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ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In Re:	:	
USGEN NEW ENGLAND, INC. BRAYTON POINT STATION NPDES PERMIT NO. 0003654	:	NPDES Appeal No. 03-12

Thursday, September 9, 2004

EPA East Building
1201 Consitution Avenue, N.W.
Courtroom 1152
Washington, D.C.

The above-entitled matter came on for hearing, pursuant to notice, at 10:02 a.m.

BEFORE:

JUDGE EDWARD E. REICH (Presiding)
JUDGE SCOTT C. FULTON
JUDGE KATHIE A. STEIN

APPEARANCES:

On behalf of the Petitioner,
USGen New England, Inc.:

JOHN STEVENS, ESQ.

On behalf of the Respondent, USEPA, Region I:

MARK A. STEIN, ESQ.

On behalf of the State of Massachusetts:

RICHARD LEHAN, ESQ.

On behalf of the State of Rhode Island:

BRIAN A. WAGNER, ESQ.

On behalf of the Utility Water Action Group:

JIM CHRISTMAN, ESQ.

On behalf of the Conservation Law Foundation:

CAROL LEE RAWN, ESQ.

On behalf of the Kickamuit River Council:

JEAN McCABE
DANIEL MORRILL

C O N T E N T S

P R O C E E D I N G S

THE CLERK: United States Environmental Protection Agency, Environmental Appeals Board, is now in session for hearing oral argument in the matter of USGen New England, Brayton Point Station, Docket No. MA-003654, Appeal No. NPDES 03-12, the Honorable Judges Scott Fulton, Ed Reich, Kathy Stein, presiding. Please be seated.

JUDGE REICH: Welcome. Argument this morning will proceed in accordance with the Board's orders of July 23, 2004 and August 17, 2004. To briefly review how we will proceed, USGen as Petitioner will proceed first. They have 30 minutes and may reserve up to five minutes for rebuttal at the end. Then the Region will proceed for up to 30 minutes.

After that we're going to take a short, 10-minute break, and after the break argument will proceed with the intervenor amicus parties, Massachusetts, Rhode Island, the Utility Water Act Group, and the Conservation Law Foundation, each of whom will have 10 minutes, and the Kickamuit River

Council which will have 5 minutes. And, finally, if USGen reserved time, then they may present a rebuttal for up to 5 minutes.

Given the multiplicity of parties, I think we'll let the participants identify themselves when it comes time for them to speak, rather than have appearances of all the parties up front.

Before we get to USGen's argument, I would like to touch on two points relative to the scope of the argument. First, as we noted in our July 23rd order, we recognize that there are disputes as to what is in the administrative record for the proceeding, and there are motions to supplement the record as well as oppositions thereto. The Board, as you know, has not ruled on those motions, and wants to review record-related arguments in the context of its review of the substantive issues they relate to, which we have not yet done.

Therefore, consistent with the Board's July 23rd order, participants may reference materials that they believe are already in the administrative record or that were submitted in a

motion to supplement, but if the Board ultimately determines that those materials are not and should not be part of the administrative record, it will treat any references to such materials during this argument as stricken.

Second and similarly, the Board recognizes that there are issues raised on all sides as to whether certain arguments have been preserved for Board review or are properly within the scope of USGen's petition, which does define the issues properly before the Board. The Board has not ruled on those issues, and parties are free to make their arguments even though others have objected to such arguments as not properly before the Board, and nobody feel an obligation to object in the course of these proceedings. We will assume all outstanding objections carried forward to this proceeding as well.

However, the Board's allowing such arguments is without prejudice to its later determination that such arguments were either outside the scope of this proceeding or not

preserved for review, in which case they will not be considered in the Board's determination.

So, with that, let me invite counsel for USGen to approach the podium, identify himself, and proceed, and if you would, advise the Board if you are reserving time for rebuttal.

MR. STEVENS: May it please the Board, John Stevens on behalf of USGen New England, and we will accept the Board's invitation to reserve 5 minutes for rebuttal. May I proceed?

JUDGE REICH: Please do.

MR. STEVENS: It is a fundamental principle of our legal order that like cases ought to be decided in a like manner. Brayton Point Station is one of 450 existing large generating stations. Of that number, it may be derived from the new Phase II rule that 30 to 40 are located on estuaries or tidal rivers. None of those other 30 to 40 plants so located have been or, it would appear, will be required to retrofit with closed cycle cooling.

Although nothing in the vast

administrative record that underlies this permit suggests that Brayton Point Station is different in any material respect from those 30 to 40 other plants, the Region is imposing closed cycle cooling on Brayton Point Station, both to control its thermal discharge and its cooling water intake. That imposition is a departure from consistent agency practice.

And under the Shaw Supermarket decision cited in our brief, a 1st Circuit decision, such a departure must be reversed unless it is explained. And in order for it to be explained, it must be recognized as a departure and there must be a showing as to why this particular instance is different from all others, or why changed views or circumstances are going to make the general rule different in the future.

In the thousands of pages that Region I has generated in this record, it does not once recognize that it is departing from practice, and it makes no attempt to distinguish Brayton Point Station from these other apparently similarly

situated cases. Nor, in the face of the Supreme Court's decision in Chemical Manufacturers v. NRDC, that Congress intended uniformity in technical standards, in the face of its own regulations that in reaching such a standard for a permit, the Region ought to look to the technology for the class or category of point sources of which the applicant is a member.

JUDGE REICH: Can I ask you, is your argument about disparate treatment limited to 316(b), or does it go to 316(a) as well?

MR. STEVENS: It goes to both of them. It is unprecedented for a control for thermal discharges as well as cooling water intakes.

JUDGE REICH: Can you meet the 316 thermal discharge standard with open cycle cooling?

MR. STEVENS: What thermal discharge standard?

JUDGE REICH: The one that's in the current variance. I mean, one of the things the Region says in its brief is that you and they agree that you would most likely meet the 316(a) standard

with closed cycle cooling, even if it were not for 316(b).

MR. STEVENS: Both, the conditions for both thermal discharge and cooling water intake absolutely require closed cycle cooling. There is no other way we can meet them.

JUDGE REICH: So if there were not a 316(b) standard, but there was still the 316(a) limit as it is in the current permit, you would still be required to go to closed cycle cooling?

MR. STEVENS: Yes. It would still treat us uniquely.

The unexplained departure from prior practice, the failure to consider the class or category, are both in and of themselves fundamental errors of law that require a remand of this permit. But since they are only the first of a whole series of fundamental errors, it is important that the remand or appropriate report to the Administrator be carefully conditioned by the Board, and I will turn next specifically to the thermal discharge.

JUDGE STEIN: Counsel, let me ask you a

question before you do that. To what extent are the records relating to these other plants that you claim the conditions for USGen are a departure from reflected in the record of this proceeding?

MR. STEVENS: The region was asked to point to similar instances, and they were able to point to none.

JUDGE STEIN: In what context? During the course of the comment period, or during the course of the appeal?

MR. STEVENS: I believe they were asked at all stages. I have seen no response in their papers filed before the Board.

As to the thermal discharge, there is one overridingly important factor, and that is that USGen applied for a variance under Section 316(a) and the Region ruled it was entitled to that variance. The Region ruled that USGen had carried its burden of showing that the chosen technology standard was more stringent than necessary to protect the balanced, indigenous population of fish, shellfish, and wildlife.

Now, what are the consequences of USGen having carried that burden? The Region would say none whatsoever. Its position is that once it has rejected the applicant's proposed permit variance limits, as it did here, it is then free to impose any standard that is sufficiently protective of the pertinent biota, standards which of course would include the very standards from which they have granted a variance.

And that is precisely what the Region did here. It supposedly granted a variance from a standard that would have required closed cycle cooling for all 8,760 hours of the year, and then it required closed cycle cooling for 8,638 hours each year. There is no material difference. What the Region did was to say that Brayton Point Station was entitled to a variance and then deny it a variance.

That this result is in error is shown not just by logic but by authority. Shortly after the enactment of the 1972 amendments to the Act, the Agency's General Counsel was asked for an opinion

whether it was permissible to do exactly what the Region has done here: to find someone entitled to a variance from a certain standard, and then to apply that standard in the permit.

And the answer was, neither the Region nor a State could do that, and that answer was reaffirmed in a more formal--in our brief we refer to that first answer as the Zener memorandum. It was ratified and accepted in a more formal opinion thereafter, General Counsel Opinion 76-12. Now--

JUDGE STEIN: Let me interrupt for a second. Given that the statute uses the permissive language "may" impose an effluent limitation different from otherwise applicable, is it your position that the Agency, assuming that USGen met its burden of proof, has no discretion but to grant that variance?

MR. STEVENS: Yes.

JUDGE STEIN: And in that regard, how do you deal with the permissive language of the statute, or the apparently permissive, the word "may"?

MR. STEVENS: Well, it has not been raised. The Region has never quarreled that once it has found a variance, once it has found an entitlement, it has an obligation to grant that variance. And in fact we say that if it cannot merely--it has been said it may not--the opinion of the General Counsel that I have just referred to is that it may not, once it has found entitlement to a variance, simply apply the standard that would result in a denial of a variance. The opinion of the General Counsel is, a variance must be granted.

And if the Region must grant a variance, it cannot impose just any standard that's a sufficiently protective limit, because the applicant is entitled to a variance from that standard. Based on the compromise that Congress made in 316(a) between our society's need for reliable, affordable energy and our desire to protect fish, shellfish and wildlife, the Region must impose, once it has found entitlement to a variance, variance limits that permit the greatest thermal discharge consistent with the protection of

the balanced, indigenous population, because the applicant would be entitled to a variance from any more stringent standard.

Now, the Region not only--

JUDGE REICH: Are you arguing that in 316(a) the obligation of the permitted to demonstrate goes only to the demonstration of a need for a variance, and not to the justification of the adequacy of the terms of the variance in terms of BIP, or do you assume that you have that burden as well?

MR. STEVENS: We assume the only burden that is exactly placed on us is to demonstrate the entitlement. It then becomes the Region's task to identify the limit that permits the maximum thermal discharge consistent with protection of the balanced biota.

The Region in its brief not only admits it failed to do that, it says it wasn't required to do that. And that failure, that disavowal, is its second fundamental error of law. It then compounded that error by, in attempting to set the

standards, by not looking at the information that its own regulations say is the pertinent information on which the variance limits should be based.

What evidence is that? According to the Agency's guidance, draft technical guidance, it is the evidence from observation or modeling of the effect of Brayton Point Station's thermal discharge on the biological functions of the pertinent population in Mount Hope Bay. There is no evidence in the record that the discharge, existing discharge or that proposed by USGen, would harm the biological functions of any of that population, and the Region didn't even look for it.

