

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

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ENVIRONMENTAL APPEALS BOARD

In re: Dominion Energy Brayton Point, L.L.C.)
(Formerly USGen New England, Inc.))
Brayton Point Station)
NPDES Permit No. MA 0003654)

NPDES Appeal No. 07-01

EPA REGION I RESPONSE TO MOTION FOR STAY PENDING JUDICIAL REVIEW

On October 16, 2007, the petitioner Dominion Energy Brayton Point, LLC (formerly USGen New England, Inc.) (“Dominion”) filed a Motion for Stay Pending Judicial Review before both the EPA Region I Regional Administrator (“Region”) and the Environmental Appeals Board (“EAB” or “Board”). The Region requests that the Board deny the Motion based on lack of jurisdiction. The Region believes that it is the Region I Regional Administrator who has jurisdiction over this matter. The Regional Administrator plans to promptly rule on this Motion unless otherwise directed by the Board.

BACKGROUND

On October 6, 2003, the Region reissued National Pollutant Discharge Elimination System (“NPDES”) Permit No. MA0003654 to Dominion. Pursuant to 40 C.F.R. § 124.19(a), Dominion filed a petition for review with the Board, which subsequently was granted by the Board. Pursuant to 40 C.F.R. § 124.16, the contested permit conditions were stayed pending final agency action. On February 1, 2006, the Board affirmed the Region’s determinations on most issues, but remanded the permit to the Region to address two substantive issues and to carry out two procedural tasks. *See In re Dominion Energy Brayton Point, L.L.C.*, NPDES Appeal No.

03-12, slip op. at 293 (EAB Feb. 1, 2006), 12 E.A.D. ____ (“Remand Order”). During this remand, all contested portions of the permit continued to be stayed.

The Region issued a Determination on Remand on November 30, 2006. Dominion filed a petition for review of this Determination. On September 27, 2007, the Board denied Dominion’s petition for review. *See Dominion Energy Brayton Point, LLC (formerly USGen New England, Inc.)*, NPDES Appeal No. 07-01 (EAB, September 27, 2007). Under 40 C.F.R. § 124.19, such a ruling constitutes the final action relating to the permit by the Board, unless a petitioner files a motion for reconsideration with the Board. Dominion has not filed such a motion for reconsideration with the Board.

On October 1, 2007, the Region issued the final permit decision in accordance with 40 C.F.R. § 124.19(f), notifying Dominion that the conditions of the permit that had been stayed by the pending appeals will take effect beginning November 1, 2007. Dominion has stated that it plans to appeal the EPA’s permit decision to the United States Court of Appeals for the First Circuit. Dominion is seeking a stay of the contested permit conditions until that court issues its decision. In response to Dominion’s Motion, the Regional Administrator plans to determine whether or not the November 1, 2007 permit effective date should be maintained - or stayed. Under FRAP 18, the Regional Administrator’s determination will then be subject to review by the Court of Appeals.

ARGUMENT

The EPA has the authority to grant or deny requests for stays pending judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. § 705. Under the EPA’s regulations, the EAB has been delegated the authority to issue final decisions on NPDES permit appeals. 40

C.F.R. § 124.2. However, once the EAB issues its final ruling, it is the Regional Administrator who has been delegated the authority to issue the “final permit decision.” 40 C.F.R.

§ 124.19(f)(1). Setting the effective date of a permit is inherently part of making the “final permit decision.” Indeed, the regulations specify that when a permit is initially issued by the Regional Administrator, the Regional Administrator may specify a permit effective date longer than the standard 30 days as part of the “final permit decision.” 40 C.F.R. § 124.15(b)(1). The EPA consistently and reasonably has interpreted the Regional Administrator’s authority to issue a “final permit decision” following an EAB ruling as similarly including the authority to set the effective date of the permit.

