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October 24, 2007

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✓ U.S. Environmental Protection Agency
Clerk of the Board
Wnvironmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-0001

Re: In the Matter of Dominion Energy Brayton Point LLC
Brayton Point Station
Renewal of NPDES Permit No. MA003654
NPDES Appeal No. 07-01

Dear Mr. Varney and Ms. Durr:

On behalf of the Massachusetts Department of Environmental Protection (MassDEP), I am herewith submitting MassDEP's Oppostion to Petitioner's Motion for Stay Pending Judicial Review in the above-referenced matter and accompanying Certificate of Service.

Thank you for your attention to this matter.

Sincerely,

Robert G. Brown

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re:	
Dominion Energy Brayton Point, LLC (Formerly USGen New England, Inc.) Brayton Point Station	NPDES Appeal No. 07-01
NPDES Permit No. MA-003654	

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION'S OPPOSITION TO PETITIONER'S MOTION FOR STAY PENDING JUDICIAL REVIEW

I. INTRODUCTION

This case involves an important estuarine ecosystem – Mount Hope Bay – whose fisheries have shown huge decreases in productivity over the last two decades, a decline that began to become manifest around the same time that Brayton Point Station's withdrawals from and discharges into the Bay appreciably increased. *In Re Dominion Energy Brayton Point, LLC,* NPDES Appeal No. 03-12, slip op. at 7-8. In issuing the Permit, Region 1 found that Brayton Point Station draws close to 1 billion gallons of cooling water a day from Mount Hope Bay and its tributaries, uses the water for cooling purposes, and subsequently discharges the then-heated water back into the Bay, which is a relatively shallow estuarine bay. Region 1 found that the large quantities of water used by the facility – annually, the amount used is equal to seven times the volume of the Bay – and the geography of the Bay have pivotal importance in terms of the facility's water quality impacts. *Id.* at 8. Associated with this water withdrawal is the entrainment and

impingement of trillions of organisms, the vast majority of which are killed. *Id.* at 154. To give the Mount Hope Bay ecosystem a chance to recover, Region 1 has concluded that the total number of organisms taken via entrainment and impingement by Brayton Point Station must be dramatically reduced and that this could be accomplished with closed-cycle cooling. *Id.*

Through a combination of forces, almost 10 years has passed since Brayton Point Station first filed its application with the United States Environmental Protection Agency ("EPA") Region 1 for renewal of its National Pollution Discharge Elimination System ("NPDES") Permit No. MA-003654. Despite EPA's careful and deliberate administrative review of the permit application over the years, Dominion Energy Brayton Point, LLC ("Petitioner") continues to avail itself of every opportunity to challenge the very measures needed to improve environmental quality in Mount Hope Bay and delay progress toward controlling its harmful discharge. Justice demands, however, that Petitioner – rather than Mount Hope Bay itself – bear the costs of the permitting and associated engineering work needed to improve environmental quality in Mount Hope Bay while Petitioner continues its discharge and seeks judicial review.

The Massachusetts Department of Environmental Protection ("MassDEP") requests that Region 1 deny Petitioner's Motion for Stay Pending Review because granting it would serve to further delay the permitting and associated engineering work needed to retrofit Brayton Point Station and would enable Petitioner to continue to degrade Mount Hope Bay, a valuable public resource, with impunity while continuing its discharge under a long-outdated NPDES permit.

Furthermore, MassDEP supports Region 1's earlier decision, as contemplated by the Regional Administrator's October 1, 2007 letter to Petitioner, a copy of which is attached to Petitioner's motion as Exhibit "A," to issue an administrative Order containing a reasonable compliance schedule for Petitioner to complete the permitting and associated engineering work needed to retrofit Brayton Point Station to attain the final permit limits. MassDEP, which maintains permitting authority for Petitioner's discharge of pollutants to waters of the Commonwealth of Massachusetts under Massachusetts law, remains ready and willing to consult with Region 1 in determining a reasonable compliance schedule for Petitioner.

II. PROCEDURAL BACKGROUND

The procedural background for this matter is as follows. Brayton Point Station initially filed its application with Region 1 for renewal of its NPDES Permit in January 1998. On October 6, 2003, Region 1 issued the final Permit. On November 5, 2003, USGen New England, Inc., Petitioner's predecessor in interest, filed a petition for review of the Permit with the Environmental Appeals Board ("the Board"). On February 19, 2004, the Board granted review of the petition; and on February 1, 2006, the Board issued an Order remanding the permit for further review. Region 1 issued its determination on remand on November 30, 2006, after concluding its further review. Once again, Petitioner filed a petition for review of the Permit with the Board. On September 27, 2007, the Board denied the petition; and on October 1, 2007, Region 1 notified Petitioner that the Permit would take effect on November 1, 2007. On October 16, 2007, Petitioner filed the Motion for Stay Pending Review that is at hand.