They required USGen to perform studies costing millions and millions of dollars. None of these studies that were commissioned looked at the effects on biological functions. They all were merely designed to show the physical, the physically detectable extent of the thermal plume. USGen kept saying, "These are not the studies you should be doing. You're not looking at the right

factors." But the Region never changed.

And when they got the right information, they ignored it. USGen, on its own, commissioned careful, elaborate, tremendously expensive studies by nationwide experts, professors from Rhode Island, experts on Mount Hope Bay, worldwide fisheries experts, showing the lack of effect on the biological functions of the pertinent biota. The Region just dismissed it.

It did the same thing not only with studies commissioned by USGen but by scientists they otherwise credited, and here I am referring to a document that is not yet in the record. It is the most important one that we ask you to require to be admitted in the record. It is a report by Mark Gibson in 2001. We didn't know it existed until after the permit had been issued.

In this study, Mr. Gibson proposed limits almost identical to those proposed by USGen. Rhode Island admits in its administrative brief it sent this report to the Region, but the Region did not include it in the record. It must be included in

the record.

Instead of looking for the pertinent evidence, looking at it when it got it, the Region just looked at types of evidence that could not possibly produce rational permit conditions. This evidence was remote. Maybe fish will be more predative. Maybe shrimp will be more predative of larvae.

There were irrelevant worries about eelgrass, which disappeared from Mount Hope Bay decades before Brayton Point Station even began operations. Trivial, a statement that "some percentage" of fish developed lymphocysts when they wintered over near the thermal discharge. That percentage was 0.16; it was one fish.

They talked about a supposed coincidence, and we put these figures in our brief, a supposed coincidence between increased operations at the plant and declines of fish. There was no coincidence. We have shown them in the brief. The fish had declined 80 percent before there was any increase in the plant's thermal discharge.

And if you appropriately line up the intake effects with the population, there is no effect, there is no coincidence there. And in that regard, we had not realized at the time we lagged that second chart in our brief that the new Phase II rule, in the new Phase II rule the Agency says that's exactly what you have to do, because it takes years for intake changes to be reflected in the pertinent population. And the cite on that, since we just had it, it's not in our brief, is 69 Fed. Reg. 41,658.

Now, as would be expected, when the Region applied the wrong standard, it didn't look at the right evidence, it ended up with permit limits that are entirely arbitrary. And I am referring to the limits, the thermal limits that drive the permit, which were not more than 24 degrees, 10 percent, 5 days. Not more than 10 percent of the bottom of the bay should be raised to more than 24 degrees on more than 5 consecutive days.

Now, it's very frustrating to find out what the real basis for these conditions was,

because if you look at all of the Region's briefs, they cite their response to comments. You look at the response to comments, they cite their determination. You've got to follow a long trail to find that there is precious little in the end in support. But here we are sufficiently specific that we force them to drag out what there was, so let's look at what there is to support these limits.

Five days, they said in their brief. It seemed like a good idea to some people sitting around the table, and it happened to be the largest number of days they asked USGen to model. There is no rational basis.

Ten percent, they said the basis for that was a circle drawn on a map. Well, according to the reference contained on the map, that map didn't even exist at the time the Region adopted the 10 percent standard. If it did exist, why didn't they put it in their determination, if it was the basis for an important permit limit. If it was so important, why, when they put it in their response

to comments, was it just a hanging, unexplained exhibit with no reference in the text whatsoever? Totally arbitrary.

Twenty-four degrees. In their brief, the Region concedes that the only relevant protective summer situation for their poster species, winter flounder, is juvenile winter flounder that have experienced the gradual warming of waters. August does not follow directly after March in Mount Hope Bay, like in the rest of the world. Yet the only, the only avoidance behavior they can identify at temperatures below 24.9 degrees relates to an irrelevant life form, adult winter flounder, or to juvenile winter flounder that have been taken from March, 14 degree waters, and suddenly plunged into August. There is no rational support for any number other than 24.9.

The Board should remand or report on thermal discharge issues, requiring new permit conditions that permit the maximum thermal discharge consistent with protection of the biota, that are based on effects on biological functions

of the species existing there, and that do not contain a maximum summer temperature lower than 24.9 degrees.

JUDGE REICH: Mr. Stevens, before we run out of time, we really have not talked at all yet about 316(b), and--

MR. STEVENS: I was just going to turn to it.

JUDGE REICH: I assumed you probably were, but let me ask a couple of questions initially to make sure I understand the scope of your argument.

I believe in your initial petition you argued that 316(b) did not cover intake limitations but was only focused on physical aspects of the CWIS. Is that still your position, and is that an issue that was addressed in Riverkeeper?

MR. STEVENS: We are arguing that these volume limitations are impermissible volume limitations.

JUDGE REICH: You are not arguing that volume limitations are per se--

MR. STEVENS: We haven't weighed that

argument. We are not urging it. We haven't urged it in our briefs and we are not urging it in this argument.

JUDGE REICH: And what is your position relative to the applicability of water quality standards in the context of 316(b), and particularly in light of language which seems to suggest to me, in Riverkeeper, that there is an acceptance of the idea that water quality standards does have relevance in 316(b)?

MR. STEVENS: That was the first question I was going to ask.

JUDGE REICH: Okay.

MR. STEVENS: May the Region, as it is attempting to do after the fact, defend the cooling water intake limitations in the permit on the basis that they are necessary to assure compliance with the water quality standards of Massachusetts and Rhode Island?

The answer in this case, and this is the only case the Board has to decide, is no. The reasons leading to that answer differ for the two

States involved. I will first deal with Massachusetts.

JUDGE REICH: So you're saying it's an artifact of the particular State water quality standards, rather than a generic issue as to--

MR. STEVENS: Exactly, in this instance. That's all you have to reach.

JUDGE REICH: Okay.

MR. STEVENS: Massachusetts, the State in which Brayton Point Station's discharge originates, therefore of course it has the right to file a certification, it has the right clearly to insist that its water quality standards affected by the discharge be required to be complied with.

Under the Supreme Court case, which the Region would give much additional weight, but under that case, PUD No. 1, if it is authorized to do so by State law--and we believe there are very substantial doubts as to whether Massachusetts is authorized to do so by State law--but if it is authorized to do so by State law, it may impose limitations on activities other than the discharge,

but it hasn't done so here.

In its certification, it said only that the limits in the permit were sufficient to protect Massachusetts water quality standards. And then, very significantly, there is a parallel State appeal that would have determined State law. Massachusetts was determined to, wished to void that appeal and to stay it, so it insisted that everything in the Federal and State permits was determined by Federal law.

Specifically it said, at page 5 of its brief, which is Exhibit I to our reply brief, that the cooling water intake limits were based not on State law but on Federal law. And then it went on in the next page to say that if on this appeal which brings us here this morning, if on this appeal those federally-determined cooling water intake limits were made considerably less stringent, then Massachusetts would have to consider whether those less stringent limits were sufficient to meet its water quality standards.

Perforce, necessarily, if it hadn't

determined that lesser limits were not sufficient to meet its water quality standards, it could not have determined that the stringent limits in this permit are necessary to meet its water quality standards. And once the Massachusetts Department of Environmental Protection had made that interpretation, when it had not interpreted State law to require these limitations, the Region has no standing for creating State law. It must defer to that interpretation.

As to Rhode Island--

JUDGE REICH: If we read Massachusetts' briefs in conjunction with the certification to conclude that Massachusetts was in fact saying that these limits are necessary to protect water quality standards in Massachusetts, then we would be compelled, would we not, to look to those limits as being attributable to State certification and not look behind them?

MR. STEVENS: In that event, there should be a deferral to the State appeal, because there are substantial issues of entitlement under State

law which there were not in PUD No. 1. In that event, you should stay your own consideration of that issue and let the State proceed. But we--

JUDGE STEIN: To what extent are documents pertaining to the State appeal in the record of this proceeding? To what extent are documents pertaining to the State appeal in the record of this proceeding, you know, other than as Attachment E to your brief?

MR. STEVENS: I believe you are entitled to notice what the State is saying as to what it has done to interpret State law to an administrative hearing officer who is charged with determining what State law is. I believe that is a binding admission on the State.

JUDGE STEIN: But you don't have a final determination on the Massachusetts permit appeal at this point. Is that correct?

MR. STEVENS: We do not. It has been stayed, because the State convinced the hearing officer that there are no State issues in the permit, that the State water quality standards have

nothing to do with it. We are being whipsawed. They say one thing to the State and another thing to--they say to each that the other is determinative.

Very quickly with respect to Rhode Island, because my time is almost up, and because the considerations there are different. Rhode Island, of course, plays a subsidiary role. It's not the State where the discharge originates. Its only right, expressly granted by the Act, is to claim that it is affected by the discharge and the discharge will harm its waters in a way that violates its water quality standards. Neither the Act nor the PUD give Rhode Island any specific right to exercise any control, even through a request to the Region, over activities other than the discharge, particularly those activities occurring wholly in another State.

JUDGE REICH: Apart from 401, if we looked at 301, does that, does EPA's obligation under 301 require us to consider the effect on Rhode Island standards as well as Massachusetts standards?

MR. STEVENS: Can't, for the intake. Rhode Island's claim is essentially a claim that the intake at Brayton Point Station, by harming fish that do or otherwise would spend a portion of their--

JUDGE REICH: I guess I was asking, as a legal question, are you saying that we are not legally allowed to, or that the nature of the Rhode Island standard is such that it wouldn't make sense to do it?

MR. STEVENS: I'm saying that Rhode Island cannot legally apply these standards, and therefore EPA may not legally apply them on behalf of Rhode Island. Rhode Island's claim is essentially, in substance, that an out-of-State activity is causing a nuisance in the State waters.

International Paper v. Ouellette long ago ruled that Rhode Island is foreclosed from doing that. Rhode Island cannot, the agency cannot adopt a regulation that says the operation of the Brayton Point intake is a nuisance. It surely cannot accomplish the same result by changing the title of

that ordinance from nuisance to water quality standard.

It's therefore no surprise, no surprise that on their face, the Rhode Island water quality standards do not purport and cannot be read to reach wholly out-of-state activities. The purpose section, which the Region does not attach to its brief--we do attach it as Exhibit M to our brief--says the purpose is to provide for the protection of the waters of Rhode Island from pollutants. Pollutants are what come out of a discharge. The section referred to by Rhode Island in its comments, refers to anthropogenic activities.

