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

In re: Dominion Energy Brayton)
Point, LLC (formerly)
USGen. New England, Inc.))
Brayton Point Station)
)
NPDES Permit No. MA 0003654)
_____)

**MOTION TO EXCLUDE OR TO STRIKE DOCUMENTS
FROM THE ADMINISTRATIVE RECORD**

Dominion Energy Brayton Point, LLC (the "Petitioner," the "Permittee" or "Brayton Point Station") hereby moves to exclude or to strike from the administrative record certain documents identified by Region 1 of the Environmental Protection Agency ("Region 1") as having been added to the record by Region 1.

DISCUSSION

The Region committed procedural legal error when it supplemented the administrative record with a number of documents relating to issues other than those remanded. Although on remand the Region could supplement the administrative record, its authority to do so was limited to supplementation on those issues that were remanded to the Region for further explanation.

The administrative record is to contain information that was before the Regional Administrator at the time he made his determination. Here, with respect to all issues aside from those on which the final Permit was remanded, the Regional Administrator's decision was final

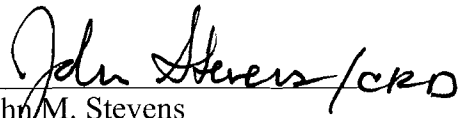
on Oct. 6, 2003; accordingly, any attempts by the Region to supplement the record as to those issues must fail. Permitting the Region to supplement the record with materials extraneous to the remand would be inconsistent with the Board's instruction that the subject matter of an appeal following the remand proceedings be limited to the "above-listed issues," *see* Remand Order at 294, and would create the unfair and untenable situation where the Region could, as it has attempted to do in this case, add new materials to the record on which the permittee would be barred from commenting. Such a circumstance would be fundamentally unfair, would violate Brayton Point Station's statutory right to comment and would cause great prejudice to Brayton Point Station..

Accordingly, the Board should strike the following exhibits from the administrative record: AR 4010; AR 4014; AR 4015; AR 4017; AR 4018; AR 4019; AR 4021; AR 4022; and AR 4037. The Region discusses these documents solely in relation to its selection of the 24°C temperature threshold. The Region was not required to reconsider and did not reconsider its determination as to 24°C; therefore, the new information that pertains to this issue should be excluded or stricken from the administrative record.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the Board exclude or strike from the administrative record in this action the documents listed above.

By its attorneys,


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