III. ARGUMENT

A. Standard of Review.

Pursuant to 5 U.S.C. § 705, when an agency "finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." The Supreme Court has identified the factors regulating the issuance of a stay pending appeal in the judicial setting, *see Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), and EPA should apply these same factors in considering the Petitioner's request for a stay. These factors are::

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id.

In discussing the "likelihood of success on the merits" prong of the analysis, Petitioner relies upon *Canterbury Liquors & Pantry v. Sullivan,* 999 F. Supp. 144 (D.Mass. 1998). In *Canterbury*, the district court interprets the *Hilton* requirement that the "stay applicant [make] a strong showing that he is likely to succeed on the merits," in light of the fact that the court (or the agency here) is being asked to opine as to the likelihood that its own decision will be upheld. Accordingly, *Canterbur* requires that an applicant for a stay show that the appeal "raises serious and difficult questions of law in an area where the law is somewhat unclear," and that the balance of equities (*i.e.*, consideration of the other three factors) is heavily weighted in its favor. *Id.* 16-18.

For reasons set forth below, including that it has not even attempted to show that the potential harm to the environment can possibly be outweighed by the slight risk that the power plant owner will incur unnecessary and unrecoverable costs in planning and

permitting for its facility, Petitioner has not demonstrated that the balance of the equities is heavily weighted in its favor. Therefore, even in the unlikely event that the Petitioner can satisfy the first prong of the *Hilton* test by showing, following the *Canterbury* formulation, that the appeal "raises serious and difficult questions of law in an area where the law is somewhat unclear," Petitioner has still failed to demonstrate that the balance of equities are in its favor.

B. Petitioner has not demonstrated that the equities are heavily weighted in its favor to merit a stay.

The equities here do not weigh heavily in favor of a stay, as they must for the Petitioner to be entitled to the relief that it seeks. Petitioner rests its motion upon the simplistic notion that EPA should not require Petitioner to incur *any* compliance costs to comply with the final Permit until it has obtained judicial review, notwithstanding the comprehensive administrative review already provided by the Board and the environmental harm that has accrued from its operations under its long-outdated permit and that will continue to accrue until Petitioner's facility is retrofitted with closed-cycle cooling, because of the mere possibility that it might prevail upon any one of a number of legal issues it may present on appeal. As discussed below, Petitioner's claim that, absent a stay, it will suffer irreparable harm is not substantiated.

Initially, MassDEP notes that the basis for Petitioner's cost estimate for permitting is not clear from Petitioner's motion and the accompanying affidavit of Mr. J. David Rives. Petitioner has not attached a detailed cost estimate in support of its motion for EPA to review to determine which of these costs are appropriate. Some of the costs claimed may not be appropriately considered. For example, Mr. Rives affidavit indicates

that Petitioner has included the cost of soil remediation in its estimate of the costs for permitting and associated engineering. Soil remediation, however, should not be considered a cost associated with permitting because Petitioner has an independent legal obligation under Massachusetts Oil and Hazardous Material Release Prevention and Response Act, M.G.L. c. 21E, to address any contaminated soil issues. Petitioner does not disclose what amount of its estimated costs for permitting relates to the need for soil remediation.

This is not a case where Petitioner can show severe economic impact. Brayton Point Station is the largest fossil-fuel burning plant in New England. Petitioner provides no economic analysis documenting the impact of such expenditures on the company or its customers and makes no claim that such expenditures would pose a financial hardship or otherwise place it at financial risk. It is not clear, moreover, whether Petitioner will actually bear any of the costs associated with permitting because Petitioner states that it is likely to pass these costs along to its customers.

Furthermore, Petitioner's argument does not adequately take into consideration the public interest.[1] Petitioner does not consider the value of the benefit the public would gain in terms of improved environmental quality in Mount Hope Bay if Petitioner were to proceed with the permitting and engineering work needed for the retrofit rather than delay. Nor does Petitioner estimate the value of the damage to the public's natural resources that has resulted from its operations and that will continue to accrue as long as Petitioner is allowed to continue to operate under its outdated permit. Without such an

[1] MassDEP finds disingenuous Petitioner's argument that "the actions of the entities charged with representing the public interest demonstrate that there is no great perceived harm from deferring the commencement of closed-cycle cooling until the Agency's decisions have been reviewed by the Court of Appeals."

analysis, Petitioner cannot meet its burden of showing the equities here are "heavily weighted" in its favor.

