically place a copy of the EPA Noise Levels Document, and a related summary thereof, in the administrative record, this material was already part of the administrative record under 40 C.F.R. § 124.18(e) because it was cited in the Responses to Comments, Ex. 2 (RTC Vol. II), App. L at 3, and it is a generally available reference document. *See also* 40 C.F.R. § 124.17(b).

issue, dissatisfied parties' opportunity to express disagreement with the Region "is not through a reopened public comment period, but by way of an appeal to the Board").

Finally, the Region's Determination on Remand demonstrates a reasonable exercise of discretion on the question of additional public comment. Dominion plainly has not shown any abuse of discretion by the Region in deciding not to reopen the public comment period on the noise issue. Petitioner's Motion to Supplement on this point should be denied.

C. Region 1 Did Not Abuse Its Discretion in Deciding Not to Reopen the Record for Additional Public Comment Regarding the Five-Day Critical Temperature Threshold Issue

With regard to the 5-day critical temperature exceedance threshold issue, the Board's Remand Order held that the Region did not adequately explain its selection of the five-day threshold in either the DPDD or the RTC. *Dominion* at 134. As a result, the Board directed as follows (in relevant part):

> We are therefore remanding the Permit to the Region to provide a rational explanation for its selection of five days. . . . The Region should supplement the record as necessary during the remand process. Alternatively, the Region may decide to modify this value. If so, the Region must provide a sufficient explanation for the new value. As necessary, the Region may need to reopen the record for additional public comment in relation to the new material in accordance with 40 C.F.R. § 124.14.

Id. at 135. On remand, the Region exercised its discretion to conclude that reopening the record for additional public comment was not necessary under 40 C.F.R. § 124.14(b). Ex. R2 (DOR) at 30-32. Region 1 explained as follows:

- it had neither modified the permit limits nor selected a different temporal threshold for critical temperature exceedances;
- its analysis did not involve substantial new questions; instead, it re-evaluated questions

already raised in the permit proceeding – namely, what should the temporal threshold be and why;

- its analysis on remand involved the reconsideration of existing data, rather than the collection of new data;[7]

- its analysis on remand was designed to consider relevant issues in response to comments regarding the five-day threshold that were posed by Petitioner in its original comments on the Draft Permit, *see* Ex. 2 (RTC) at III-29, III-57, and its appeal, and that were later echoed by the Board in the Remand Order, *Dominion* at 133, and the analysis, therefore, was in the nature of a supplement to its responses to comments.

Ex. R2 (DOR) at 30-32.

In reaching its decision, Region 1 also again considered Dominion's February 17, 2006, letter requesting that the Region re-open the record for additional public comment on the five-day threshold issue "[b]ecause the EAB concluded that the record is inadequate on [this issue] . . . and because of the importance of . . . [the issue] to the final permit." Ex. R16. *See also* Ex. R17 (Region's April 3, 2006, letter reply to Dominion). The Region decided, however, to deny the request. Ex. R2 (DOR) at 31-32. While acknowledging that the Board had found inadequacies in the record, the Region concluded that the Determination on Remand cures them. *Id.* The Region also acknowledged that the five-day threshold was important for the derivation of the Permit's summer thermal discharge limits, but pointed out that neither its reconsideration of the value nor Dominion's letter identified any substantial new questions. *Id.* Region 1 also considered the long delay thus far in putting the new BPS NPDES Permit into effect and concluded that the additional time needed to hold another public comment period and respond to

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[7] While noting that the remand determination was focused on the five-day threshold issue, the Region did consider trawl data submitted by the company in its annual monitoring reports since the Remand Order – such reports are required by the facility's NPDES permit – and summarized relevant findings in a footnote in the background section of the Determination on Remand. Ex. R2 at 12, n. 12. The company's trawl data referred to by the Region indicated that fish abundance levels for 2005 *remained* near historically low levels, which cannot be considered to create a substantial new question.

comments counseled against the Region reopening the proceeding for additional public comment. Ex. R2 (DOR) at 31. *See Old Dominion Electric*, 3 E.A.D. at 797-98 (delay in permit issuance is an appropriate consideration in deciding not to reopen comment period).