JUDGE REICH: I think we are out of time. Do the judges have any other questions?

Okay. Thank you.

MR. STEVENS: Thank you very much.

JUDGE REICH: The Region?

MR. STEIN: Thank you, Your Honor. May it please the Court, my name is Mark Stein. I'm Senior Assistant Regional Counsel with EPA Region I in Boston. Sitting with me at counsel table are

Carol Ann Siciliano and James Curtin of the Office of General Counsel at EPA Headquarters here in Washington.

First I would like to address the environmental setting of the Brayton Point NPDES permit. Then I'll turn to issues related to 316(a), and then after that 316(b), including water quality standards. This discussion will demonstrate that the Region's permit has a rational basis, is consistent with applicable law, and it should be upheld.

The permit for Brayton Point Station is of great environmental importance. The water quality and fishery resources of the Mount Hope Bay estuary are at stake. These waters provide critical habitat for marine life, including crucial spawning and nursery habitat. They are also an important part of the Narragansett Bay estuary, one of the first estuaries designated as an estuary of national significance under the Clean Water Act National Estuary Program. And these waters have also been given the highest water quality

classifications by two States, and as such they are supposed to provide excellent quality fish habitat and a recreational fishing resource.

This permit addresses one of the biggest influences on the Mount Hope Bay ecosystem, the once-through cooling system of the Brayton Point Station power plant. This plant discharges a huge quantity of heat into the shallow Mount Hope Bay estuary. The thermal plume can cover the entire bay, an area of 14 square miles, and reach out into Narragansett Bay on an outgoing tide, and this plume drastically alters the thermal regime of the bay and harms marine life.

In addition, the plant's cooling system ingests approximately 1 billion gallons of water a day from the bay. It's an amount equivalent to the entire volume of the bay going through the plant seven times a year. In the process, it entrains and impinges billions of fish eggs, fish larvae, juvenile and adult fish, and trillions of invertebrates, and Mount Hope Bay's fish populations are in a state of collapse.

JUDGE REICH: In considering either the thermal discharge limit under 316(a) or the intake limit under 316(b), did you feel you had any obligation to look at other facilities and what had been done with other facilities? And if so, is there in the record any analysis that shows the environmental impacts from Brayton Point as compared to the environmental impacts from the other facilities you looked at?

MR. STEIN: I'll have to answer that question in parts.

JUDGE REICH: Okay.

MR. STEIN: Under 316(b) we did feel it was appropriate to look at other facilities because we're looking at a technology standard, and we needed to look at what technologies would be feasible and what might constitute the best technology for minimizing adverse impact based on what had been accomplished at other facilities. So we did look at other facilities, and what we found was that there were other facilities that had been converted from entirely once-through systems to

entirely closed cycle systems using cooling towers, the technology that we looked at for Brayton Point.

On the 316(a) side, we did look at other facilities in response to comments because the company commented on that, and you'll see discussion of other facilities in the administrative record, in fact, in certain attachments that we had to our last brief. But the analysis under 316(a) is a case-by-case analysis, and as the Administrator said, in I think it was the Wabash permit appeal, the 316(a) analysis is necessarily unique. It turns on the facts of each specific case, so we focused on the environmental impacts at Brayton Point, and that's what drove our decision. So I would like to turn to Section 316(a).

Heat is a pollutant, and as such, discharges of heat have to comply with whatever is more stringent between technology-based standards or water quality-based standards, except that 316(a) provides for a variance from these otherwise applicable limits if a thermal discharge limit, an

alternative limit, can be identified that would be sufficient to assure the protection and propagation of the balanced, indigenous population in the receiving water, also commonly referred to as the BIP. 316(a) limits are based on biological criteria, not economic or technological criteria.

JUDGE REICH: Going back to the question that Judge Stein asked, has the Agency approached 316(a) as permissive, or has the Agency approached it as something that it felt an obligation to grant if a proper showing were made?

MR. STEIN: I believe the Agency has approached it that if a proper showing was made, the Agency would grant a variance unless there was some other reason to prevent it. Namely, for example, if a thermal discharge would be allowed that would cause violations of dissolved oxygen criteria in the water, there might be a water quality standards obstacle.

But I think it's fair to say that despite the permissive language in the statute--in other words, I haven't seen a case where the Agency said,

"Even though they have made a showing, we're not going to provide for a variance, because the language says 'may'." Now, we did discuss in the permit record the fact that the language says "may," and it seems to leave some discretion there, but that didn't drive the permit decision that we made.

JUDGE STEIN: If I understand it correctly, you determined that a variance was appropriate but you didn't grant the variance that the company sought. In other cases where the Agency has applied 316(a), are there other circumstances where the agency has determined that a variance was appropriate but not the variance that in fact was sought by the company?

MR. STEIN: I don't exactly know the answer to the question, to be honest. I don't know whether there is another permit where it unfolded just that way. My assumption, and that's all it is, is that there would be such cases; that if the Region in question does an analysis and finds that a company has asked for a variance and has not met

its burden to show that the limits it proposes will satisfy the 316(a) standard, that that limit that was proposed could get modified in the course of a decision. And the permittee is not in a position to complain that, "Oh, the limits should have been made even more stringent by applying the more stringent technology of a water quality-based standard that would apply in the absence of a variance.

JUDGE STEIN: So I take it you then disagree with the statement by counsel for USGen that they in fact met their burden?

MR. STEIN: Absolutely. The Petitioner did not meet its burden. The Petitioner's burden was to show that the alternative limits that it proposed would be adequate to protect the balanced, indigenous population in Mount Hope Bay, and they did not meet that burden. And I would like to speak about that and explain why.

The statute doesn't dictate exactly how a 316(a) analysis should be done, and so the Region is in a position to use reasonable scientific

judgment in developing that analysis, and we did that in this case, using the 1997 draft EPA 316(a) guidance document which is still the standing guidance document in the field.

A key part of our analysis was what we refer to as an area impacted analysis, where we looked a key habitat areas in the bay and we looked at the key representative species of fish that reside in the bay and other types of organisms, and what the temperatures are that would cause adverse thermal effects to these species. We found that the most sensitive species in question here were juvenile winter flounder in the summer, and winter flounder eggs and larvae in the winter season.

Protecting these organisms was necessary, in our view, because the winter flounder is a critical species within the context of the balanced, indigenous population of Mount Hope Bay, and that by protecting these species we would protect the other species within the balanced, indigenous population.

JUDGE REICH: In reaching the thermal

discharge limits you ultimately reached, I know there is argument back and forth in the briefs about the extent to which the limits were based on the Massachusetts mixing zone proposal, and it has been asserted that it was. It has been, I think, denied by you, denied by Massachusetts. And I know Massachusetts has also said that in totality the mixing zone proposal would have been more restrictive.

But the numerical criteria, the 10 percent, the 5 days, the 24 degrees, were they also, do you know, in the Massachusetts mixing zone proposal? And if so, how does it come to be that you come up with the same numerical criteria?

MR. STEIN: My understanding is that some of the same criteria were used when Massachusetts assessed the mixing zone, which isn't surprising because they were looking to protect high quality, excellent quality fish habitat under the standards and protect zones of passage and other kinds of biological functions in the receiving water, whereas under 316(a) we are looking to ensure the

protection and propagation of the balanced, indigenous population, sort of similar standards.

But my understanding of the Massachusetts mixing zone is it does not command the same limits or use exactly the same criteria in the same way that we did. The limits that they derived to meet the various State requirements would have been more stringent in totality, as you say. It would have required actually no discharge during certain parts of the year, to protect zones of passage and other factors, whereas the 316(a) variance limit that we put forth has a monthly thermal discharge limit which we then apply across the 12 months to get an annual limit. The facility can discharge, you know, throughout the year, rather than having to shut down at certain times.

So the analyses have some similarities but they are not the same analysis, and our 316(a) analysis is not based on the State mixing zone criteria.

JUDGE REICH: Okay. Thank you.

MR. STEIN: Now, what we did do is, we

looked at the key nursery and spawning areas in Mount Hope Bay, and we found that they are clustered in the shallow waters close to the discharge point, where the rivers come down and into the bay.

And as a result, we determined that the thermal discharge should not exceed critical temperatures in those areas that would affect the functions of these areas. They shouldn't exceed critical temperatures that would cause juvenile winter flounder to avoid the nursery habitat where they need to be to grow and thrive, and they shouldn't exceed critical temperatures in the spawning areas where eggs hatch and where larvae develop.

And we found that to avoid those key areas, which happen to be near the discharge point, the critical temperature should only be exceeded in no more than 10 percent of the area of the bay. The Petitioner says that we came up with that analysis after the fact, that they only saw that in our most recent brief.

That is not so. We explain that analysis in the record for the draft permit. It is explained in the text, and I can give you the reference, Exhibit 4, page 6-56 to 6-57. It is further explained in our responses to comments at Exhibit 2, pages III-30 to 31, in a number of figures that are cited and reference in those pages.

In fact, the figure that Petitioner complains about, that they say we created after the draft permit, is a figure that is actually drawn from a figure from one of Petitioner's own reports. The only thing we added to it was, we drew a semicircle to show where the 10 percent area was that we had already described in the text of our analysis. Petitioner has had the information on where the key areas were. We explained what our analysis was based on, and there is no record problem there, we would submit.

Now, we turned to look at the 316(a) analysis really in two ways. A petitioner or an applicant can try to obtain a 316(a) variance by

making what has been referred to as a retrospective showing, where they try to show that the discharge has not caused, has not interfered with the protection and propagation of the BIP in the past. It's a retrospective showing.

We evaluated the showing that the Petitioner attempted to make, and we felt that they did not carry their burden in that regard. We found that with the existing thermal discharge, 75 percent of the bay would exceed the critical temperatures that I just described, and those critical temperatures would be exceeded in all the key spawning and nursery habitat.

Moreover, on top of that, we found that the thermal plume interferes with normal migration of various species of fish such as striped bass and menhaden. We found that the thermal discharge appears to be promoting the appearance of nuisance species that favor warm waters in Mount Hope Bay. And we saw numerous other types of problems.

Furthermore, as we said, the data shows that fish populations had collapsed in Mount Hope

Bay by the mid-eighties, following increases in thermal discharge by Brayton Point Station as a result of increased generation operations by the plant and the conversion of Unit 4, which actually had been originally required to operate in a closed cycle fashion, by converting that to open cycle. And the Region believed that, although this coincidence in time does not prove cause and effect, we felt that it added to the weight of the evidence that the existing thermal discharge had been contributing to the serious problem with the fish populations in Mount Hope Bay.