Determining whether a stay should be granted is part of determining when a permit will take effect. Thus since 40 C.F.R. § 124.19(f)(1) grants the Regional Administrator the authority to determine the effective date of the permit, it grants him the authority to rule on motions for stays. *See also* EPA Delegations Manual, Clean Water Act delegation 2- 20 (granting the Regional Administrators the authority to “issue and condition permits”).

When a motion for reconsideration has been filed with the EAB, the regulations specify that the EAB may grant or deny a motion for stay, pending a decision on the motion for reconsideration by the EAB. 40 C.F.R. § 124.19(g). However, no motion for reconsideration has been filed in this case. While the regulations logically grant to the EAB the authority to rule on a stay motion when a matter still is before it, different logic applies when (as here) the EAB has finished its work and the remaining task of issuing the final permit decision has instead been assigned to the Regional Administrator. There is nothing to suggest that the authority to issue

final permits or determine when they should become effective has been assigned to the EAB.¹

In its Motion, Dominion does not argue that the Board has jurisdiction over this matter, but rather simply states, "because the law is not entirely clear on this point, Brayton Point is submitting this motion to both the Regional Administrator and the [Board]." *Id.* at 1, n.1. The Region believes that the regulations actually are clear. In any event, the matter can be resolved by the EAB denying the petitioner's Motion based on lack of jurisdiction and the Regional Administrator then ruling on it. The petitioner has not carried its burden of articulating any basis for EAB jurisdiction. *See In re Envotech, L.P.*, 6 E.A.D. 260, 273-74 (EAB 1996).

If the EAB believes that it has or may have jurisdiction to rule on this Motion, along with the Regional Administrator, it still should defer this matter to the Regional Administrator. The jurisdiction of the Regional Administrator is clear. The Regional Administrator is committed to ruling on this matter promptly and fairly.

¹ In its Motion, the petitioner incorrectly cites *In the Matter of Midwest Steel Division, National Steel Corp.*, 3 E.A.D. 307, n.2 (Adm'r 1990), as being a decision of the EAB. In fact, this appeal of a RCRA permit decision was decided by the Administrator and included simultaneous denial of a request for a stay pending judicial review. The Administrator also decided a stay motion in the case of *In re Public Service Company of New Hampshire, et al.*, 1 E.A.D. 332 (Adm'r 1977). Both decisions, however, were issued prior to the establishment of the EAB and do not support any proposition that after issuing its final decision on a permit appeal, the EAB has the authority to decide a request to stay the final NPDES permit pending judicial review. Rather, the regulations have given this authority to the Regional Administrators.

CONCLUSION

The Region requests that the Board deny the petitioner's motion based on lack of jurisdiction.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark Stein', written over a horizontal line.

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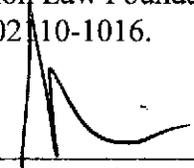
Dated: October 19, 2007 .

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2007, EPA Region 1 served a true copy of its Response to Motion for Stay Pending Judicial Review on the following parties, by first class mail:

1. John M. Stevens, Esq., Foley Hoag LLP, counsel for the Petitioner, USGen New England, Inc., at Foley Hoag LLP, 155 Seaport Boulevard, Boston, MA 02210-2600;
2. Robert G. Brown, Assistant General Counsel, Massachusetts DEP, One Winter Street, Boston, MA 02108;
3. Tricia K. Jedele, Special Assistant Attorney General, Rhode Island Attorney General's Office, 150 South Main Street, Providence, RI 02903; and

Patty Fairweather, Executive Counsel, Rhode Island Department of Environmental Management, 235 Promenade Street, Providence, RI 02908;
4. Wendy A. Waller, Attorney, Save the Bay, Narragansett Bay, Inc., 100 Save the Bay Drive, Providence, RI 02903;
5. Joseph L. Callahan, Board of Directors, Taunton River Watershed Alliance, Inc., P.O. Box 1116, Taunton, MA 02780; and
6. Ann Morrill, Vice President, Kickemuit River Council, 90 Dexterdale Road, Providence, RI 02906-1926.
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