Dominion argues that the Determination on Remand raises substantial new questions because although the Region stated in its July 8, 2004, brief to the Board that it was setting thermal discharge limits to prevent juvenile winter flounder avoidance of important nursery habitat, the Region's Determination on Remand relies "almost exclusively" on scientific literature related to the effect of water temperature on winter flounder growth rates. Petition at 19 (citing Region 1 Brief of July 8, 2004 at 19). Petitioner argues that this is not "merely a refinement or re-articulation" of the Region's analysis but is, instead, a "substantial change" requiring a reopening of the comment period. *Id.*

Petitioner's argument is off target. Region 1's analysis on remand does not raise substantial new questions. The question on remand has been at issue since the Draft Permit: how many days of critical temperature exceedance can be allowed by the thermal discharge limits designed for the Permit and still assure the protection and propagation of the BIP. This question has been obviously on the table since the Draft Permit because selection of this time period was one of the three elements in the formula from which the Permit's limits were derived. *See* Ex. 4 (DPDD) at 6-38 to 6-39, 6-56; Ex. 2 (RTC) at III-30.

Petitioner also mis-characterizes both past and present facts. It is neither true that the Region relied entirely on avoidance in prior analyses, nor true that the Region now relies "almost exclusively" on growth effects. Throughout the development of the Permit's limits, the Region has considered avoidance, growth inhibition and other adverse thermal effects. During

development of the Permit, the Region consistently explained that while it was setting the summer discharge limits principally to prevent avoidance of nursery habitat by juvenile winter flounder – and therefore had selected 24°C as the critical temperature – it had also considered other effects, including behavioral changes and other sublethal effects caused at even lower temperatures. Ex. 4 (DPDD) at 6-27, 6-34 to 6-38, 6-44 to 6-45, 6-54 to 6-57 (considering sublethal effects, such as avoidance and cessation of feeding, trophic effects, mortality, and other effects); Ex. 2 (RTC) at III-11 (considering other adverse effects such as reduced feeding and forced burrowing which may, in turn, result in reduced growth and other harmful effects)[8]; III-13, III-28, III-65.[9] Indeed, in the DPDD, the Region explained that the Agency's 316(a) guidance makes inhibiting fish growth one of the "decision criteria" (along with forced avoidance of habitat) for determining whether a § 316(a) variance request should be denied because the discharge will cause appreciable harm to the receiving water's balanced indigenous population of fish, shellfish and wildlife (the "BIP"). *See* Ex. 4 (DPDD) at 6-20. Thus, effects other than avoidance have always been a consideration.

The Region also has not focused "almost exclusively" on growth effects on remand. In the Determination on Remand, Region 1 explained that:

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[8] As the Region explained in the Determination on Remand, "activities that disrupt normal feeding and activity levels (such as decreased feeding, excessive activity levels, burrowing in cooler sediments or engaging in other avoidance behavior) will detract from the quantity of energy directed to growth. If these activities are sustained for an extended period, they will reduce growth rates and contribute to the overall predation mortality rate." Ex. R2 at 18.

[9] Contrary to Petitioner's suggestion, supported by a single cite to page 19 of the Region's July 2004 Brief, the Region's prior briefing to the EAB in this appeal also explained that while the Region focused primarily on avoidance in setting the summer limits, it also considered other sublethal effects in setting the permit limits. *See* EPA Region 1 Brief in Response to Briefs of USGenNE and UWAG in Support of USGenNE's NPDES Permit Appeal (July 8, 2004), at 18, n. 25 and n. 29; EPA Region 1 Response to Petition for Review (Dec. 24, 2003) at 14, 78, 137-38.