JUDGE STEIN: Counsel, there has been a fair amount of discussion in the briefs and somewhat during the argument about the nature of the burden, and I guess I would like to get a clearer understanding of what you believe Petitioner's burden was. Was it simply to establish that the effluent limitations were more stringent than necessary to assure propagation of a balanced, indigenous population, or was there some further burden, in the Region's view?

MR. STEIN: In our view, the Petitioner had the burden not only to show that the limits that otherwise applied were more stringent than necessary, but they had the burden to show that the limits that they were proposing, the alternative limits, would be adequate to ensure the protection and propagation of the BIP. We feel that that's their burden.

JUDGE STEIN: How do you get to that from the language of the statute?

MR. STEIN: We get to it because when you look at the language of the statute as well as the language of the regulations, it's clear that the way the Agency has interpreted 316(a) is that the Petitioner is supposed to come forward and make a demonstration that there are alternative limits that will be adequate to protect the balanced, indigenous population. What the statute says is that the Agency may allow such a variance. We may do that if a petitioner has come forward with an adequate showing.

Now, we feel that we have a burden, too.

If we find that the Petitioner has not carried its burden, we have to show that that finding is not arbitrary and capricious. If we decide to grant a variance, then we take on the burden of showing that the limits that we are imposing will in fact be adequate to ensure the protection and propagation of the BIP, and that they are not otherwise, again, arbitrary and capricious.

JUDGE REICH: But going back to the wording of 316(a), is it not true, though, that the language that talks about "the applicant can demonstrate" relates to the initial finding that the standards that would otherwise be imposed are more restrictive than necessary to protect BIP? And then, having gotten to the end of that clause, it talks about "the Administrator may impose." Doesn't it suggest that, having made that finding, the burden shifts to the Administrator, since it's the Administrator who has to determine what to impose?

MR. STEIN: Again, I think that the Administrator would take on the burden of showing

that the limits that were imposed are adequate to assure the protection and propagation of the BIP. I agree with that.

JUDGE REICH: Okay. And what is the effect of, if the Agency fails to do that, what is the effect of that? Is the permittee without a variance?

MR. STEIN: We would say yes, indeed. Yes, that's right. If we fail to support the limits that we have imposed, then the permit would have to be remanded for the region to develop new limits, and in the meantime the petitioner would not have variance-based limits, or they would have whatever was in their existing permit if they are an existing discharger. But yes.

JUDGE REICH: So does that mean that if we find that a variance was proper but that these limits are not the right limits, that our course would be to remand it back to you to develop appropriate limits?

MR. STEIN: If you find that they are appropriate limits, in the sense that we did not

carry the burden to show that they are stringent enough to meet the standard of 316(a), then yes, that would be the--you know, then the permit limits wouldn't stand, and we would have to go and redo the permit and develop limits that would stand.

JUDGE REICH: But if we conclude that they are overly stringent, then you wouldn't have any burden at that point to show that it can be made less stringent--

MR. STEIN: We don't believe--

JUDGE REICH: --and still meet the standard of protecting BIP?

MR. STEIN: I'm sorry, Your Honor. We don't believe that we have the burden of showing that they are the least stringent possible limits that could be developed and might protect the balanced, indigenous population. If you found that our limits were so stringent that they are arbitrary and capricious, that we don't have a rational basis for the decision that we made to set those limits, then I think you would be--it would then be your role to remand that permit for us to

develop new limits that could be supported, or to develop a better basis for the limits that we did impose.

I'll say one last thing about 316(a), and I would like to turn to 316(b). As I mentioned, there is a retrospective showing. We also looked at the Petitioner's prospective showing, where an applicant can say "Even if there has been past harm from our discharge, we've got an alternative set of limits that, going forward, won't cause harm."

And we did review the Petitioner's proposal to reduce its thermal discharge from a 42 trillion Btu's a year discharge to a 28 trillion Btu discharge. But what we found was, under that condition, still 62 percent of the bay would exceed the critical temperatures that we identified before, and again, all of the critical nursery and spawning habitat up near the discharge point would exceed the temperature. So we found again that the Petitioner had not carried its burden to justify those limits.

What we then asked ourselves was, well,

what would be a set of thermal limits that would meet the critical temperatures in the area outside that 10 percent zone, and we then did the calculations to figure out how many Btu's they could discharge and still meet that standard. And I'll say most of the time, virtually all the time--of course, conditions can change in the bay based on tides and currents, and so the plume moves around--these limits that we impose we felt would principally protect the nursery and spawning habitat, and as a result would satisfy 316(a).

And while Petitioner has raised a number of technical disputes with the analysis that we did, we don't think they have shown that the limits were arbitrary and capricious or inconsistent with law. And I would note that several independent experts agreed that the analysis was reasonable, including Massachusetts and Rhode Island but also experts from the Oak Ridge Laboratories. Their analysis is provided at Exhibit 34, and it may be interesting for the Board to focus on that as well.

Now I would like to turn to 316(b), and I

will address why it was proper that we develop this permit on a BPJ basis, explain why these BPJ limits should be upheld, and address the issue of State water quality requirements.

The Region began work on this permit in 1997. We issued the draft permit in July of 2002 and the final permit in October of 2003. Throughout this time, there were no national applicable technology standards that applied to this facility, and it was the Agency's practice, consistent with the Act, to do BPJ--best professional judgment--case-by-case permitting, and that's what the Region did. The Phase II regulations were not signed until February of 2004, and they only just became effective.

JUDGE REICH: Well, let me ask about that. I read the last brief filed by USGen as conceding that the Phase II regulations do not per se apply in this situation, but given that this permit is not final, if there were technical objections--and I'll state this hypothetically so I don't trip into administrative record issues--but hypothetically,

if a party made technical objections to some of the aspects of the proposed Phase II rules, and if they made the same technical objections as part of the record of this proceeding, why would it be irrational--that may be too high a standard--for the Board to look at how the Agency dealt with those same issues in the context of the Phase II rulemaking as suggestive of the Agency's latest thoughts on those issues, even if the regs themselves don't apply?

MR. STEIN: Well, it's hard to visualize exactly the context in which those other comments would have been made in the national rulemaking and how they would fit with the permit that we developed. The responses that the Agency may have made in the rulemaking are not part of the record for the permit that we developed, and so obviously we couldn't have considered those matters in developing the permit.

JUDGE REICH: Yes. My question was deliberately designed to apply only to situations where the same issues were raised as part of this

proceeding, because I agree there is no obligation to look at issues that were raised in the Phase II proceeding, that weren't also raised in the context of this proceeding.

MR. STEIN: You know, if the Board decided to go afield and outside the record of the permit and to look at the analysis that was done in the rulemaking, you might decide that it gives you some sort of guidance. Still, looking at issues in the context of a national rulemaking is different than in the context of a case-by-case, facility-specific permit, certainly different in many ways, and I can't say that that would provide real guidance for the permit.

You know, I think it's worth remembering that the Agency repeatedly told the Regions to continue doing best professional judgment permitting while the rulemaking was ongoing. They said this three times: a December 2000 guidance document; in the proposed Phase II rule; and then again in a February 2003 guidance document.

The Agency said Regions should continue

doing case-by-case permitting while the rulemaking is ongoing, and in the proposed rule the Agency actually said specifically, "This proposed rule should not be used as guidance in developing the best professional judgment permits," because there are so many options and issues on the table, and that the BPJ permits that get developed could turn out to have limits more stringent than or less stringent than whatever the final rule might provide.

So, you know, to sort of go to the Phase II rule as it ultimately turned out, and then use that to go back and revisit the permit somehow, we would submit is inconsistent with what the Agency was directing the Regions to do and would sort of undermine the public's interest in seeing finality at some point to NPDES permits. So we don't think it's advisable.

And the Region did a sound best professional judgment analysis in this case. 316(b) requires the best technology available for minimizing adverse environmental impacts, and it

requires that you apply the--because we do a best professional judgment analysis, it requires that we apply these legal standards to the specific facility at hand and the environmental conditions at hand, and that's what we did here.

We reasonably assessed the adverse environmental impacts, and I described them before, the entrainment and impingement of billions of organisms. And we found, again that, the fish populations had collapsed coincident in time with large-scale increases in cooling water withdrawals by Brayton Point Station, suggesting a relationship between the intake and the collapse.

And 316(b) requires adverse impacts to be minimized, which the Agency has defined, as is explained in our record, as "reduce as much as possible." And then we looked at technology, and we found that you could convert the open cycle cooling system to closed cycle cooling at all four units at Brayton Point Station, and that would get the largest reductions in adverse environmental impact, thus meeting the standard of minimizing

those adverse environmental impacts.

In fact, conversion of the whole facility would get a 94 percent reduction, whereas the company proposed to convert one generating unit to closed cycle cooling, which only would achieve a 33 percent reduction in flow. We found that such a conversion was technologically and economically practicable, and the Petitioner didn't question that. And we found that it had been accomplished at other facilities, making it generally the best technology within the industry.

Now, normally that would end the analysis, except in the Seabrook Public Service Company of New Hampshire permit appeal decision by the Administrator in 1977, the Administrator said that while there is no requirement to do a cost-benefit analysis, it's appropriate to consider cost and to consider the reasonableness of the costs, and to do that by applying a wholly disproportionate cost test. In fact, the Administrator noted that if it was not for that test, perhaps all facilities would be required to convert to cooling towers who could

afford to do so. The Administrator said that specifically, because it's understood that that would get the greatest reduction in adverse environmental impact.

So the Region went ahead and we looked at costs and we looked at benefits, and while we had significant disagreements with the Petitioner on costs, the issue really here, the material issue is benefits, because we concluded that the costs were not wholly disproportionate to the benefits even if you consider the Petitioner's costs. And we would submit that we did a reasonable assessment of benefits, looking at them from a number of different perspectives.

And I would like to quickly turn to water quality standards, because I see I'm running short on time. It is our conclusion that it's necessary --we initially developed 316(b) limits based on the technology standard, but we concluded that it was also necessary to ensure that State water quality standards be satisfied as well.

And we found that the standards for

Massachusetts and Rhode Island did apply to the impacts of the intake of cooling water, and both States agreed, and you see that in their letters in the record. With respect to Massachusetts, we concluded that we could not make the intake limits significantly less stringent without violating their standards, and that's based on the State certification that said that it was necessary to control entrainment and impingement, and the limits that we imposed would allow the attainment of the designated uses of the State standards.

JUDGE REICH: Is that truly what the certification said, or did it say that it adequately addresses entrainment and impingement and would allow for attainment? I don't remember the language of the certification itself using the word "necessary."