This is also not a case where denying a stay would destroy Petitioner's right to meaningful review of the Permit. Petitioner would still be allowed to operate under the terms of an administrative Order while its request for judicial review is underway and it is likely that the First Circuit would complete its review on the merits before any construction work associated with the retrofit would need to commence.

In light of the comprehensive administrative review and the exhaustive record developed in this case over the past 10 years, which amply support the closed-cycle cooling requirements in the permit, coupled with the heavy burden Petitioner will face in its judicial challenge, it is overwhelmingly likely that the permit will be upheld by the First Circuit. However, even if Petitioner ultimately is successful in having the permit remanded by the Court, it is more likely that it would be remanded to cure some technical defect, rather than to disturb EPA's carefully considered technically based decision to require that the facility convert to closed-cycle cooling to protect the Bay's aquatic organisms from the harm caused by Petitioner's open-cycle cooling operations. So, it is very unlikely that the efforts to retrofit the plant for closed-cycle cooling, and the associated expense, will have been wasted.

Finally, even if this matter were remanded by the First Circuit and Region 1 were to conclude that closed-cycle cooling is not the best technology available as a matter of federal law, Brayton Point Station would nonetheless still be required to retrofit Brayton Point Station with closed-cycle cooling under the terms of its state discharge permit. In December 2006, MassDEP revised its surface water quality standards published at 314

CMR 4.00 as they relate to cooling water intake structures. *See* 314 CMR 4.05(3)(b)(2)(d), 4.05(3)(c)(2)(d), 4.05(4)(a)(2)(d), 4.05(4)(b)(2)(d) and 4.05(4)(c)(2)(d). However, contrary to Petitioner's assertion in its motion that "only after the permit was issued and EAB review nearly concluded did Massachusetts take steps to . . . authorize . . . requirements for . . . cooling water intake structures," prior to revision of its surface water quality standards, *see* Petitioner's Motion, p. 11, MassDEP had interpreted its surface water quality standards to apply to cooling water intakes. *See, e.g.,* Amicus Brief of the Massachusetts Department of Environmental Protection in Support of EPA NPDES Permit No. MA-003654 (December 22, 2003) at pp. 5-12; and Supplemental Amicus Brief of the Massachusetts Department of Environmental Protection in Response to Briefs Filed by USGen and Utility Water Act Group ("UWAG") in Support of USGen's Appeal of EPA NPDES Permit No. MA-003654 (June 24, 2004) at pp. 2-8. As MassDEP explained in its response to public comments on these provisions, the new language added to the surface water quality standards was intended to simply place the regulated community on notice of MassDEP's existing legal authority to regulate cooling water intake structures to prevent the degradation of state waters. Therefore, any permitting and engineering costs incurred pending judicial review for retrofitting the towers to closed-cycle will only be incurred "for no purpose," as Petitioner claims, in the nearly inconceivable confluence of the following events: (i) Petitioner succeeds in having the Permit remanded by the First Circuit; (ii) Region 1 determines on remand that closed-cycle cooling is not required under Section 316(b) and that determination survives the inevitable challenge by advocates for the Bay; (iii) Petitioner succeeds in having the state

discharge permit remanded; and (iv) on remand closed-cycle cooling is not required by Massachusetts and that determination survives challenge.

C. Petitioner has not presented a substantial case on the merits.

The gravamen of Petitioner's complaint with the Permit is that it requires Petitioner to rebuild its entire cooling system to convert to closed-cycle cooling. The intake and discharge limitations in the Permit driving this conversion are principally governed by two independent sections of the Clean Water Act: Section 316(a), which governs the facility's thermal discharge and pursuant to which EPA granted Petitioner a variance from the technology-based standards of Section 301, and Section 316(b) which governs the facility's cooling water intake structures. Significantly, according to Petitioner, the conditions imposed under *each* of these independent sections of the Clean Water Act effectively requires Petitioner to convert to closed-cycle cooling. Therefore, Petitioner ultimately will need to establish that EPA misapplied both Sections 316(a) and 316(b) of the Act if it is to avoid converting the facility's cooling system to closed-cycle cooling under Federal law.