> [a]s explained above, in conducting its 316(a) variance analysis, Region 1 opted to focus on avoidance temperatures rather than temperatures designed specifically to reduce adverse effects on growth. The Region concluded that avoidance effects more clearly and directly indicated a violation of CWA § 316(a) in this case. Still, it is abundantly clear that if the 24°C critical avoidance temperature is exceeded for seven days in a month, and those seven days would be consecutive, then the weekly average temperature for that week would substantially exceed the Gold Book's suggested value of 20°C for avoiding excessive adverse effects on growth. Therefore, the Region decided that an exceedance frequency threshold of seven days above the critical temperature of 24°C would not provide reasonable assurance of the protection and propagation of the BIP.

Ex. R2 (DOR) at 27. *See also id.* at 28-29. Thus, Region 1 has continued to focus primarily on avoidance effects in setting the permit's thermal discharge limits, while also considering mortality and other sublethal effects, such as growth inhibition. Ex. R2 (DOR) at 16, 18, 19, 22-30. The Region has refined its analysis to make clear that more lenient thermal discharge limits based on a temporal threshold allowing seven or more days of critical temperature exceedance would be unacceptable not only because of avoidance effects, but also because they would result in extensive exposure to excessive heat resulting in significant adverse growth effects unacceptable under CWA § 316(a). *Id.* at 27-30. Put differently, avoidance provides the main basis for the time-period selected by the Region, but growth inhibition effects help to explain why it rejected lengthier time-periods.

Additional public comment also is not needed because rather than addressing substantial new questions, the Region's analysis on remand was provided in response to Petitioner's comment (and the Board's ruling) that Region 1 had neither justified its five-day threshold adequately nor explained why some other number of days was not chosen. *See Dominion* at 279.

See also Ex. R2 (DOR) at 31. The Region's analysis also did not lead to a change in the conclusion about the five-day threshold or the Permit's conditions, and did not involve the collection of new data. *Id. See Dominion* at 279 (new analysis provided for first time in response to comments does not necessitate reopening public comment period when it addresses an issue already present in the proceeding, reaches similar results, and does not lead to changed permit conditions).

In the Petition and the Motion to Supplement, Petitioner argues that it is "entitled to a meaningful opportunity to review and comment on the Region's reliance on new information before a determination on remand." Petition at 19. *See also* Motion to Supplement at 2, 3 (Item 1). Yet, the law is clear that Petitioner's opportunity to review, comment on, and challenge the Region's Determination on Remand is provided by an appeal to the Board. In *NE Hub*, the Board held that where a Region's response to comments on an issue had been lacking and the Region used the remand period to "prepare a full and accurate response to comments and reference[] supplemental materials" relevant to the issue, dissatisfied parties' opportunity to express disagreement with the Region "is not through a reopened public comment period, but by way of an appeal to the Board." 7 E.A.D. at 587, n. 14. *Accord Dominion* at 278; Ex. R2 (DOR) at 32. Of course, the Region's Determination on Remand must provide adequate information for Petitioner to formulate its appeal, and it does so.

Finally, even if significant new questions were raised by the new information on remand, the Region's determination not to reopen the public comment period based on the facts of this case, including the long delay in putting the new Permit into effect, was not an abuse of discretion and the Board should defer to the Region's judgment in this regard. *See Old Dominion*

Electric, 3 E.A.D. at 797-98. Region 1 also notes that in the nine months between the Board's Remand Order and the Region's Determination on Remand, Petitioner could have submitted information on the five-day issue but did not do so despite the issue clearly being under review. The fact that the Petitioner submitted nothing other than its letter of February 17, 2006 – which did not identify any substantial new questions – further supports the conclusion that the Region did not abuse its discretion on this issue.

II. The Board Should Not Treat Petitioner's Extra-Record Submissions as Part of the Administrative Record in this Permit Appeal

Dominion also asks the Board to treat its "evidentiary submissions as part of the administrative record for this case." Petition at 20; Motion to Supplement at 2. This request should be denied. Region 1 moves that the Board, instead, strike this material and Petitioner's arguments related to it from the record on appeal.