MR. STEIN: No, it doesn't use the word "necessary." In fact, if I said that, I misspoke. It says exactly what you just said, Your Honor. And so that's why we concluded that the limits could not be made significantly less stringent, and

it's why you didn't see us arguing that the permit appeal on 316(b) should be sent to the Commonwealth of Massachusetts because the limits were attributable to State certification. The State certification did not go quite that far. But we concluded, under 301(b)(1)(C), in our analysis of their standards, that we could not make the limits significantly less stringent and still meet the designated uses that apply here.

JUDGE REICH: It was interesting to me that in one of your briefs you basically said that while you relied on 301(b)(1)(C), we didn't have to reach that because there was ample authority under 316 and 401, but yet you then later seemed to bring 301(b)(1)(C) back into the mix. That puzzled me a little bit.

Let me ask one question, just for my understanding. The reason you said that we didn't need to reach 301(b)(1)(C) was because there was ample authority under 316 and 401. Does 316(b), in your view, provide authority for regulation, or does 316(b) just provide a gloss on regulations

developed under 301 and 306? Because it does talk about any standard established pursuant to 301 and 306, which suggests to me that that's where the underlying authority comes from, not 316(b) per se.

MR. STEIN: I guess I think that what the Agency's position has been, and I hope I'm not speaking beyond what the Agency has really decided, is that these limits, intake limits, are based on both 316(b) and 301 or 306, as the case may be, and authority derives from both.

JUDGE REICH: Okay.

MR. STEIN: I guess my time is up.

JUDGE REICH: I think there may be some other questions.

JUDGE STEIN: Yes. I have a question related to a point you didn't get to, but could you please explain the sort of statutory basis on which you would take Rhode Island's water quality standards into account, and how if at all that differs from what you would do with Massachusetts?

MR. STEIN: Yes. Rhode Island's standards come into play via 401(a)(2) as well as

301(b)(1)(C). Under 401(a)(2), that relates to--we often refer to them as "downstream affected States." We feel that there has to be a discharge from a facility to trigger the application of 401(a)(2).

But when you look at the language of 401(a)(2), you know, if you're in that world, what it says is that permit limits must reflect requirements or have requirements that will assure the satisfaction of the standards of all affected States. And that's consistent with the language in 40 C.F.R. 122.4(d). 301(b)(1)(C) of course also says that permit limits must satisfy applicable State requirements.

So we look to Rhode Island's standards because of 401(a)(2) and 301(b)(1)(C), as well as the regulations. Now--

JUDGE REICH: Excuse me. Is there a difference in the way discharge is referred to in 401(a)(1) and 401(a)(2), in that in 401(a)(1) it talks about an activity which may result in a discharge, whereas in 401(a)(2) it talks about

whenever a discharge may affect, which suggests potentially that 401(a)(1) really relates to the existence of a discharge, whereas 401(a)(2) really focuses more specifically on the effect of the discharge?

MR. STEIN: We don't think that there is such a difference, and we don't think that it would be--I mean, the way you're talking about the language is correct, but we don't think it has a substantive difference. And we don't think it would make sense for the Act to provide that activities related to a discharge have to satisfy water quality standards in the State where the discharger is located, but related activities could cause standards to be violated in the downstream affected State. We think the purpose of the Act is to ensure that State water quality standards and the standards of all affected States are met.

JUDGE FULTON: If we could go back to 316(a) for just a moment, as I understand it, USGen seems to be arguing that this permit decision should be seen as occurring somewhere between two

important bookends, one bookend being the Agency's prior practice leading up to the issuance of this permit, and the other being the latest thinking on the Agency's part as reflected in the Phase II rulemaking. And USGen's suggestion is that this permit should be viewed as an anomaly or at least as an exception to the general approach. Just tell me once again why we should not see it in that light.

MR. STEIN: It shouldn't be seen in that light. Now, are you referring to 316(b) or 316(a) or both?

JUDGE FULTON: (a), I believe.

MR. STEIN: Well, the Phase II regulations are 316(b).

JUDGE FULTON: Okay.

MR. STEIN: But in either case, the analysis under 316(a) and under the BPJ, 316(b) permitting is for a case-by-case analysis. Permits to different facilities can lead to different limits, based on the different facts at hand. We cited the case law that establishes and supports

that point.

At the same time, there is nothing in the history of the Agency's practice in these areas that says that you couldn't have limits that might lead to the requirement for closed cycle cooling. In fact, the record shows, and we described this in our response to comments and in our draft permit record, that there have been other permits issued to facilities that have, at times draft permits that have required closed cycle cooling, though in the final permits different resolutions came about, in some cases requiring the installation of fine mesh screens, in other cases requiring outages at the facilities, such as facilities on the Hudson River and a facility in Florida called the Crystal River plant.

So it has been clear that closed cycle cooling under 316(b) is an option on the table. There are many plants out there that have it. It's just that in these other cases, you know, that may not have been the final result of the permit, and it is the final result of this permit. And we

don't think there's anything inconsistent about that at all.

JUDGE FULTON: And you think what you have just shared here is reflected pretty fully in the response to comments document?

MR. STEIN: Absolutely. We went through a discussion of the Brunswick plant in North Carolina, the Crystal River plant in Florida. We mentioned plants on the Hudson River.

And again, I guess one other thing I should emphasize, that under 316(a) technology is not--it's not a technological test, so you're not looking to the technology in other facilities. You're simply looking to what's necessary to protect the balanced, indigenous population of that receiving water. So that's 316(a).

On the (b) side where you are looking at technology, you know, the issue of what may have happened at other plants comes into play, but only to a limited extent, and we don't think there is anything inconsistent with respect to what we have done in our BPJ permit.

JUDGE FULTON: Would you agree that under 316(a), in assessing the rationality of the Agency's approach, that it is not inappropriate to consider what the Agency has done in like circumstances?

MR. STEIN: Yes, if you found a like circumstance, perhaps it would be. You know, we would submit that what we found here is a collapsed fishery, very important resources at stake, and the analysis that we did on what would protect these specific fish, winter flounder, in this area, led to the permit limits that we imposed. You know, if you look at another facility that has the same issues at hand, presumably the result should be similar.

JUDGE FULTON: Thank you.

JUDGE STEIN: One final point that I want to be clear on, and hopefully USGen can also address this in their rebuttal. Did I understand you to say that the difference between what the Region imposed versus what USGen proposed was a difference of closed cycle cooling for four towers

versus one tower? That USGen in fact imposed the kind of technology you're talking about, but you're just talking about the extent to which that was imposed more broadly at the facility?

MR. STEIN: Yes, Your Honor. The proposal that the company made was to reduce its intake flow from approximately 1 billion gallons to approximately 650 million gallons a day, based on converting one of the four units at the facility to closed cycle cooling.

JUDGE STEIN: So it's not an objection to closed cycle per se; it's an objection to the magnitude of what this would mean for the facility in economic terms? And I'll give USGen an opportunity to explain.

MR. STEIN: Yes. I mean, they'll speak for themselves. My feeling is, what they have argued is an economic argument, but only in the terms of the wholly disproportionate cost test. They have conceded that they can afford to install cooling towers for the entire facility, that it's economically practicable and that it's

technologically practicable. But what they have argued is that the benefits don't warrant--or actually the reverse--the costs are wholly disproportionate to the benefits, and we disagree.

JUDGE REICH: Okay. Thank you.

We are going to take a 10-minute recess. We will reconvene promptly at after the recess.

[Recess.]

THE CLERK: This session of the oral argument is now in session, the Honorable Judges Scott Fulton, Ed Reich, Kathie Stein, presiding. Please be seated.

JUDGE REICH: Okay, thank you. We will now proceed. First argument after this break is the State of Massachusetts.

MR. LEHAN: My name is Richard Lehan. I am a Deputy General Counsel with the Massachusetts Department of Environmental Protection. Given my time limit, and in response to your request, I will try to distill the interrelationship between Massachusetts water quality standards and Section 316 as applied to the Brayton Point permit.

First as to the Section 316(a) variance limits, DEP's water quality certification of the Brayton Point permit documents our concurrence with Region I's establishment of the Section 316(a) variance limits. DEP's certification cites the relevant provisions in the Mass. water quality standards which provide that any determinations concerning the thermal discharge limitations in accordance with Section 316(a) will be considered site-specific limitations in compliance with our water quality standards at 314 C.M.R. 4. Accordingly, because DEP's water quality certification concurred with Region I's determination of the Section 316(a) variance limits, those site-specific limits are, by regulation, deemed to be in compliance with our water quality standards.

As to the Section 316(b) cooling water intake limit, the Massachusetts portions of Mount Hope Bay that are severely impacted by Brayton Point's cooling water withdrawals are classified as Class SA or Class SB waters. SA waters, the most

protective classification, are designated for use as an excellent habitat for fish, other aquatic life, and wildlife, and for primary and secondary contact recreation.

Brayton Point's existing 1 billion gallon per day withdrawals destroy trillions of marine organisms, including billions of fish eggs and larvae. This has resulted in the massive annual loss of a range of important fish species in Mount Hope Bay. DEP concurred with Region I that Brayton Point's activity clearly interferes with the attainment of an excellent or even healthy fish habitat, and with recreational uses such as fishing in Mount Hope Bay.

JUDGE REICH: In looking at the 316(b) limits relative the water quality standards, did you look at it from the perspective of whether the limits were adequate, or did you also look at it from the standpoint of whether the limits were potentially overly restrictive? I mean, was there any analysis that showed one way or another, that is part of the record, whether the limits could

have been less restrictive and still adequately addressed State water quality standards?

MR. LEHAN: I think our focus was, this was a limit that was established by Region I pursuant to the technology standard in Section 316(b), and our determination was whether that limit would comply with our water quality standards. And it was predicated on our independent State law authority to apply the designated use components of our water quality standards to an activity like a cooling water withdrawal. That was kind of the underlying foundation for us addressing that in our water quality cert.

JUDGE REICH: Can I ask for clarification on what that means? You do cite in your brief various authorities that Massachusetts has, that in your view allow you to address intake. In issuing the joint permit, did you actually rely on and exercise those authorities?

MR. LEHAN: Yes. Yes, we did. It's predicated on our interpretation and application of

our broad regulatory authority under the Massachusetts Clean Waters Act. Under the Massachusetts Clean Waters Act, in addition to discharges, DEP has authority to regulate other activities that may reasonably result, directly or indirectly, in a discharge of pollutants. Brayton Point's withdrawals are an activity that directly results in a thermal discharge.