In its attempt to show a substantial case on the merits involving a serious legal issue, Petitioner raises the issues summarized below in its motion for a stay.

(1) Whether EPA may make a determination that "conservative" thermal limits should be applied in order to assure protection of the BIP without first defining, in some meaningful quantitative sense, the characteristics and requirements of such a population and the extent to which curtailing thermal discharges will contribute to achievement of those characteristics?

(2) Whether a permittee must anticipate and address in its comments every argument and issue that could be raised as the result of EPA's subsequent analysis of information submitted in those comments in order to preserve the issue or argument for appeal?

(3) Whether Region 1 and EAB denied the Petitioner due process of law by constraining the record?

(4) Whether Region 1 unlawfully divorced its site-specific "BPJ" determination from the facts and analyses the agency simultaneously was developing at the Headquarters level in connection with § 316(b) regulations for existing power stations?

(5) Whether Region 1 justified its decision requiring closed cycle cooling based on its own novel interpretations of "designated uses" under Massachusetts water quality standards?

Petitioner's motion states "these are just a few examples of the many novel and complex issues likely to be presented on appeal." Notably, the Board addressed these same issues and multiple others in the administrative appeal.

Petitioner does not explain in any meaningful way why these issues are sufficiently "serious" so as to satisfy the more relaxed standard for the first prong of the *Hilton* test. Although the Board found that Brayton Point Station's petition for review involved a number of important, complex factual and legal issues to warrant Board review, the Board's conclusion with respect to the petition does not govern the legal question raised by Petitioner's motion. Moreover, the Board found that Petitioner failed to demonstrate that Region 1 clearly erred in establishing the conditions of the Permit and that there were no issues involving Region 1's exercise of discretion or an important policy consideration that warrant a change to the conditions of the Permit. Petitioner must do more here than simply list a few examples of possible legal issues and claim that additional issues may be lurking without presenting a substantial case on the merits.

Petitioner has not attempted to show why there is any possibility that it may be successful in the First Circuit on the merit of any of these issues. The only support offered by Petitioner to show a probability of success is Petitioner's allegation that none

of these so-called "novel and complex issues" has been resolved yet by the courts. However, the mere fact that the courts may not have addressed an issue is not sufficient alone to show a probability of success on the merits. *Gusdonovich v. Business Information Co.,* 119 F.R.D. 15 (W.D.Pa. 1987). Again, Petitioner must do more here than just speculate about the *possibility* it may succeed on the merits of *any* issue to warrant a stay of the Permit.

Equally important, Petitioner's allegation that the Permit is "unprecedented" because EPA "has never before determined . . . that closed cycle cooling is the 'best practicable' or the 'best available' technology for existing power plants" (emphasis added) is overstated. *See* Petitioner's Motion at p. 5. Petitioner's argument ignores both the history of Section 316(b) and the Second Circuit's recent treatment of the cases arising under Section 316(b).

Although Congress directed EPA to develop cooling water intake structure rules in the 1972 Clean Water Act Amendments, EPA did not promulgate any such rules until litigation in the 1990s over EPA's failure to implement Section 316(b) resulted in a consent decree with a schedule for rulemaking. Under that schedule, EPA agreed to adopt regulations for cooling water intake structures in three phases: Phase I was to apply to new, large energy facilities; Phase II was to apply to existing, large energy facilities; and Phase III was to apply to smaller energy facilities and other industrial facilities with cooling water intakes. In contrast to the consent decree, Section 316(b) does not differentiate between Phase I, II and III facilities. EPA promulgated all three phases of the cooling water intake rule, accordingly.

Most aspects of the Phase I rule – including the imposition of closed-cycle cooling systems as best technology available ("BTA") for new, large energy facilities – were upheld by the Second Circuit in a case known as *Riverkeeper I. Riverkeeper, Inc. v. U.S. Environmental Protection Agency*, 358 F.3d 174, 190 (2d Cir. 2004). In *Riverkeeper I*, the Second Circuit upheld EPA's regulation mandating closed-cycle cooling as the national minimum technology for new power plants and factories, while striking down a provision that would have sanctioned inferior technology and attempts to replace damaged resources. The Second Circuit court was very clear that the Clean Water Act requires best technology, not after-the-fact attempts at mitigation.