Faced with similar issues previously in the appeal of the BPS Permit, the Board ruled that such post-decision material could not be considered part of the administrative record and discussed the many reasons that this was so. *Dominion* at 38-43 (citing numerous EAB and federal court cases). General principles of administrative law dictate that the administrative record includes the documents, materials, and information that the agency actually relied on in making its decision. *Id.* at 39. Material not before an agency when it made its decision cannot satisfy this basic principle. *Id.* at 38-43. *See also In re Port Authority of New York and New Jersey,* 10 E.A.D. 61, 97 (EAB 2001) (denying motion to supplement record with documents not in existence at the time of decision); *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1455-56 (1st Cir. 1992) (affirming district court ruling that material never seen by agency is

outside administrative record for CWA § 404 permit). *See also In re Kendall New Century Development,* 11 E.A.D. 40, 55 (EAB 2003) (rejecting arguments based on material submitted to Board on appeal but not in the administrative record). Moreover, material that the Agency neither saw nor possessed at the time of its decision does not fall within any of the categories of records to be included in the administrative record under 40 C.F.R. § 124.18. *See Dominion* at 35-36 (administrative record closed upon issuance of Region's decision).

Petitioner complains that this appeal is its first chance to challenge Region 1's Determination on Remand. Yet, as discussed above, 40 C.F.R. § 124.14(b) does not require the public comment period to be reopened in all cases in which new information is added to the record by an agency in response to comments or on remand. A party dissatisfied with the agency's action on remand has the recourse of an appeal to the Board. *See N.E. Hub,* 7 E.A.D. at 587, n. 14. *See also Dominion* at 36, 278 (citing numerous cases).[10] The party may "'question the validity'" of material added to the record by the Region, but may not add new material itself to the record after the administrative record is closed. *Dominion* at 278 (quoting *Caribe General Electric*, 8 E.A.D. at 705 n. 19). The Board will consider a petitioner's written briefs presenting arguments about a Region's decision in light of the record that was before the Region in order to determine whether review and/or any remand is warranted. *See Three Mountain Power, LLC,* PSD Appeal 01-05 (EAB, April 25, 2001), unpublished final order at 2-3.

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[10] *See In re Caribe General Electric Products, Inc.,* 8 E.A.D. 696, 705 n. 19 (EAB 2000) (material added by Region to record in response to comments after comment period closes does not prejudice petitioner who can question the material in the administrative record on appeal to Board), *appeal dismissed per. stip.,* No. 00-1580 (1st Cir. 2001); *In re American Soda, LLP,* 9 E.A.D. 280, 299 (EAB 2000) (inclusion of information after public comment period closed does not improperly deprive petitioner of comment rights and petitioner can challenge record material in appeal to the Board); *In re Ash Grove Cement Company,* 7 E.A.D. 387, 431 (EAB 1997) (opportunity to review items added to administrative record occurs after final decision by Region and before deadline for filing petition for review with the Board).

Petitioner cites *In re Metcalf Energy Center*, PSD Appeal Nos. 01-07, 01-08 (EAB, Aug. 10, 2001), unpublished final order at 22, n. 13; and *Three Mountain Power,* unpublished final order at 2, in support of the proposition that material that was not before the Region can properly be included in the administrative record. Petition at 20, n. 5. Yet, neither case stands for that proposition and both are distinguishable from the instant case.[11]

Metcalf Energy and *Three Mountain Power* both involved state-issued Prevention of Significant Deterioration ("PSD") permits under the Clean Air Act, where the critical "top-down" Best Available Control Technology analyses supporting the permits' conditions were not made available for public review and comment and this new analysis resulted in changed permit conditions. *See Metcalf Energy*, unpublished final order at 10-12; *Three Mountain*, unpublished final order at 2-3; *In re Three Mountain Power, LLC,* 10 E.A.D. 39, 44 (EAB 2001). The instant case differs from both these cases because the Permit's limits have been fully subjected to public review and comment and the issues evaluated on remand – the five-day threshold value and whether closed-cycle cooling would likely comply with MassDEP noise regulations – have been evident and well known to Petitioner for many months.