JUDGE REICH: So you invoked those authorities in the joint--

MR. LEHAN: Yes.

JUDGE REICH: When you issue a permit, is there any limitation that requires you to establish limits no more restrictive than necessary? Do you do that judgment in the course of issuing a permit? Is there anything that the fact that those are the limits in your permit suggests about whether they could have in fact been made less stringent?

MR. LEHAN: I first addressed that in the context of a Section 316 limit that was established in the first instance by EPA, a technology standard. No, in that context we would not try to

identify whether there is a less stringent limit.

More generally, our water quality standards, in talking about the more traditional effluent discharges, do talk about ensuring a reasonable margin of safety, so it's more framed from that perspective.

But again, under the Mass. Clean Waters Act we have authority to regulate other activities that may reasonably result in a discharge. We also have the authority to specify technical controls on treatment works in a manner which DEP deems necessary to safeguard water quality.

"Treatment works" is defined very broadly under the Mass. Clean Waters Act to include processes used in the pumping, transmission, recycling and reuse of pollutants such as thermal discharges. From our perspective, we think the Mass. Clean Waters Act provides ample authority for us to regulate an activity like a cooling water discharge.

Similarly, under Section 401, the statute and the PUD No. 1 decision, the Riverkeeper

decision, make clear that Brayton Point's thermal discharge triggers the application of the State's water quality certification provisions, thereby authorizing DEP to issue a water quality certification that addresses and conditions Brayton Point's activity to ensure compliance with the designated uses in our water quality standards.

JUDGE REICH: But do I understand you to say that this certification that you issued was basically a certification that took the limit as it was proposed and said "This will be adequate," and was not intended to suggest one way or another whether a less restrictive limit could be adequate?

MR. LEHAN: The certification did not provide that the limit could not be made any less stringent.

JUDGE REICH: Right.

MR. LEHAN: But the certification was predicated on Region I showing that the limit will ensure compliance with our water quality standards. The cert affirms that Region I provided reasonable assurance to the Department that the 316(b) permit

intake limit will not violate our water quality standards.

In addition, our action of incorporating the limit in our State permit also evidences our further satisfaction that the intake limit is also appropriate for our permit, because again, first and foremost, it will ensure compliance with our designated uses.

JUDGE STEIN: Could you respond to the argument that USGen made about various positions taken by the State of Massachusetts in the State permit appeal, both substantively as well as the extent to which we ought to consider, the Board ought to consider events taking place in that appeal, if you can?

MR. LEHAN: Yes. USGen included a motion that the Department filed to stay the appeal of the State permit. We were saying, and I think we have been consistent on this, that the permit is based in the first instance on a determination by Region I pursuant to the technology standard under Section 316(b). But we also made clear in that

filing that any lessening of the stringency of that intake limit would require us to determine whether the revised limit would still allow for the attainment of the designated uses.

So we, from our perspective, and as Region I had said earlier, we do not regard our certification as saying that the limit cannot be made any less stringent in the sense of being a State-only enforceable condition. We were satisfied that the limit will ensure compliance with our water quality standards, and the limit again was predicated on the application of a BTA technology standard.

JUDGE STEIN: Thank you.

JUDGE REICH: Thank you very much.

Counsel for Rhode Island?

MR. WAGNER: Good morning, Your Honors. Brian Wagner, Deputy Chief Legal Counsel for the Rhode Island Department of Environmental Management for the State of Rhode Island.

Before I get to the issue of Rhode Island's water quality standards which the EAB did

ask us to address, I wanted to very briefly touch on two issues that were raised in previous arguments: first, the Phase II rule as raised by Region I. I wanted to point out that Region I did not mention that the Phase II rule at this point has been challenged by 13 separate entities in I believe seven circuits, including three of the amici here today: Rhode Island, Massachusetts, and the Utility Waters Action Group.

There really does not appear to be any likelihood that this Phase II rule is going to be implemented soon, possibly not even in its current condition. So the game of speculating as to whether or not the Phase II rule should apply or should not apply really should be off the table, because it is so overtly speculative that it shouldn't have any application here in this case.

The second issue that I wanted to touch on tangentially was USGen's reference to a December 2001 report by a DEM employee, Mark Gibson, and how that report was not included in the record. The State of Rhode Island did address this issue

thoroughly in its December 22, 2003 brief at pages 18 through 23 and Exhibit A.

I don't feel the need to repeat what we said in that brief, except to point out that the December 2001 report was put together by a member of the Department's Division of Marine Fisheries. It later received comments from the Department's Division of Water Resources, and was subsequently amended or revised in 2002. That revised report is part of Region I's record and has appropriately been considered. The remainder of that controversy is addressed in our brief.

With respect to the State's water quality standards, the State of Rhode Island has argued and stands by its position that Region I did have a mandate or an obligation to consider the State of Rhode Island's narrative water quality standards as a downstream affected State. That obligation can be found in Section 401 of the Clean Water Act. It can be found in Section 301(b)(1)(C) of the Clean Water Act.

JUDGE REICH: Mr. Wagner, relative to

that, I was not clear what Rhode Island was saying relative to 316(a). Language in your brief, I'll quote it, says "Consideration of a State's numeric water quality standards is not the end of the consideration process for the reviewing agency, in that a State's narrative requirements must also be weighed against the selected technology and any ultimate determination as to whether a variance was available."

I wasn't sure whether I should be reading that as suggesting that State water quality standards were part of what we had or what the Agency had to consider in determining BID, or whether they overrode potentially BID, or exactly what the relationship was between water quality standards and BID determination in 316(a).

MR. WAGNER: I think that there has always been some discussion as to the role that narrative standards play as opposed to, you know, specific numeric criteria, and I think what we were getting at in that section of our brief, you can't just look at the numeric criteria and do some math and

determine whether or not there is compliance with the water quality standards as a whole. The narrative portion of the State's water quality standards do have a very important function in trying to describe the kind of conditions that the State is trying to maintain in a given water body.

JUDGE REICH: And does that become an element of what BID is?

MR. WAGNER: BID? BIP?

JUDGE REICH: BIP.

MR. WAGNER: Of course it does. The narrative criteria are intended to describe the balance, the biological balance that should be maintained in water bodies of that particular classification.

In this case Mount Hope Bay, the two-thirds of Mount Hope Bay that falls within the State of Rhode Island are designated as SA and SB and are, much like Massachusetts, are required to maintain the highest level of water quality for fisheries habitat. This is what we're trying to protect, and this is what those narrative standards

are trying to get at.

We believe that EPA had an obligation to consider these standards, and that obligation I think is best exemplified in 410(a)(2). The U.S. Supreme Court's decision in PUD No. 1, although it relates to 401(a)(1), where you actually have a discharge State and not a downstream State, is a good model for how things should happen in the downstream State.

As in the upstream State under 401(a)(1), the discharge is a trigger for consideration of the downstream State's water quality standards. Once there is a discharge, there is an obligation to notify us, as a downstream State, that our water quality may be affected. We then look at that to determine if there is an actual effect. If we make that determination, then we have the right to comment on the permit as a whole.

JUDGE REICH: But didn't the Court in PUD No. 1 say that if Section 401 consisted solely of subsection (a), which relates to a State's certification that a discharge will comply with

certain provisions of the Act, petitioner's assessment of the scope of State certification would have had considerable force, and only then look to 401(b) to determine that the scope is broader than just looking at the effect of the discharge?

MR. WAGNER: I agree, but 401(a)(1) and 401(a)(2) are not identical. They are not mirror images of each other, intended to apply to the discharge State and the downstream State. There are many elements of 401(b) that are found in 401(a)(2), including requirements that or a mandate that those water quality standards be protected for the downstream State.

More pragmatically, I think that we also need to look at the fact that even if there is not a formal, affirmative obligation on Region I to make sure that Rhode Island's water quality standards are met, Region I certainly had the discretion to look to Rhode Island's water quality standards and use them as a guidepost.

JUDGE REICH: In looking at your brief, if

I understood it, I was reading you as saying that the permit would not in fact protect water quality standards, and I think you made reference to Rule 8(d)(1). Is that correct? And if that is correct, does that relate to the 316(b) intake limits or the 316(a) variance or both?

MR. WAGNER: Rhode Island determined that there are elements of the permit as issued that will not comply or are likely not to comply with Rhode Island's water quality standards, specifically the 122 hours of once-through cooling that are allowed under the permit. We believe that in that mode, that the thermal discharge will violate Rhode Island's water quality standards.

However, looking at the permit as a whole, the protections to be afforded over the course of the year, we made a decision not to object to the permit because we felt that as a package, overall, that the permit would be protective of Rhode Island's water quality standards.

JUDGE REICH: Do you think that the Agency, under 301(b)(1)(C) or under 401, has the

same discretion to overlook the alleged violation of Rhode Island's water quality standards?

MR. WAGNER: I think based on the fact that Rhode Island has chosen not to raise a formal objection, that yes, that discretion with respect to the State's water quality standards would be passed on the permit writer, in this case Region I.

JUDGE REICH: Thank you very much, Mr. Wagner.

The Utility Water Act Group.

MR. CHRISTMAN: Thank you. May it please the Board, my name is Jim Christman and I am representing the Utility Water Act Group, usually known as UWAG.

UWAG doesn't ordinarily involve itself in individual permit proceedings, but this one was important, important because it was so anomalous. As was already said, you have over 25 years of case-by-case interpretation of 316(b), which is our prime concern right now. You also have a proposed rule, before the permit came out, saying that closed cycle cooling is not BTA for 316(b). Now

you have a final rule in which EPA says, "We've concluded that closed cycle cooling is not BTA for this category."

So whether or not this applies, or whether it could have been used, should have been used, you know what the law is now. You know what BTA is under 316(b). You have to, the courts have to apply the law at the time of decision, absent manifest injustice, and we know what that is.

And, moreover, the final rule which says cooling towers are not BTA is simply consistent with more than 25 years of precedent. So you've got one case here. The rule goes into effect two days ago, the new rule. We've got 25 years of precedent plus a final rule saying cooling towers are not BTA, and then we have one case, one case which says cooling towers are BTA under 316(b). What are we to make of it? How are we to interpret the law with that one anomaly out there?

Now, you may say even if we applied the Phase II rule to this plant, and it depends under guidance on whether the permit issued before or

after this past Monday, and I suppose that the final Agency action will be after this past Monday but you will say that the permit issued before last Monday. In any event in the short term this Phase II rule and the guidance under it calls for BPJ.