Phase II of the cooling water intake rule did not impose a single technology or require such facilities to reduce intake flows to the same degree of performance as closed-cycle cooling did for Phase I facilities. Instead, EPA identified a suite of technologies that the agency deemed BTA for existing, large energy facilities. EPA explained in the final rule that the five compliance alternatives offered were "commensurate with" closed-cycle cooling. However, several states and environmental groups challenged the Phase II Rule on numerous grounds, including that EPA exceeded its authority under Section 316(b) by rejecting closed-cycle cooling as best technology available for existing facilities. In a case known as *Riverkeeper II*, the Second Circuit held that the BTA standard in Section 316(b) precludes EPA from engaging in cost-benefit analysis, as it did in promulgating the Phase II rule, but allows it to consider cost-effectiveness only. *Riverkeeper v. EPA*, 475 F.3d 83 (2d Cir. 2007). Because the administrative record was unclear as to the basis for EPA's selection of a suite of technologies instead of a single technology, the court remanded the Phase II rule for EPA

to clarify its decision rationale and reassess its approach to BTA if necessary. EPA has since withdrawn the Phase II rule.

Phase III of the cooling water intake rule does not impose a fixed technology but, instead, requires NPDES permit writers to exercise best professional judgment in establishing facility-specific BTA requirements.

Despite the remand, the Second Circuit's *Riverkeeper* opinions strongly suggest that, if EPA's rule-making record supports the identification of closed-cycle cooling as the best technology for reducing the adverse environmental impacts of cooling water intakes, then, unless the agency finds this technology is cost-prohibitive for the affected industries, it should deem that technology to be BTA.

It is worth noting that EPA exercised best professional judgment, rather than apply the Phase II rule, in establishing the technology requirements for Brayton Point Station. In doing so, Region 1 performed the required BTA cost analysis.[2] Given the Second Circuit's Riverkeeper's opinions, and that EPA has established an exhaustive administrative record that supports closed-cycle cooling for Brayton Point Station, it is unlikely that Petitioner will prevail on the merits.

IV. CONCLUSION

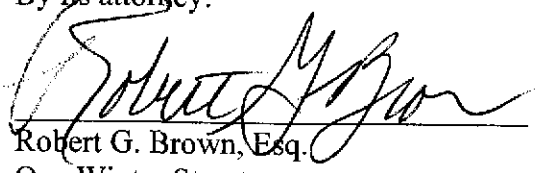
Petitioner's Motion for Stay Pending Review pits its own economic interests against the common good. By filing this motion, Petitioner seeks to delay taking the steps needed to come into compliance with the new limits expressed in the final Permit, notwithstanding that the fisheries in Mount Hope Bay have shown huge decreases in productivity over the last two decades. Petitioner is proposing that EPA allow Petitioner

[2] Notably, *Riverkeeper II* also rejects the argument that was raised by the petition for review that Region 1 should have performed a cost-effectiveness or cost-benefit analysis under Section 316(b).

to continue its damaging withdrawals from and discharges into Mount Hope Bay under its long-outdated permit, notwithstanding that the decline in productivity began to become manifest around the same time that Brayton Point Station's withdrawals from and discharges into the Bay appreciably increased. The common good, however, demands that EPA safeguard Mount Hope Bay, an important estuarine ecosystem, from further harm by requiring Petitioner to take immediate steps to come into compliance with the final Permit. So, MassDEP requests that EPA deny Petitioner's motion for a stay because justice demands that Petitioner – rather than Mount Hope Bay itself – bear the risks associated with the continuing litigation of the permit, and the Petitioner must not be allowed to delay compliance further in an effort to put off having to incur the inevitable costs of the permitting and associated engineering work needed to improve the environmental quality of Mount Hope Bay.

Respectfully submitted,

Massachusetts Department of Environmental Protection
By its attorney:



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Date: October 24, 2007

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Massachusetts Department of Environmental Protection Opposition to Petitioner's Motion for Stay Pending Review in the matter of Dominion Energy Brayton Point, LLC (Formerly USGen New England, Inc.) Brayton Point Station, NPDES Appeal No. 07-01, were served by United States First Class Mail on the following persons this 24th day of October, 2007, on:

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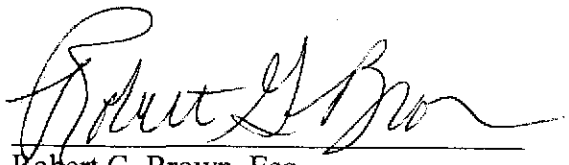

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Date: October 24, 2007