Metcalf Energy is also distinguishable on other grounds. In that case, while ruling that the comment period did not need to be reopened, *see id.* at 26-30, the Board also decided to treat certain post-decision, public health-related information *as if* it was in the record. *Id.* at 22, n. 13. It is the Region's understanding that the Board decided to do this because it concluded that the

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[11] The Region also notes that Petitioner appears not just to request that its currently submitted material be accepted into the record, but that it be allowed to submit even more material during any additional briefing period. *See* Petition at 20, n. 5. Therefore, Petitioner's request is not only inconsistent with applicable law, it is also inappropriately open-ended.

information was minor in scope and ultimately of little probative value, and that considering the information would moot a procedural argument that the proponent of the information would otherwise have maintained. This differs from the instant case in that the information submitted by Petitioner is not minor in scope, even if it is, in the Region's view, of little probative value.

Three Mountain is also distinguishable on additional grounds. In that case, the parties negotiated an agreement that the petitioner would drop procedural objections to the state's decision and its request for the comment period to be reopened in exchange for the other parties agreeing that the petitioner could submit new evidence to the Board and no party would object that the information was outside the administrative record. *See Three Mountain*, unpublished final order at 2-3; *In re Three Mountain Power, LLC,* 10 E.A.D. at 45-46. As the Board explained, and petitioner in *Three Mountain* agreed, without this agreement among the parties, the Board would only consider the existing "administrative record and the written briefs submitted by the parties" and new information could be considered only if a remand for additional public comment was ordered. *Three Mountain*, unpublished final order at 2-3. Thus, the new, extra-record material was considered by the Board pursuant to a negotiated agreement among the parties. No such agreement has been negotiated here.

Petitioner also argues, in the alternative, that the Board should consider its extra-record evidentiary submissions under a judicial exceptions to the record review rule. Petition at 20; Motion to Supplement at 2-3. The Board should decline this invitation.

The Board typically limits its role to reviewing Regional decisions based on the administrative record before the Region. *See Dominion* at 39; *Port Authority of New York,* 10 E.A.D. at 98 (Board declined to apply judicial exception to administrative record rule). This

approach helps to provide for orderly permit decision-making in compliance with EPA regulations and consistent with principles of administrative law. *See Dominion* at 35-36, 39. This approach also maintains the locus for Agency permit decisions primarily in the Regions. *See In re Peabody W. Coal Co.*, CAA Appeal No. 04-01, slip op. at 16 (EAB, Feb. 18, 2005). In addition, the Board reviews technical issues "to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information *in the record.*" *Dominion* at 28 (emphasis added). Applying this test involves Board consideration of Petitioner's arguments in light of the existing administrative record, not the review of extra-record material. The Board's review may, however, consider arguments about whether any materials that should be in the record are missing. *See Dominion* at 36.

Similarly, the federal courts go beyond the administrative record in reviewing agency decisions only as a narrow exception to the rule and in limited circumstances not presented here. *See, e.g., Murphy v. Commissioner of Internal Revenue,* 469 F.3d 27, 31 (1st Cir. 2006) (affirming exclusion of extra-record evidence and stating that judicial review is limited to administrative record, with narrow exceptions); *Town of Norfolk*, 968 F.2d at 1446, 1459 (affirming denial of request to supplement administrative record and stating that judicial review of CWA § 404 permit is limited, with narrow exceptions, to the administrative record before agency); *Nat'l Wilderness Institute v. U.S. Army Corps of Engineers*, 2005 U.S. Dist. LEXIS 5159, at *29-*32 (D.D.C. Mar. 23, 2005) (declining to supplement the administrative record and indicating that such supplementation is the exception, not the norm). Petitioner cites *Fund for Animals v. Williams,* 391 F.Supp. 2d 191 (D.D.C. 2005), and *Nat'l Wilderness Institute v. U.S.*

Army Corps of Engineers, 2002 U.S. Dist. LEXIS 27743, at *9-*12 (D.D.C. Oct. 9, 2002), to support its suggestion that in highly technical cases a court may decide to accept additional "background information" to help determine if relevant information was not considered by the agency that should have been. Petition at 21; Motion to Supplement at 3. Yet, neither case suggests a similar result should apply to the instant proceeding.