But BPJ, and this is very important, BPJ doesn't mean all bets are off, there are no rules, we can make our decision based on raw, subjective judgment. The law is pretty clear on this. What BPJ means, if I can use my own words, is you're trying to make your best estimate of what the categorical standards would be if EPA had made them. The law technically says that BPJ doesn't give the decision-maker unlimited discretion; that you have to apply the same statutory standards; and that you have to be as uniform as you can be.

Well, in this unusual situation we know what uniform means and we know what the law is today, and this case is inconsistent with it. And that is very important, and it is important to a lot of power plants who will have to be applying this new rule in the short term and using BPJ

limits.

The other thing is, if you let BPJ impose massive construction requirements in the interim, this rule will apply to all these existing facilities in future permit renewals. If you make them build a cooling tower now, they can't really use the new rule in the future. In this brief window of time, you have prevented the application of this brand-new rule which is EPA's well-considered and best judgment about what BTA is.

Now, there is another thing that causes us to want to get involved in this case to the limited extent of being an amicus, and that is this business about State water quality standards. In the case of Rhode Island, you stole my thunder, Judge Reich, a little bit. I was going to cite the business about how, if it weren't for 401(d), the argument that there has to be a discharge would have considerable force.

And I've heard, well, let's use 401(d) as a model, let's use it as an analogy for 401(a)(2), but that's not right. It's a different statute and

it's different words. And it says the State determines that such discharge in the upstream State will affect the quality of its waters so as to violate a water quality requirement.

Now, if you look, you can't see it but I can see the Ohio River up there. The Ohio River runs right south of Illinois, Indiana, Ohio, over into Pennsylvania. There are six States involved, and on the Ohio River there are 47 power facilities. Five of them are hydro facilities; the rest are steam electric plants.

The idea that Rhode Island can impose its own water quality standards on an upstream State would mean that all of those five States downstream from Pennsylvania could impose requirements, if only they share some fish, and that just isn't what this Congress intended and it isn't what this statute seems to say to me.

JUDGE STEIN: Can I ask a question at this point? Leaving aside what Rhode Island might be able to do, what is your view of the Agency's both obligation and discretion to take Rhode Island's

water quality standards into account?

MR. CHRISTMAN: Well, if there is a State requirement here, they may have to impose it, but the State tells them that by interpreting State law, and it's not EPA's job to take a narrative standard or a use--and they are about the same thing in many of these cases, the fish--they are not to take a State law, use, or narrative standard and create a Federal requirement out of it. That's not allowed by the statute.

Now, you know, the only case I can think of--there aren't very many cases about EPA's interpreting narrative standards--there is a 1980 case called, it's a Webco case, not the famous Webco case on the air side that you know about, but it's about water quality standards.

There were five or six plants that the power company was applying for permits on, and the State put some chlorine limits in those permits. And the EPA said, "Well, no, we're not going to approve those because you need a harsher limit to meet State water quality standards."

So the State dutifully put that into the permits, and that went up on appeal--and this is a State court case, not a Federal court case--and they said you can't do that. You can't just--they didn't do any State process. They didn't make a decision under State law. They just took EPA's word for it, and that wasn't appropriate.

Now, that case gets all muddled up in the question of improper rulemaking without rulemaking procedures. Most of the cases about narrative standards end up talking about improper rulemaking, absence of rulemaking procedures, but the idea, the analogy is somewhat close to this situation.

I also should point out that 122.44(b)(1)(6)--122.44 is one of those that goes on forever like your grandfather's war stories, but if you dig way down into it, it tells you how you can translate a narrative standard, let alone a use, into at least a chemical-specific permit limit. And it says you translate it using one or more of the following means, and one of those means is an explicit State policy or State regulation.

But you can't just take a narrative standard or a use and say, "We'll use raw judgment and make up a new Federal requirement."

JUDGE REICH: Let me ask, because you indicate in your brief when you're talking about Massachusetts, what you say is, "If the Region disagrees with Massachusetts' interpretation of its own standard, the proper form to address such a disagreement is a rulemaking process with notice and comment. It is entirely inappropriate for the Region to offer its contrary interpretation in an NPDES permit proceeding."

If the Region understood Massachusetts' interpretation of its own standard as requiring these limits based on Rhode Island's interpretation of its narrative water quality standards, why would it be equally inappropriate for the Agency to second-guess it in the course of this proceeding?

MR. CHRISTMAN: Well, if I understand the question, it's not EPA's job to be making interpretations of State law. Now, if EPA understands that the State wants to interpret its

law a certain way, you've got a process problem, because if this is some sort of understanding about what the State really wants, that is not a fair process.

If the State has--remember, in the Public Utility Districts case, what happened was, the State had done a study and they said, "We need this minimum flow to meet our water quality standards." There was process and there was a record. And then it went to the Washington Supreme Court, and the Supreme Court said, "Yes, as a matter of State law, we conclude that this is necessary to meet water quality standards."

There was no question there was a State law requirement. The statute speaks in terms of a permit having limits as necessary to ensure the compliance with State law requirements. The State has to say what the State law is, and EPA shouldn't be making guesses about what they think the State law is.

JUDGE REICH: But if EPA has a proposed limit and goes to the State, and the State comes

back and says, "Yes, this is necessary, and in fact you need these few other things if you really want to meet State water quality standards," then really isn't the determination that's going in the final permit reflective of the State's interpretation, not just EPA's interpretation?

MR. CHRISTMAN: If the State makes a proper certification and says, "These are the requirements of State law," and bear in mind Public Utility Districts also says that the ability of a State, even for the in-State law, not the downstream State, the ability to impose its requirements is not unlimited. They said, "We're not going to say what kind of limits there are, but limits that are necessary to ensure compliance with water quality standards can be imposed in a proper 401 certification."

If the State made that judgment as a matter of State law and its proper procedure under State law, then EPA should, would have to put that in the permit, but that isn't what happened here. What the State said was, "Yeah, we go along with

the Federal requirements." That's kind of like the Wisconsin case, what the State did there, and they got reversed by their State Supreme Court.

Let's see. I believe I want to say one more thing. Oh, I'm out. I'm sorry. I wanted to talk about economic issues and the shabby and unclear use of economic methods in this case, but I'm afraid I'm out of time so I can't talk about it.

JUDGE REICH: I think we are. Thank you.

MR. CHRISTMAN: Thank you.

JUDGE REICH: Conservation Law Foundation?

MS. RAWN: Good morning. I'm Carol Lee Rawn with the Conservation Law Foundation.

Just before I begin my prepared remarks, I just want to quickly address the issue of the applicability of Phase II. As both EPA and Rhode Island said, there are many reasons that it's not applicable here. Obviously the EPA was expressly directed to apply best professional judgment. It's under legal challenge as we speak. There's no way of knowing what it's going to look like in two

years.

But the assertion that closed cycle cooling would not be required under Phase II regulations is not correct. In fact, the Phase II regulations expressly say that closed cycle cooling would be deemed to meet performance standards, and expressly talk about utilization of closed cycle cooling in situations like Brayton Point, where it says that closed cycle cooling may be suitable where adverse effects of intake are severe and where screening systems aren't practicable, or where thermal discharge impacts pose serious environmental problems, as in Brayton Point.

Mount Hope Bay has historically been an important recreational and commercial fishery, as well as a critical spawning--and it serves today as a critical spawning and nursery area. Unfortunately, due in large point to Brayton Point Station, this important resource has suffered severe environmental degradation and is in crisis today. As documented in the record, as you have heard today, the impacts of Brayton Point have been

and continue to be significant and harmful.

As we stated in our initial comments, as well as the briefs submitted in this proceeding, CLS has long had concerns that the permit conditions may not be sufficiently stringent to meet the requirements of the Act in this severely stressed estuary. In any event, any relaxation of the limits would clearly be in violation of the Act. In light of the continuing harm caused by the plant with every additional day of delay, we support the permit as issued.

I would like to highlight certain facts and legal requirements that support our premise that closed cycle cooling is not only required under the Act in this case, but that it would have been reasonable for EPA to require a more stringent permit.

Examination of 316(a) requirements reveals that the permit represents the bare minimum necessary to achieve compliance with the Act. First of all, it's an extremely stringent standard. The legislative history has established that there

is a presumption against granting variances, and that this provision should be considered a very limited waiver. EPA has had a longstanding presumption against granting variances in estuaries such as Mount Hope Bay.

Second, cumulative impacts must be taken into account. Under Seabrook, the permit must ensure the protection and propagation of the BIP, taking all other considerations into account, including zone intake.

And, finally, the permit must ensure the protection of the BIP at a level that would otherwise be present but for past pollution. Mount Hope Bay has experienced severe environmental degradation, including the collapse of 16 species of finfish populations, mass mortalities of blue mussels, disrupted migratory patterns, and blooms of blue-green algae. Given the degradation of Mount Hope Bay, this permit must be more stringent than might be otherwise required in a healthier habitat.

Given these three considerations, it's

questionable whether the permit goes far enough to comply with the Act. Under the permit, approximately 10 percent of Mount Hope Bay, including preferred juvenile flounder habitat, will experience adverse temperature effects. It's clear that the EPA could have reasonably made the permit more stringent, but certainly not less stringent, in order to comply with Section 316(a).

The second independent requirement that EPA had to meet was compliance with Section 316(b), and again, examination of 316(b) and its attendant requirements shows the EPA could have certainly required a more stringent permit, and that a less stringent permit would violate the Act.

Rhode Island, as has been stated by EPA and the States, Massachusetts and Rhode Island State water quality standards do apply here. Rhode Island's response is significant, in that it demonstrates how EPA could have reasonably imposed a more stringent permit, but that certainly nothing less would have been in compliance.

In a September 18, 2002 letter, Rhode

Island suggested several changes to mitigate the impact of the 122-hour exemption, and as you noted, stated that the 122-hour allowance was inconsistent with narrative standards. EPA only adopted one of those, and continued to allow the 122 hours of once-through cooling during summer months, which is problematic for juvenile winter flounder.

JUDGE REICH: Can I ask you the same question that I asked Mr. Wagner? Given the posture of this appeal, where Rhode Island chose not to challenge the permit, do you think the Agency has the discretion under 301 and under 401 to kind of overlook the concerns that Rhode Island raised about whether these limits do in fact protect Rhode Island's water quality standards?

MS. RAWN: Well, as I understand Rhode Island's position, they have concluded that, in all, that it is in compliance with State water quality standards. I think that this is significant because it shows how much more stringent EPA could have made the permit.

JUDGE REICH: So your interpretation of

what Rhode Island has said is that the permit does protect water quality standards?

MS. RAWN: Excuse me?

