

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

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

NPDES Appeal No. 07-01

NPDES Permit No. MA 0003654)

**REGION 1 ASSENT TO PETITIONER'S MOTION TO STRIKE DOCUMENTS FROM
THE ADMINISTRATIVE RECORD**

On January 3, 2007, Dominion Brayton Point, LLC (Formerly USGen New England, Inc.) (the "Petitioner"), filed a Motion to Exclude or to Strike Documents from the Administrative Record ("Motion to Strike"). Petitioner filed the Motion to Strike in conjunction with its appeal of the "Determination on Remand from the EPA Environmental Appeals Board, Brayton Point Station, NPDES Permit No. MA0003654" (the "Determination on Remand"), which was issued by the United States Environmental Protection Agency's ("EPA") Region 1 office ("Region 1") on November 30, 2006. Region 1 issued the Determination on Remand in response to the decision by EPA's Environmental Appeals Board (the "Board") in *In re Dominion Energy Brayton Point, L.L.C. (Formerly USGen New England, Inc.) Brayton Point Station*, NPDES Appeal No. 03-12 (EAB, Feb. 1, 2006) (the "Remand Order"). Petitioner's appeal concerns NPDES Permit No. 0003654 issued by Region 1 to the Brayton Point Station power plant ("BPS") on October 6, 2003 (the "Permit"). For the reasons stated below, Region 1 assents to the Petitioner's Motion to Strike.

DISCUSSION

The Remand Order remanded two specific substantive issues concerning the Permit to Region 1. One related to the Region's selection of a five-days per summer month temporal threshold for exceedances of the summer critical temperature of 24°C, while the other related to the Region's consideration of potential noise impacts from converting BPS to closed-cycle cooling. The former issue relates to the Permit's thermal discharge limits under Section 316(a) of the Clean Water Act, while the latter issue relates to the Permit's cooling water intake limits under Section 316(b) of the statute. While the Board remanded the five-day temporal threshold issue, it did not remand the Region's selection of 24°C as the critical temperature. Finally, the Remand Order indicated that the administrative record could be supplemented as necessary but only as to the remanded issues. *Dominion* at 135, 293.

In the Determination on Remand, the Region summarized certain major elements of the Permit that had not been remanded solely in an effort to "provide[] factual and legal background to eliminate or minimize the need for the reader to refer to other documents or recall the relevant issues." *See* Ex. R2 (Determination on Remand) at 3. As part of providing this context, the Region explained its decision regarding the choice of 24°C as the critical temperature for the benthic layer in the summer. In the course of doing this, the Region also referenced some additional papers that it believed further supported its original finding on the critical temperature threshold, but that it had not cited previously.

Petitioner points out that these materials relate to the selection of the critical temperature threshold of 24°C and that this is not an issue on remand. Petitioner now moves the Board to strike the following documents from the administrative record on the grounds that the materials

relate to an issue not remanded to the Region and, therefore, supplementation of the record with these materials was inappropriate:

AR Number	Document Name
4010	Coutant, 1977. Physiological Considerations of Future Thermal Additions for Aquatic Life.
4014	Manderson, <i>et al.</i> , 2000. Predator-prey relations between age 1 + summer flounder and age-0 winter flounder predator diets, prey selection, and effects of sediments and macrophytes.
4015	Fairchild and Howell, 2000. Predator-prey size relationship between <i>P. americanus</i> and <i>C. Maenas</i> .
4017	Taylor and Collie, 2003. Effect of temperature on the functional response and foraging behavior of the sand shrimp preying on juvenile winter flounder.
4018	Taylor, 2003. Size-dependent predation on post-settlement winter flounder by sand shrimp.
4019	Manderson, <i>et al.</i> , 2004. Shallow water predation risk for a juvenile flatfish in a northwest Atlantic estuary.
4021	Short, <i>et al.</i> , 1988. Comparison of a Current Eelgrass Disease to the Wasting Disease of the 1930s.
4022	Taylor and Collie, 2003. A temperature- and size-dependent model of sand shrimp (<i>Crangon septemspinosa</i>) predation on juvenile winter flounder (<i>Pseudopleuronectes americanus</i>).
4037	Taylor and Danila, 2005. Predation on winter flounder (<i>Pseudopleuronectes americanus</i>) eggs by the sand shrimp (<i>Crangon septemspinosa</i>).

Petitioner rightly points out that the Remand Order only allows supplementation of the record as to the remanded issues. *See Dominion* at 135, 293. Because the 24°C critical temperature issue was not remanded, the Region agrees that the above-cited materials are beyond the scope of the remand and are not properly part of the administrative record for the Permit.

CONCLUSION

For the reasons stated above, Region 1 assents to Petitioner's Motion. The above-referenced documents have, accordingly, not been included in the Certified Index of the Administrative Record.

Respectfully submitted by EPA Region 1,

Dated: March 5, 2007



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