In *Fund for Animals*, the District Court for the District of Columbia held that the record should be supplemented with material adverse to the agency's decision that the agency had left out of the administrative record, but that the plaintiff showed was *in the Agency's possession.* 391 F. Supp.2d at 196-99. In *Nat'l Wilderness Institute,* the same court held that discovery would be permitted to determine whether the agency had adverse information in its possession at the time of the decision that it had left out of the record or had failed to consider information that it had itself indicated was "'critical'" to the decision. 2002 U.S. Dist. LEXIS 27743, at *13, *14-*17. These cases do not apply here because Region 1 was neither in possession of, aware of, nor had deemed critical, any of the new information that Petitioner proposes be considered by the Board. Moreover, if supplementation was required in all cases involving technical complexity, as Petitioner now seems to suggest, the heretofore narrow exception would quickly devour the administrative record rule in cases before the EAB given that many or most of the Board's cases involve technical issues of some complexity.

Petitioner points out that a court may look beyond the record where it appears that an Agency "deliberately or negligently excluded documents that may have been adverse to its decision." Petition at 21; Motion to Supplement at 3. Yet, as the cases cited by Petitioner indicate, this exception applies where an agency may have left out information that it possessed,

or at least was aware of, in an effort to "skew" the administrative record. *Fund for Animals,* 391 F. Supp.2d at 196-99; *Nat'l Wilderness,* 2002 U.S. Dist. LEXIS 27743, at *12-*17. *See also Dominion* at 36, 278 (petitioner to the Board may question the validity of material in the administrative record and whether material that should be in the record is missing). There was no such effort to skew the record here. The Region did not deliberately or negligently exclude either (a) any documents that it possessed or was aware of that are adverse to its decision, or (b) any of the material submitted by Petitioner, none of which the Region had ever seen before being served with the Petition and some of which did not even exist at the time the Region issued its Determination on Remand.

Specifically, Petitioner's Exhibits A and F consist of new comments on the Determination on Remand that were prepared by Petitioner's consultants. Both include not just comments on the Region's analyses on remand, but also new data not currently in the record and arguments about that data. *See, e.g.,* Petitioner's Ex. A at Figure 1 (discussed in Motion to Supplement at 4 (Item 2); Ex. F at 2 (table of measurements from BPS "main stack"). Petitioner's Exhibits B, C, D and E all consist of papers (scientific articles, Agency guidance, and lay articles) that are not in the record and that the Region neither had in its possession, had reviewed, nor was aware of at the time of the Determination on Remand.[12] Petitioner's Table 1,

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[12] Petitioner's Exhibit B is a paper by Reynolds (1977) which is cited in Casterlin and Reynolds (1982), Ex. R7, a paper that is in the record and which played an important role in the Region's analysis. The Region was "aware" of Reynolds (1977) only in the sense that it is cited in Casterlin and Reynolds (1982). The Region did not, however, retrieve and review the paper and, thus, was not aware of its contents. Based on what Casterlin and Reynolds (1982) reported and the aspects of the paper that were significant to the Region's analysis, the Region did not think it necessary to obtain and review Reynolds (1977). The Region is not required to locate and review every paper cited in every paper that the Region relies upon. Otherwise, the technical review would never end, because every paper would lead to ever more references to be reviewed. The results and conclusions in Casterlin and Reynolds (1982) that the Region relied upon were clear and the Region reasonably did not find it necessary to obtain and review Reynolds (1977). As the Region explains in its Response to the Petition, having now reviewed the paper because Petitioner submitted it on appeal, the Region concludes that it is immaterial to the issues at stake and that the

appended to the Petition, refers to, and make arguments based on, both the Exhibits and still other documents that are not in the administrative record.[13]

None of these Exhibits or materials cited in Petitioner's Table 1 should be considered as if they were part of the administrative record, or under an exception to the administrative record rule. At most, Exhibits A and F should be considered as argument on appeal, but only to the extent that they rely on material that is in the administrative record. To the extent that arguments in Exhibits A and F rely on materials outside the administrative record, they and the extra-record material underlying them should be stricken from the record on appeal.[14]

The Region's Response to the Petition, including Appendix A thereto ("Response by Region to Additional Arguments Presented in Petitioner's Table 1 and Exhibits"), identifies the extra-record materials, as well as the arguments based thereon, submitted by Petitioner. In each instance, the Region moves that the Board strike these additional materials and arguments from the record on appeal.