JUDGE REICH: Your interpretation of what Rhode Island says is that the permit does protect water quality standards in Rhode Island?

MS. RAWN: Well, I could say Rhode Island is somewhat ambiguous, but--

JUDGE REICH: I mean, I only ask that because your brief doesn't seem to be premised on that assumption.

MS. RAWN: Right. I mean, they conclude in the--I mean, they do note that there is violation of water quality standards, which we think is significant because it shows they could have been more stringent, but they conclude that in general they comply.

JUDGE REICH: Okay.

MS. RAWN: I would also like to briefly touch on costs, to put that in context. AP Consultants looked at the production cost at Brayton Point and concluded that even with air

control and closed cycle cooling, costs would be $18 a megawatt hour. The real time market price over the last 12 months has been $49 a megawatt hour, so clearly Brayton Point could continue to enjoy a considerable profit margin if it went forward and imposed closed cycle cooling.

In conclusion, in light of the stringency of the 316(a) standard and the degraded status of Mount Hope Bay and the requirement that the permit comply with State water quality standards, it's clear that it would have been reasonable for EPA to issue a much more stringent permit. In light of the long-term impacts of continued operation of the plant at current levels, we urge that the permit be upheld.

JUDGE REICH: Thank you.

Kickamuit River Council. I hope I didn't mangle the name too badly. You have only 5 minutes.

MS. McCABE: Good morning. My name is Jean McCabe. I'm here today to represent the Kickamuit River Council. I'm going to speak for a

portion of that 5 minutes, and then allow Daniel Morrill, who also represents Kickamuit River Council, to speak for the remaining time.

Kickamuit River Council was formed in 1973. It wasn't the first council or the first group of people who formed to protect the Kickamuit River, a Class SA river which leads into and is salt water fed from the Mount Hope Bay, and is in the area that is affected by the Brayton Point power plant.

What I would like to bring here today is testimony about the real lives that this has affected, the lives of not only the generations before me but the generations to come. My grandfather raised my father on the Kickamuit River. My parents raised myself. I have raised my children, and now my grandchildren are enjoying the Kickamuit River.

And I should say that we're not talking here about a nuisance. We're talking here about a devastation. When I was growing up in the 1960's and the 1970's, we lived on the river, we fed off

the river. When I was an early young mom, I went to the river to fish and to blue crab and to quahog, and fed my family from this river.

We also went right out into the Mount Hope Bay, because the Kickamuit River leads right out into the Mount Hope Bay. There are real people here. There's 350 families represented with the Kickamuit River Council. We have obtained over 600 signatures from the citizens of our area. We have got over 79 letters from the schoolchildren directly abutting, living on the Kickamuit River.

It has been a devastating effect. We have watched it to the point where we now go hours, an extreme time. We need you to hear from the people who live there, whose lives this has affected, how we have waited decades.

In 1991 we lost our SA Class status. We had had sewerage that caused the closing of our estuary to shellfishing. We took steps and we have taken steps since then, decades worth of steps, to get that river reopened to shellfishing, because we felt it was not only our right, we not only

inherited this from our ancestors, we have actually borrowed it from our children.

And we have gotten that river reopened. We have fixed storm drain problems. We have put in septic systems. We have tied people to the sewerage. We have prevented overflow. We have prevented the dumping of silt. We have worked decades. And we want you to understand how vitally important upholding this permit is to us, and that the delay in it and the potential delay to go into appeals, to question other things, to rewrite it, is affecting us and it's affecting our children.

And I would like to turn this time over to Daniel Morrill so that he can say his statement.

MR. MORRILL: Thank you, Your Honor.

When I was 13, I found out that day that there was going to be a bus trip to see the Boston Red Socks. I had no money. I got my blue crab net, I went down to the river, I caught 44 blue crabs, went to bar on Charles Street, sold them for $10 and went to the game.

When I was 11 years old, my father took me

out to the mouth of the Kickamuit River. It was the best fishing I ever had, because every time we dropped a line in, it was a hand-held line, we caught a fish, winter flounder. I took my nephew last year, two hours, same location, same type of line, same bait, didn't have a bite in two hours.

When I was a teenager, we would row out to the mouth of the Kickamuit, to Spar Island which is offshore of the power plant, and by the time we got back to the mouth of the Kickamuit River, having trolled one line, we would have used up all our bait and caught several fish.

I took, this year, two nephews and a niece and myself, four lines, from the middle of the Kickamuit River, and we trolled all the way to Spar Island. Then we did a quarter mile loop in the Bay. By the time we got back to the Kickamuit River, we hadn't had one bite, not any fish at all.

When I was growing up, if you took a minnow trap, put some mussels in there and threw it offside to the beach in the Kickamuit River, within 10 minutes you would have 50 to 100 minnows in

there. Now, this summer, if you were to do that, which we did, you would be lucky in three hours to get 25 minnows.

And that's all I have to say. Thank you very much.

JUDGE REICH: Thank you. Mr. Morrill, I will not hold it against you, but making a Boston Red Sox argument to a New York Yankee fan is not always the best thing to do.

[Laughter.]

JUDGE REICH: All right. USGen.

MR. STEVENS: It is a sad fact that up and down the Atlantic Coast, commercial fishermen have devastated fishing stocks.

I would like to address four issues very quickly. As to the new rule, it establishes closed cycle cooling as a safe harbor. Because of the financial limitations on what any one power station can be required to spend, no one can be required to install closed cycle cooling.

USGen is not asking to have the substantive, detailed provisions of the new rules

applied to its permit, but that does not mean that the new rule has no effect whatsoever on the permit because, based upon considerations virtually identical to those urged and placed in the record in this proceeding by USGen in connection with issuing the permit, the Agency set forth conclusions that the benefits analysis on which this permit was based was invalid, and that in general best technology available for controlling cooling water intake is not closed cycle cooling.

That statement in the preamble is the law. It's the responsibility of this Board to ensure that the final Agency action in this proceeding is consistent with the law.

And therefore we ask the Board to do what you have done in a variety of cases where a new statement or rule of the law informs the matters at issue, which is either to apply that law yourself or to remand to the Region with a direction to reach a result consistent with the law. We therefore ask you to require that new conditions be issued that do not establish closed cycle cooling

as best technology available for controlling cooling water intakes.

Second, as to the relationship between the variance limits and the mixing zone, 24, 10, 5, they are identical. Massachusetts so concedes in its submissions. It is utterly implausible that those arbitrary, bright line conditions could have been derived independently, and we can't understand why the Region persists in its denials.

As to the burden of proof, USGen had the burden of establishing that the technology and water quality standards were more stringent than necessary. If it wanted the particular permit limit, as we did, it had the burden of establishing that those particular permit limits were sufficient to protect the balanced, indigenous population. If the Region disagreed, the burden shifted, and they had to make a reasoned decision as to what was the maximum thermal discharge that was permitted with that protection.

It is agreed that we met our burden on the first issue. Had they looked at the pertinent

evidence, they would have found that we met our burden at the second issue, because in 2001 the principal scientist on which the Region and the States relied said, "I have concluded that the limits proposed by USGen are substantially sufficient to protect the balanced, indigenous population."

What did the Region do? They hid it. What did Rhode Island do? We have discovered e-mails, through the Public Records Act, to Massachusetts, who was forthright in producing them following the conclusion of the proceeding. They pressured them to take that statement out. His boss told him to take it out, and he did.

Instead, you heard from Mr. Stein that they looked at the wrong evidence in deciding that USGen had not met its second burden. You heard him say it from this podium. The reason why they found that USGen had not met the second burden was not because of biological effects. It was because there was a physical extent of the plume over too great a portion of the bay. That's not what their

own regulations say they should be looking at.

As to whether the Region looked at other plants, we did place evidence in the record saying that we had conducted a comprehensive survey of all other plants, and there was absolutely no precedent for holding closed cycle cooling, whole station closed cycle cooling, to be best available technology for thermal discharge limitation or best technology available for controlling cooling water intakes.

At that point, the Region knew that its decision was a departure, and its obligation was to look at the other similarly situated plants, the other 30 to 40 big plants on estuaries, and say why Brayton Point Station was different from them. It didn't do that. It did the exact opposite.

It tried to find different stations that it could say were precedents for what it was doing, and came up with four or five very different stations. As we show, not one of them, not one of them--and these are in the footnotes at page 4 to 5 to our reply brief--not one of them was a station

that was required to go to closed cycle cooling for the entire station, either to limit its thermal discharge or to control its cooling water intake.

Our proposal was not one unit closed cycle cooling. Our proposal was a flexible arrangement of cooling towers that could be connected with whatever unit or units were generating the most heat. You got a lot more bang for a smaller buck from that type of creative technology. And we have never conceded, we do not today, that whole station closed cycle cooling is affordable.

JUDGE REICH: Thank you, Mr. Stevens.

Any questions?

Thank you.

MR. STEVENS: Thank you.

JUDGE REICH: I would like to thank everyone for their participation this morning, and compliment everybody on the quality of their arguments. I know I found it very helpful and enlightening.

Before adjourning, I have not done this before, but I would like to make a comment about

where we go from here and reasonable expectations, while we have virtually all the interested persons in the room. As was clearly demonstrated this morning, this is an exceptionally complicated case with numerous participants and many, many issues, some of which have significance beyond this particular case. The Board does recognize that participants feel a deep sense of urgency in this matter. The Board also recognizes that it has taken 10 years for this matter to reach the current stage of appeal before the Board. The Board intends to give this matter priority, and I assure you we will issue a decision as quickly as we can reasonably do so, recognizing that there are other matters that the Board has before it. However, I anticipate that this will still take a significant period of time. The Board needs to and will take the time it needs to assure that the issues are dealt with in the most appropriate way. It does no good for the Board to issue a decision that then gets overturned on appeal, and there is no doubt in my mind that whatever the Board does decide, it's

going to be judicially challenged by somebody. So what I am suggesting is that you be prepared to exercise some patience and be comforted by knowing that even if you are not hearing from us for a while, you can rest assured that it's not for lack of diligent effort towards issuing our decision.

So, with that, this oral argument is adjourned.

[Whereupon, at 12:20 p.m., the proceedings were adjourned.]

CERTIFICATE

I, **ELIZABETH L. WASSERMAN,** the Official Court Reporter for Miller Reporting Company, Inc., hereby certify that I recorded the foregoing proceedings; that the proceedings have been reduced to typewriting by me, or under my direction and that the foregoing transcript is a correct and accurate record of the proceedings to the best of my knowledge, ability and belief.

Elizabeth L. Wasserman

ELIZABETH L. WASSERMAN