Finally, the cases cited by Petitioner indicate that the District Court for the District of Columbia applies a presumption of regularity to an agency's designation of the administrative record, and that it considers either a showing of bad faith by the agency, or such an utter failure

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Region's decision not to obtain and review Reynolds (1977) has been validated.

[13] As the Region explains in its Response to the Petition, including Appendix A ("Response by Region to Additional Arguments Presented in Petitioner's Table 1 and Exhibits"), none of the materials referenced by Petitioner in the Exhibits or Table 1 effectively undermine the Region's decision on remand and many of the issues they address are beyond the proper scope of appeal in this case.

[14] Petitioner references, and makes arguments based on, the Exhibits in the following items in Table 1 appended to the Petition: Item 4 (referencing Petitioner's Exhibit C); Items 6, 8 and 24 (referencing Petitioner's Exhibit A); Item 12 and 14 (referencing Petitioner's Exhibit B); Item 13 (referencing Petitioner's Exhibit D); and Item 24 (referencing Petitioner's Exhibit E).

to explain the decision that judicial review is frustrated, to be an essential element in any decision to consider going beyond the administrative record in its judicial review. *See Fund for Animals,* 391 F. Supp.2d at 198-99 ("plaintiff must demonstrate bad faith or improper behavior on the part of the agency, or that, 'the record is so bare that it prevents effective judicial review'" before exception to record review rule will be applied (citation omitted)); *Nat'l Wilderness,* 2002 U.S. Dist. LEXIS 27743, at *11-*12 (to overcome "strong presumption" that agency properly designated administrative record, party seeking discovery must make strong showing that it will find material "'indicative of bad faith or an incomplete record'" (citations omitted)). Other courts also require either a showing of bad faith or a failure to explain the decision severe enough to frustrate judicial review before they will consider applying an exception to the administrative record rule. *See Murphy,* 469 F.3d at 31; *Olsen v. United States*, 414 F.3d 144, 155 (1st Cir. 2005); *Norfolk*, 968 F.2d at 1458-59. *See also Port Authority of New York,* 10 E.A.D. at 98 (citing *Elf Atochem N. Am., Inc. v. United States,* 882 F.Supp. 1499, 1502 (E.D. Pa. 1995)).

Petitioner's arguments fall far short of establishing either any bad faith by the Region or that the extensive record in this case is so devoid of explanation that review would be frustrated. *See also Dominion* at 57 (citing *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 788-89 (EAB 1995), *aff'd, Marine Shale Processors Inc. v. EPA*, 81 F.3d 1371 (5th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997)). Petitioner specifically points to the fact that the Region did not identify and review the paper submitted by Petitioner as Exhibit C (Meng *et al.* (2005)), but this establishes nothing. Petition at 21 n. 6. As discussed in the Response to the Petition, at § IV.C.2, the Region disagrees with Petitioner's interpretation of that study and disputes its relevance to the five-day threshold issue addressed by the Region on remand. Indeed, as is clear

from the Region's discussion of the paper in its Response to the Petition, the Region would not likely have included the paper in the record had it been aware of it.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Region 1 requests that the Board deny Petitioner's Motion to Supplement the Administrative Record and grant the Region's Motion to Strike from the record on appeal Petitioner's Exhibits B, C, D and E, and any extra-record material submitted or referenced in Table 1 to the Petition, and any arguments related to any of this material presented in the Petition, including Table 1. In addition, Region 1 requests that the Board deny Petitioner's Motion to Supplement the Administrative Record, and grant the Region's Motion to Strike, as to Petitioner's Exhibits A and F and any arguments related to them that appear in the Petition, including Table 1, to the extent that these Exhibits and related arguments rely on new, extra-record information.

Respectfully submitted by EPA Region 1,

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